



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**SUCCESSION CAUSE NO. 146 OF 2012**

**IN THE MATTER OF THE ESTATE OF ANDREW WAKANYA KAMAU alias WAKANYA KAMAU (DCD)**

**SIMON MAINA WAKANYA.....APPLICANT**

**V E R S U S**

**ZAWERIO WACHIRA WAKANYA.....RESPONDENT**

**JUDGMENT**

1. This matter relates to the estate of Andrew Wakanya Kamau alias Wakanya Kamau, deceased. A Grant of Letters of Administration was issued to Zaverio Wachira Wakanya on 4/3/2011 and confirmed on 19/4/2012. The estate of the deceased was distributed as follows:-

**a). Mutithi/Strip/321**

Zaverio Wachira Wakanya - (whole share)

**b) Mwerua/Kiandai/44**

Zaverio Wachira Wakanya – 1.7 acres

Cecilia Wairimu Kamau – 1.7 acres

Evan Kathigo Benson – 1 acre

2. A summons for Annulment of grant under ***Section 76 of the Law of Succession Act Cap 160 Laws of Kenya*** (to be referred to as **the Act**) was filed by Simon Maina Wakanya on 19/10/2012. The application is based on the grounds that:

- The grant was obtained and confirmed fraudulently or by concealment from court of something material to the cause.
- That the proceedings to obtain the grant were defective in substance.
- That the applicant was not informed when the proceedings were filed.
- That as a son of the deceased and a beneficiary of his father's estate he was deprived of his rightful inheritance.

3. The application is supported by the affidavit of Simon Maina Wakanya sworn on 19/10/2012. The gist of his contention is that he is the son of the deceased's second wife Charity Njeri Wakanya. The respondent who is the son of the 1<sup>st</sup> wife Rosa Ria Wakanya failed to disclose to court that the deceased had a second wife. The respondent filed the succession secretly without informing him. The applicant avers that he is entitled to get the deceased's land parcel No. Mutithi/Strip/321 which he has been utilizing all his life and the respondent and the beneficiaries from his house were only entitled to the land parcel No. Mwerua/Kiandai/44 where they have resided even during the lifetime of their deceased father.

4. The applicant depones that the proceedings were defective in substance and also fraudulent because the respondent made false statements or concealed from court some material facts in the cause.

5. The respondent opposed the application and filed a replying affidavit sworn on 12/11/2012. His contention is that the applicant is not a son of the deceased and is therefore not entitled to inherit the estate of the deceased. The respondent avers that the mother of the applicant used to be a friend of the deceased and not a wife. He further avers that the applicant is the son of Kariuki and it is strange that he has the name of the

deceased as his surname. The respondent has come to learn that the applicant and his family lives in Mukurweini in Nyeri County.

6. The respondent avers that the applicant in an attempt to deceive has several names like Simon Maina, Simon Kamau and Karani son of Kariuki which is on his land parcel No. Mwerua/Kiandai/44. That applicants deceased mother was not buried on the deceased's land parcel. That the applicant has not disclosed whether he has other siblings and if so where they are. The respondent prays that the application be dismissed.

7. In a further affidavit sworn on 4/8/2015 the respondent depones that the applicant and his mother were not mentioned in the Eulogy if the deceased. The Succession Cause was filed and the grant was confirmed. Land parcel No. Mutithi/Strip/321 was sold to a 3<sup>rd</sup> party by name David Kabuteni Muthike and title No. Mwerua/Kiandai was closed on sub-division.

8. In response the applicant filed a supplementary affidavit sworn on 26/7/2018 and contends that his deceased mother was buried on land parcel No. Mutithi/Strip/321. That the deceased had given them the original title deed for the land parcel No. Mutithi/Stip/321. He further contends that his late mother and the deceased had bought the land parcel but it was registered in the name of the deceased. That he attended the burial of deceased but did not protest the Eulogy though they were left out. He reiterates that the proceedings were defective in substance and ought to be revoked.

9. The applicant adduced evidence and filed submissions. For the applicant it was submitted that the application is brought under **Section 76 of the Law of Succession Act** and based on the grounds set out on the face of the application and supporting affidavit. The applicant raises four issues for determination as follows:-

- a) Whether the applicant's mother was a wife of the deceased person.
- b) Whether the applicant is a child of the deceased and therefore a beneficiary of the deceased's estate.
- c) Whether the grant was obtained and confirmed through fraud concealment of material facts thus the proceedings were defective in substance.
- d) Whether the grant should be revoked.

10. On the first issue it is submitted that the applicant has adduced evidence that her mother Charity Njeri Wakanya was the Second wife of the deceased and that the applicant was born and brought up on land parcel No. Mwea/Mutithi/Strip/321. That Charity Njeri was buried on the said parcel of land. That the respondent admitted that the said Charity was a friend of the deceased and later changed to say he was his employee. That the deceased had handed over the title deed to the applicants mother who inturn handed it over to her. That the respondent admitted that he never informed the applicant when he filed the succession. He also never informed the court that the deceased had a second house. That the applicant has proved that the grant was obtained fraudulently and ought to be revoked or annulled.

11. For the respondent it is submitted that the application is full of falsehoods and inconsistencies hence misconceived and lacks merits. The respondent submits that the applicant did not adduce any evidence to prove that he is a son of the deceased as he did not produce a birth certificate or a Chief's letter to confirm the allegation.

12. The respondent further submits that though the applicant had said he had been living on the land Mwea/Mutithi/Strip/321 he admitted in cross-examination that he has never lived on the land as it had long been sold to a 3<sup>rd</sup> party. That the applicant admitted that he owns land parcel No. Muhito/Mutindu/4 registered in the name Karani son of Kariuki which is his name. This is shown of certificate of search annexure ZWW-1- to the respondent's affidavit sworn on 12/11/2012. Further that the applicant has also said his name is Simon Maina which he used when filing an application for prohibitory order on 19/10/2012 and on the Jurat he has given his name as Simon Kamau. That the applicant is the son of one Kariuki and he is not a son of the deceased.

13. The respondent submits that he deceased had never supported the applicant during his lifetime as provided under **Section 29(b) of the Law of Succession Act**. The applicant and his mother never attended the deceased's burial not assisted during his long sickness. That the allegation that the deceased's mother was buried at Mwea/Mutithi/Strip/321 is not true as the land had long been sold to a 3<sup>rd</sup> party.

14. I have considered the application, the evidence tendered and the submissions. The issues which arise for determination are as set out by the counsel for the applicant. I will therefore address the issues.

#### **Whether the applicants mother was a wife of the deceased.**

The applicant bears the burden to prove this allegation. The rule of Evidence is that he who alleges must prove. The rule requires that the person making an allegation must present evidence before the court to prove on a balance of probability that the allegation is correct. This is the burden of proof which is borne by the party who alleges. **Section 107-108 of the Evidence Act** provides:-

***“1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

***108. Incidence of burden The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”***

The applicant has not discharged the burden of proof that his mother Charity Njeri was a wife of the deceased. There was no indication as to which system of marriage she was married to the deceased, either Custom, Statutory or Christian or any other. He did not call a witness from the family to confirm that the applicant's mother was a wife of the deceased. The applicant and his mother have not been introduced to this court by a Chief's letter.

15. The applicant relies on a burial permit. He did not produce the original burial permit. The copy produced has visible alterations which makes the document unreliable and inadmissible.

16. The applicant testified that he lives in Mwea Wamumu Sub-location but not on the property of the deceased. It is not conclusive evidence that the applicant buried the deceased on the land of deceased. It was necessary to produce the original burial permit and call the maker as the evidence of the applicant was insufficient.

17. On the issue of the title deed, it was in the name of the deceased. The applicant testified that the title deed was given to his mother by the deceased. The title deed had been declared as lost. The applicant's mother was said to have been a friend of the deceased. She had access to the house of the deceased. My view is that she could have obtained the title deed through other means and not necessarily that it was given to her by the deceased. The title was not transferred and even after the deceased's death she did not file succession to acquire the land. It is also noted that the land was sold and the person who bought took possession without objection from the said Charity Njeri or the applicant. It is therefore not proved that the title deed was given to Charity by the deceased.

18. The respondent produced the Eulogy of the deceased annexure ZWW-1-b showing that the deceased had only one wife. The said Charity was not mentioned nor did she object as it the case where a wife is left out. The irresistible inference is that she was not the wife of the deceased. The applicant has failed to discharge the burden to prove that Charity Njeri was the wife of the deceased.

**If the applicant is the son of the deceased.**

The applicant alleged he was the son of the deceased. The burden of proof was on the applicant to prove he was a son. The respondent objected that the applicant was not a son of the deceased. The applicant did not produce any evidence like a birth certificate to prove his claim. He admitted that he was not living on the deceased's land parcel. He did not prove the claim for dependency. **Section 29 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;*

*(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and*

*(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”*

The applicant had the burden to prove that he was a dependant as defined under the Section. He claim to be a child of the deceased and he had to lay material before this court to prove that he was a child of the deceased.

19. The applicant failed to provide prove and he has not helped by using a multiplicity of names in attempts to prove that he is a son of the deceased.

20. As it was pointed by the counsel for the respondent when the applicant filed a Chamber Summons seeking an order that a prohibitory order on Land Parcel No. Mutithi/Strip/321. He stated that his name is Simon Maina Wakanya ID. No. 3394995 and on the durat he swore as Simon Kamau Wakanya. Thereafter he has given his name as Simon Maina Wakanya. The respondent produced a certificate of Official Search as far back as the year 1959 the applicant was registered as the owner of land parcel No. Lower Muhito/Mutundu/4 as Karani son of Kariuki. The applicant admitted the land parcel No. Lower Muhito/Mutundu/4 which is in the name of Karani Son of Kariuki is registered in his name. It is clear that the applicant has used various names. My view that he has used the names in an attempt to fraudulently acquire the estate of the deceased when he is not a beneficiary or a dependant. This is by means of having in his possession the title deed of the deceased in unclear circumstances.

21. My view is that the applicant is an impostor and is not a son of the deceased. The applicant was not a truthful witness as he said he does not know Karani and yet he admitted that the land parcel No. Muhito/Muhindu/4 which said is registered in his name is in the name of Karani son of Kariuki. **Section 3(2) of the Law of Succession Act** defines a child as the biological child or a child who a man recognizes as his own, it states:-

*“has expressly recognized or infact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility, shall be an automatic dependent under Section 29(a) of the Act.”*

22. The applicant did not produce a birth certificate nor did he produce any document showing that he is the son of the deceased. He did not prove that he was maintained by the deceased immediately before his death he never attended the burial of the deceased in short he has not laid any material before this court to warrant a positive finding that he was a son of deceased or a dependant. The **Hulsbury's Laws of England 4<sup>th</sup> Edition Volume 17 at Para 13 and 14** describes the legal burden of proof as follows:-

*“The legal burden is the burden of proof which remains constant through out a trial it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.*

*The legal burden of proof normally rests upon the party desiring the court to take action thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon a party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”*

23. The applicant did not discharge the burden to prove that he is a son of the deceased which is the gist of his claim. On the other hand, the respondent produced documentary evidence, that is a certificate of official search showing that the applicant is the son of Kariuki. The evidential burden had not shifted on the respondent. The applicant failed to adduce evidence by birth certificate or by calling witnesses to confirm the allegation that he is a son of the deceased. I find that the applicant has not proved that he is a son of the deceased. He is therefore not a dependant and is not entitled to a share of the estate of the deceased.

#### Revocation of Grant.

#### **Revocation of grant**

**Section 76 of the Law of Succession Act Cap 160** states;

*“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) that the proceedings to obtain the grant were defective in substance*

*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.*

*that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.”*

24. The section provides for the elements which a party must prove in order for the court to order revocation of grant. From the record the respondent filed the cause and it was gazette. A grant was issued and later conformed. There is nothing to prove that the proceedings to obtain the grant were defective. Having concluded that the applicant was not a son of the deceased, there is no prove that the respondent obtained the grant fraudulently by the making of a false statement or concealment from court of something material to the case.

25. I find that the grounds set out under **Section 76 of the Law of Succession Act** have not been proved. I therefore find that the application lacks merits and is dismissed with costs to the respondent. I wish to observe that the applicant holds an original title deed for land parcel No. Mutithi/Strip/321 in unclear circumstances.

26. The lower court did on 27/7/12 order the Land Registrar Kirinyaga to dispense with the production of the original title deed in respect of land parcel No. Mutithi/Strip/321. The order has not been varied or set aside. This followed an application by the respondent who informed the court that the title deed could not be traced. The order was complied with and the grant was issued and executed. The title No. Mutithi/Strip/321 does not exist as the title was closed on sub-division and is no longer in the name of the deceased. It is not the interest of the public that this title be in the hands of the applicant as it can be used unlawfully and to mislead unsuspecting members of the public. I therefore make an order that the title deed be surrendered to the Deputy Registrar of this court who will in turn surrender it to the Land Registrar Kerugoya for destruction.

**Dated at Kerugoya this 13<sup>th</sup> day of November 2019.**

**L. W. GITARI**

**JUDGE**