REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 533 OF 2011

(IN THE MATTER OF THE ESTATE OF ISAIAH KIRURI WOKABI (DECEASED)

MARGARET WANJIKU WOKABI.....APPLICANT

-VERSUS-

TITUS GAKURU KARURI.....RESPONDENT

JUDGMENT

On 9 June 2011, the respondent petitioned for and was subsequently granted letters of administration intestate for the administration of the estate of Isaiah Karuri Wokabi who died on 14 November 1980. The late Wokabi hailed from Gathuthi in Nyeri county and at the material time, he was domiciled in the Republic of Kenya.

According to the affidavit sworn by the respondent in support of the petition, the deceased was survived by seven children the eldest of whom is the respondent. The assets comprising his estate were listed as land parcels, Title No. Thegenge/Gathuthi/438 and Title No. Thegenge/Kianjogu/27.

The grant made to the respondent was eventually confirmed on 23 November 2012 and according to the distribution of assets in the schedule to the certificate of confirmation of grant, Title No. Thegenge/Gathuthi/438 was shared out amongst some of the children of the deceased while Title No. Thegenge/Kianjogu/27 devolved upon the respondent absolutely. Accordingly, the title to this parcel was subsequently transmitted and registered in the name of the respondent, more particularly on 3 December 2012.

By a summons dated 29 July 2015, the applicant sought to revoke or annul the grant and, in the meantime, he prayed for a prohibitory order prohibiting any dealings whatsoever on Title No. Thegenge/Kianjogu/27.

The basis of the applicant's application is that the grant was obtained fraudulently by the making of a false statement to the effect that the deceased was wrongly identified as the proprietor of Title No. Thegenge/Kianjogu/27. According to the applicant's affidavit in support of the summons, the respondent misrepresented the deceased as also being known as Wokabi son of Karuri who, in actual fact, was the applicant's husband and who was the registered owner of Title No. Thegenge/Kianjogu/27. Her said husband happened to be the respondent's cousin but he died on 15 June 2007. Her case is simply that Title No. Thegenge/Kianjogu/27 is not part of the deceased's estate.

The respondent opposed the summons and in the affidavit in response thereto, he deposed that his father was the son of one Wokabi Wamugo and was survived by three sons whom he named as Kairu Wokabi, Karuri Wokabi (who is the deceased in this petition) and Warugu Wokabi who was the father to Gabriel Wokabi, the applicant's husband.

It is the respondent's case that his late father bought the two parcels of land in issue by which time Warugu Wokabi had died in the Mau Mau war. The deceased, so he swore, gratuitously allowed Warugu Wokabi's wife and who, as noted was the applicant's mother- in-law, to settle on Title No. Thegenge/Kianjogu/27 where she could cultivate and raise up her children including the applicant's husband. He disputed the fact that the land belonged to the latter and deposed that the land belonged to his father who was also known as Wokabi son of Warugu. The respondent further deposed that he had indeed asked the applicant to vacate the land.

At the hearing, the applicant testified that the father to the deceased and the father to her late husband were brothers. She reiterated that Title No. Thegenge/Kianjogu/27 belonged to her late husband and that he was registered as the owner of the land as early as 1958.

The applicant further testified that she filed a succession cause in respect of the estate of her late husband but she did not include Title No. Thegenge/Kianjogu/27 as part of his estate. The reason she gave for the omission is that she forgot to include it though she has lived on that parcel of land for the last 40 years. She proposed that this parcel of land should be shared between herself and the respondent; initially, she suggested that the respondent should get a bigger share but later she proposed that they should share it equally.

On his part, the respondent reiterated the depositions made in his affidavit in response to the applicant's summons and confirmed that he has

lived with the applicant's family on the suit land all along although he occupies the bigger portion; as a matter of fact, the applicant's husband was buried on this land.

What comes out clearly from this evidence is that the applicant has not presented herself as a beneficiary of the deceased's estate or the deceased's dependant; she is not seeking a share of the deceased's estate in any of those capacities. She is also not claiming Title No. Thegenge/Kianjogu/27 in her own right as the owner; all she is saying is that this parcel of land which has been included in the list of assets comprising the deceased's estate is her late husband's land and for that reason, it ought not to have been distributed as part of the deceased's estate. In other words, the applicant is pursuing the interest of her husband or, to be precise, the interest of his estate.

If the applicant's argument is to be followed to its logical conclusion then she was bound to demonstrate, at the very least, that she is the legally appointed representative of her deceased's husband's estate. The law on such representation is well settled and I would do well if I expressed it here rather attempt to belabour it.

I should start by stating that any claim that the applicant's deceased husband may have had on Title No. Thegenge/Kianjogu/27 against any other competing interest or interests obviously survived him by virtue of **section 2 (1)** of the **Law Reform Act, cap. 26** which states as follows:

> ***2. (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of, his estate;***
>
> ***Provided that, this sub-section shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claim damages for adultery.***

Now, in order to pursue any action by way of a suit on behalf of a deceased person, as is undoubtedly the case here, it is incumbent upon the applicant to seek, in the first instance, the authority of the court for such representation. Section 51 of the Law of Succession Act, cap. 160 primarily provides for the application for grant of representation and the form that sort of application takes. Once the application has been made and allowed, and the grant of representation made, the personal representative is thereby vested with a range of powers properly prescribed in section 82 of the Act. Of particular relevance to our case is the power to pursue, by suit, causes of action which survive the deceased; that particular power is prescribed in section 82(a) of the Act and it reads as follows:

> ***82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-***
>
> ***(a) to enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arise out of his death for his estate;***

It is apparent from this section that only personal representatives have the powers to, among other things, enforce by suit or otherwise all causes of action which survive the deceased.

For avoidance of doubt a personal representative has been defined in section 3 of the Act to be someone who has been granted letters of administration to the estate of the deceased intestate pursuant to an application under **section 51** of that **Act.** The need to be duly appointed as a personal representative of a deceased person before purporting to pursue the interest of his estate was emphasised in **Hintz versus Mwalimu (1984) KLR 294**; Kneller JA (as he then was) put it this way:

> ***It may well be that, in many instances, the sole heir or one of the heirs of a child, is his or her father, but without a grant, general or limited, of letters of administration to the estate, the heir cannot represent the estate and bring an action on its behalf because, until the grant is obtained by someone, the estate (and the legal chose in action) is vested in court. The form of grant bears this out. When the grant is obtained the estate and the legal chose in action pass automatically to the administrator." (See page 309).***

Although this was a dissenting opinion in the split decision by the Court of Appeal, the same court, sitting as a bench of five judges (F.K. Apaloo, R.O. Kwach, A.M. Cockar, R.S.C. Omolo and P.K Tunoi J.J.A.) in **Trouistik Union International & Ingrid Ursula Heinz versus Jane Mbeyu and Alice Mbeyu, Civil Appeal No. 269 of 1997** overturned the decision of the majority in **Hintz versus Mwalimu** case (supra) and upheld the dissenting judgment of Kneller JA as the correct position of the law. The learned judges said of Justice Kneller's opinion:

> ***Indeed, the presiding judge of the Court (Kneller, J.A.) expressed his open disagreement with it (that is, the majority decision). And as we have tried to show, his lone voice was the correct one. In our opinion, the true view is that that appeal (that is, appeal in Hintz versus Mwalimu) was simply wrongly decided.***

While reiterating that it is only an administrator who can sue on behalf of a deceased person under the Law of Succession Act, the judges of appeal said at page 3 of their decision:

> ***The Act came into force on the 1st July, 1981. The person whose death and succession gave rise to this suit, namely, John Katembe, died on the 10th April, 1984. To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82(a) of the Law of Succession Act. That section confers that power on personal representatives within the contemplation of the Act. That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3 the interpretive section, provides an all-inclusive answer; it says "personal representative means executor or administrator of a deceased person". It is common ground that the deceased in this case died intestate. Therefore the only person who can answer the description of a personal representative is the administrator of the deceased. The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the Act? Section 3 says "administrator means a person to whom a grant of letters of administration has been made***

under this Act.

The applicant suggested in her testimony that she took succession proceedings with respect to her husband's estate; however, there was no evidence of such succession proceedings and more importantly, there was no proof that she had been appointed as the administratrix of his estate.

Assuming she had assumed that capacity, she told the court that she nonetheless did not include Title No. Thegenge/Kianjogu/27 as one of the assets comprising her late husband's estate. I found this explanation intriguing for I see no reason why the applicant could have omitted such an important asset from the deceased's assets if she was of the firm conviction that it was always his property; her purported explanation does not appeal to me to be tenable.

In any event, even if the applicant is assumed to have forgotten to include this particular property as part of the deceased's estate, there was no proof that any application, however, belated it may have been, had been made to include it in the alleged succession cause.

The only logical conclusion that one can make from these facts and in particular the omission of Title No. Thegenge/Kianjogu/27 from the list of assets comprising the applicant's estate in the succession cause which she claims to have filed can only be that this property was not her husband's.

Further, I note that the applicant herself suggested that the land should be shared out between herself and the respondent; she even initially suggested that the respondent should get a larger share before she offered to have it shared equally between themselves; what I could not understand from the applicant's testimony is, if the land was her husband's and, ultimately her inheritance, why share it with a person who has no interest whatsoever in her husband's estate?

My assessment of the available evidence leads me to the conclusion that even if the applicant was in good stead to pursue what in her view is a claim due to her late husband's estate, that claim has neither factual nor legal basis.

I am minded that both parties are in agreement that the applicant and, prior to his demise, her husband, have all along lived on this particular land. If that is not in dispute then I would agree with the counsel for the respondent that the applicant's remedy may lie elsewhere; it certainly does not lie in this succession cause.

For the reasons I have given I am inclined to and I hereby dismiss the applicant's application; I make no orders as to costs as the disputants are family members.

Dated, signed, read and delivered in open court this 20th day of September, 2019

Ngaah Jairus

JUDGE