



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 5 OF 2014

IN THE MATTER OF THE ESTATE OF NDARU MBUI (DCD)

NIXON NJAGI NJUE.....APPLICANT

V E R S U S

PATRICK KINYUA IRERI.....RESPONDENT

RULING

1. This matter relates to the Estate of Ndaru Mbui(deceased) who died on 23/11/1970 A Grant of Letters of Administration was issued to Patrick Kinyua Ileri on 5/9/2012 and Robert Muriuki Ndaru on 24/5/1995.

2. The applicant Nixon Kinyua Njue has filed an application dated 5/3/2014 seeking orders that the grant of letters of administration issued to Patrick Kinyua Ileri and Robert Muriuki Ndaru be revoked on the grounds that the grant was obtained fraudulently by making of a false statement or by concealment from court of something material to the case, that is to say that the respondent herein misled the court by saying that they are the only surviving beneficiaries of the deceased.

Applicant's case

That another grant in respect of the same estate was made in favour of Patrick Kinyua Ileri Ndaru on 10/08/2012 and confirmed on 13/08/2012. That they failed to include all persons who are ranking pari pasu with them as beneficiaries and indicated that they are the only surviving beneficiaries of the deceased. That they failed to inform court of a previous grant confirmed though wrongly in the name of Ileri Ndaru and Robert Muriuki Ndaru.

Respondent's case

In response Patrick Kinyua Ileri stated that the case between the applicant and him has been finalized. That the deceased is grandfather and the applicant his cousin. That he is the son of Ileri Ndaru while the applicant is the son of Robert Muriuki Ndaru.

3. That following demise of their grandfather, the deceased, their parents instituted succession proceedings and on 24/05/1995, the grant was confirmed. Unfortunately, before execution of the grant they both passed away and they both applied for rectification of the certificate of grant. The learned magistrate dismissed the applicant's application, allowed his and adopted his mode of distribution which had been consented and adopted by both Ieri Ndaru and Robert Muriuki Ndaru. That the applicant being dissatisfied should have preferred an appeal instead of filing the instant application.

The parties proceeded by way of written submissions.

4. For the applicant submissions were filed by A. P. Kariithi and Co. Advocates. It is submitted that the estate relates to Ndaru Mbui who was the father of Ileri Ndaru and Njue Ndaru. There were two other sons. Ileri Ndaru is the father of Patrick Kinyua(respondent). The father of the Nixon Kinyua is Robert Njue. Ileri and Njue Ndaru were brothers. The two, named their first borns as is customary after their father Ndaru Mbui(deceased). There was a succession cause No. 128/1993 filed at Kerugoya Resident Magistrate's Court which was decided based on the decision of Elders. That the decision was not valid as the elders had no jurisdiction to hear succession matters. That Patrick Kinyua filed another Succession Cause No. 128/1993 alone and was decided on 13/8/2012. That it is that decision which they are challenging.

5. That the applicant had lived on the land until 4/7/2014 when he was evicted after the respondent obtained the grant in his name and transferred all what was in occupation by the applicant with all developments thereon to one of his sister's sons by name Alex Peter Mugo Ndambiri.

6. He submits that the proceedings were defective in substance, the grant was obtained fraudulently by making of false statements and by concealment from court something material to the case.

7. For the respondent, submissions were filed by Jackline W. Kiragu for Magee Wa Magee and Company Advocates. It is submitted that the parties herein are grandchildren of the deceased. Their fathers had filed succession cause No. 128/1993 whereby the grant was issued to both of them. Robert Muriuki Ndaru who was the applicant's father was to get one(1) acre where he has his coffee while Ileri Ndaru the respondent's father was to get 6.90 Acres. The two were the Administrators and agreed on that mode of distribution. However the two passed away before the estate could be distributed. Both parties then filed application to substitute their deceased fathers. The application by the respondent was dismissed while that of the applicant was allowed.

8. That the applicant has failed to prove that the respondent failed to disclose the beneficiaries or made false statement and concealed from court material facts.

9. I have considered the application. The issue for determination is revocation of grant. The estate in dispute in this cause is that of the deceased Ndaru Mbui who according to the affidavit of the applicant sworn on 5/3/2014 died on 23/11/1970. **Section 2(1)(2) of the Law of Succession Act** provides:-

“(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

“(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

10. The Act applies to estates of deceased dying after the commencement of Act. The Act does not apply in retrospect. Estates of deceased persons dying before the commencement of the Act are subject to written Laws and customs applying at the date of death. The administration of their estates shall commence or proceed so far as possible in accordance with the Act. The administration of such estate is the only aspect which shall commence or proceed as far as it would be possible under the Act.

Section 3(2) of Judicature Act Cap 8 Laws of Kenya provides that:-

“The High court, the Court of Appeal and all sub-ordinate courts shall be guided by African Customary Law in Civil case in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

11. Since the deceased died before the commencement of the **Law of Succession Act** the distribution of his estate is strictly governed by the applicable customary law. Revocation of Grant is under **Section 76 of the Law of Succession Act**. It is not a matter of proceedings or administration which may proceed under the Act as provided under **Section 2(2) of the Act**. My view is that revocation of grant under **Section 76 of the Act** does not apply to estates of deceased persons dying before the commencement of the Act. A party not satisfied with the distribution of the estate under written laws and customs applying at the date of death of the deceased should move the court by way of an appeal but not by way of application for revocation of grant under **Section 76 of the Act**. The application is not properly before the court.

12. Be thus as it may, I will proceed to consider the merits of the application. The matter was filed before the Senior Resident Magistrate's Court Kerugoya. A grant was issued on 12/7/1994 to Ileri Ndaru and Robert Muriuki Ndaru, annexure PKI A. The two were sons of the deceased. It was confirmed on 24/5/1995 annexure PKI 2. Certificate of Confirmation of Grant. Robert Muriuki Ndaru was to get one acre and Ileri Ndaru 6.90 Acres of the estate which was comprised in land Parcel No. Ngariama/Nyangeni/275. Unfortunately the two died before the grant was executed, annexures PKI 3 a & b, the death certificates of Ileri Ndaru who died on 28/2/2004 and Robert Muriuki Ndaru who died on 5/9/02. The applicant and the respondent applied to substitute the deceased administrators. The application were filed in the same succession cause before the Resident Magistrate No 128/1993. By a ruling of the trial court dated 10/8/12, the trial Magistrate ordered that Patrick Kinyua Ileri substitutes the petitioners and the estate be distributed in mode he had proposed in the Supporting Affidavit, the proceedings are annexure PKI-7.

13. A certificate of grant was issued on 5/9/12 and distribution was ordered as follows:-

- **Grace Njoki Robert (wife of Robert Muriuki Ndaru one of the initial administrators – 1 Acre.**
- **Robert Kinyua Ileri – 1 ½ Acres.**
- **Peter Kinyua Ileri – 1 ½ Acres.**
- **Bedan Mwaniki Ileri – 1 ½ Acres.**
- **Elizabeth Gikuyu Ileri – ¾ Acres.**
- **Pauline Kathungu Ndambiri – 1 Acre.**

These are the children of Ireri Ndaru who was the other initial administrator.

13. These distribution is therefore in accordance with the initial grant. The proceedings before the trial Magistrate shows that the mode of distribution was by consent. Though counsel for the applicant submits that the distribution was by decision of elders who had no jurisdiction this is not borne out by the record. The submission that there was another succession cause is not borne out by the record. The Misc. Succession Cause No. 5/2014 is the present application filed by the applicant. All the matters proceeded in Succession Cause No. 128/1993. If there was another succession cause the applicant has not proved it.

14. The applicant was the son of Robert Muriuki Ndaru. His mother Grace Njoki Robert was given one acre which Robert Muriuki had consented to be his share out of the estate of his father who is the deceased in this case. Annexure PKI-7 at Page 5 proceedings of 24/5/95 applicant had filed an objection to making of a grant in the lower court. The proceedings before the trial Magistrate show that the applicant was aware of the proceedings and filed application and objections. It is not therefore true that the respondent failed to disclose other beneficiaries or obtained the grant fraudulently. The applicant has not proved that the respondent concealed something material to the case.

In Conclusion:

It has been proved with facts from the trial Court that the fathers of the applicant and respondent had filed succession in the estate of the deceased who was their father and consent on the mode of distribution. The grant was issued but they died before it was executed. Upon substitution of the respondent, the grant which was consented by the initial administrators was followed, only that what was to go to Ireri Ndaru was distributed to is children. The respondent's mode of distribution was in compliance with the initial grant. The applicant has failed to prove allegations of fraud, concealment of facts material to the case or that the proceeding were defective. The application is without merits and is dismissed with costs.

Dated at Kerugoya this 3rd Day of July 2019.

L. W. GITARI

JUDGE