



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISC APPL. NO. 206 OF 1998

CHRISTINE CHERUBET.....1ST PLAINTIFF

ELIZABETH MBOGA.....2ND PLAINTIFF

VERSUS

ROMANA JEPKOECHKEBENI.....DEFENDANT

RULING

The applicant filed summons for revocation of grant under *Section 76 of the Law of Succession Act* and *Rule 44(1) of the Probate and Administration rules* and *Section 128 of the Registered Land Act* issued to the defendant on the following grounds;

- a) The grant was obtained fraudulently by the making of a false statement or concealment of material facts
- b) Pending the application an inhibition order do issue against the defendant and third parties against any dealings in land parcel NANDI/KAMOYWA/637
- c) Subject to (a) above, the registrar of the respondent was not entitled to benefit from the estate of the deceased as she is married with children and is in her matrimonial home and further grounds were stated in the supporting affidavit.

PW1 told the court that she was married to *Martha Jeruto Bariori* by Nandi customary law which was witnessed by *Henry Kipkurgat, Eliud Keter* and *Kiptenai Burei* and were blessed with 6 children. *Martha Bariori* had another wife, *Elizabeth Mboga* who had 2 children. *Bariori* had one child, the defendant. Their husband had a property NANDI/KAPTICH/211 which their husband had subdivided between her and her co wives who were each to get 6 ½ acres.

PW2 told the court that the deceased was her husband and she was the first wife. That the defendant was given land measuring one acre and a cow by the deceased. She stated that they live at Kaptich on land they were given by the husband and each wife was given 6 ½ acres. The defendant was given one acre which she sold and acquired land at Kamoywa and registered it in her name.

APPLICANT'S CASE

The applicant submitted that it is not in dispute that the applicants were married to *Martha Jeruto Bariori* under Nandi customary law. They cited the case of *Ezekiel Kiptarus Mutai v Esther Chepkurui Tapkile (2015) eKLR* on the determination of the essentials of women marriage amongst the Nandi.

The applicants were wives of the deceased within the meaning of *Section 29(a) of the Law of Succession Act*. The grant was obtained fraudulently in that in the petition of letters of administration intestate and affidavit, only one parcel of land NANDI/KAMOYWA/637 was indicated and that she was the only beneficiary surviving the deceased thus locking out the applicants.

The applicants cited *Section 40(1) of the Law of Succession Act* and stated that the household was polygamous thus the respondent ought to have stated the same. She failed to inform other beneficiaries of the proceedings of confirmation pending in court. The applicant cited *Rule 26(1) of the Probate and Administration Rules* to support this point.

The applicant cited *Section 76 of the Law of Succession Act* on revocation of grant and stated that the grant should be revoked to ensure all the beneficiaries of the estate of the deceased person inherit the Estate. Further, they cited the case of *Savo Ngoinet & 2 others v Naiyeso Munkaya Gurne & Another (2017) eKLR* and the case in the matter of the estate of *Isaac Kireru Njuguna* (deceased) on revocation of grants.

RESPONDENT'S CASE

The respondent submitted that the applicants did not want her to inherit her mothers' property as she is married and she would inherit from her husband. She further submitted that it would be contrary to Article 27 of the constitution which prohibits discrimination and moreso Article 27(3). She submitted that *Section 29(a)* of the *Law of Succession Act* does not classify children of the deceased as sons, daughters, married or unmarried in recognizing them.

She cited the case of the *Estate of Solomon Ngatia Kariuki (deceased) 2008 eKLR* and the case of *Eliseus Mburu M'There v Harriet Gambaka & Anor (2012) eKLR* on discrimination. In the instant case the applicants want the letters of administration revoked on the basis that the respondent is married and will inherit from her husband thus she should not inherit from her mother.

The respondent cited the case of *Peter Karumbi Keingatu & 4 others v Dr Ann Nyokabi Nguithi (2014) eKLR* on the issue of married daughters not inheriting.

The marriage of the sons and daughters has no bearing on whether or not such daughter is entitled to inherit property that comprise the estate of their deceased parent. The respondent maintained that under *Section 29(a)* of the *Act* the respondent being the daughter of the deceased is entitled to the right to inherit.

ISSUES FOR DETERMINATION

- a) Whether there was concealment of material facts
- b) Whether the grant should be revoked

WHETHER THERE WAS CONCEALMENT OF MATERIAL FACTS

The main bone of contention is that the respondent omitted the fact that the applicants were wives to the deceased and as such they were deprived of being beneficiaries to the estate. The respondent has not disputed that they are wives to the deceased, married, under Nandi customary law. She has only addressed the issue of their submission that she should not inherit any of the property as she is married.

In order to determine if the applicants are indeed beneficiaries the court must establish if they are dependants within the meaning of the Law of Succession Act.

Section 29(a) of the *Law of Succession Act* provides;

For the purposes of this Part, "dependant" means—

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**

In *Ezekiel Kiptarus Mutai v Esther Chepkurui Tapkile [2015] eKLR* the court held;

Eugene Cotran a reknown author on the customs of various tribes in Kenya in his book "The Law of Marriage & Divorce Vol. 1 (London; Sweet and Maxwell 1968) at Page 117 says;

WOMAN – TO – WOMAN MARRIAGE.

(Kitum Chi Toloch). A woman past the age of (among the Nandi & Kipsigis) child – bearing and who has no sons, may enter into a form of marriage with another woman. This may be done during the lifetime of her husband, but is more usual after his death. Marriage consideration is paid, as in regular marriage and a man from woman's husband's clan has sexual intercourse with the girl in respect of whom marriage consideration has been paid. Any children born to the girl are regarded as the children of the woman who paid marriage consideration and her husband".

In the case of *Hortensia Wanjiku Yawe –vs- The Public Trustee, Civil Appeal No. 13 of 1976*, the court held: -

The onus of proving customary law marriage is generally on the party who claims it. The standard of proof is the one usually for a civil action, namely "on the balance of probabilities." Evidence as to the formalities required for a customary law marriage must be proved to that standard. Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it. Only cogent evidence to the contrary can rebut the presumption. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.

As per the record there are no witness statements or testimonies from the witnesses to the marriage. However, given that the respondent has not contested the marriage, it's deemed to be valid. The court's decision on this issue determines whether there was concealment of material facts.

Given that the marriage was valid and can be considered for purposes of succession, it follows that the applicants are dependants. Further, the land in dispute is Nandi/Kamoiywo/637 and the applicants claim that the respondent indicated that she was the only one surviving the deceased.

In her affidavit in support of the petition for letters of administration intestate it is evident that she excluded all the other beneficiaries. Material facts that were therefore concealed.

WHETHER THE GRANT SHOULD BE REVOKED

Section 76(b) of the Law of Succession Act provides;

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) ...

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

It is evident that there was concealment of the fact that the applicants were also dependants and consequently the grant herein should be revoked.

The respondent has submitted on whether she has a right to inherit notwithstanding that the main issue is the revocation of the grant. On the issue I find that she is entitled to inheritance despite being married. However, given that this is not the matter in issue, the grant stands revoked.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 17th day of October, 2019.

In the absence of;

Mr. Birech for the Applicant

Mr. Nyachiro for the Respondents

Ms Abigael - Court assistant