



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 167 OF 1999

In The Matter of the Estate of M'Irura M'Mungania (Deceased)

SARAH KAMENWA MAGANA.....PETITIONER

-VS-

MUKOMURIMI M'ITUARUCHIU..... OBJECTOR

SAMSON KIBETERU.....1ST INTERESTED PARTY

SILAS MURIUKI RUTERE.....2ND INTERESTED PARTY

KARWITHA KINAITORE.....3RD INTERESTED PARTY

JUDGMENT

[1] **M'IRURA M'MUNGANIA** ("the deceased") to whom this succession cause relates died on 27th December 1963. According to the Chief's letter of introduction dated 7th August 1992 it is stated that the deceased was survived by Kamenwa M'Irura (**daughter**). His asset is listed as L.R. NO. NYAKI/MUNITHU/ 327 (hereinafter 'the Suit Land') measuring 1.8 Ha.

[2] Kamenwa petitioned for grant of letters of administration which were issued to her on 17th December 1999. She applied for confirmation of grant vide her application dated 28th February 2001 but an objection was raised by the objector who claimed to be the eldest daughter of the deceased. The application stalled for about four (4) years but confirmation of the grant was granted on 13th February 2009.

[3] The petitioner died and her son Silas Kibiti Magana sought to be substituted vide his application dated 10th March 2010. As a result, rectification of the grant of letters of administration intestate was done and letters of administration were issued to Silas Kibiti on 11th December 2012 and confirmed on the same day.

[4] The Interested Parties filed summons for revocation of the grant dated 16th September 2013 pursuant to **Section 47 and 76 of the Law of Succession Act CAP 160 Laws of Kenya** and **Rule 44 and 73 of the Probate and Administration Rules**. The Interested Parties seek among other orders the revocation/annulment of the letters of administration issued and the setting aside of all subsequent orders.

[5] The grounds upon which the application is made are set out in the application, the supporting and supplementary affidavit of Silas Muriuki Ruteere sworn on 18th September and 23rd November 2013 respectively. It is contended that the Suit Land is ancestral land but was gathered and registered in the name of the deceased with the understanding that the land would be shared with his brother **M'MUNGANIA MUNGANIA**. However, the deceased died and M'Mungania died before the sharing was done. That members of both families continue to live and occupy the land. They also argued that the petitioner secretly filed the cause without their knowledge and they only came to discover about it when they were asked to move out. To them, the grant was obtained fraudulently making a false statement or concealment for the court and by means of untrue allegation of essential fact in point of law. Thus, the proceedings to obtain the grant were defective in substance.

[6] *Viva voce* evidence was adduced. **PW1 Samson Kibeteru** stated that the petitioner was a sister to his mother, Mukomurimi M'Ituarachu, the objector. She divorced from his father M'Itharachi when he was young and went to live with the deceased on the Suit Land where she is buried. The deceased was his grandfather who left the Suit Land to his two daughters. The clan went ahead and divided the land and gave it to the deceased and other people (cousins) and that is how they have been living. His cousins are the deceased's brother's children. His mother's objection was not decided on at the time of her death. When the petitioner's son replaced the latter they were not informed and was done without their knowledge. He stated that he has not ganged up with outsiders to disinherit the immediate family.

[7] **PW2 Silas Muriuki Rutere** told the court that the deceased was a brother to his grandfather called M'Mungania. The Suit Land

belonged to the two of them but the deceased consolidated and registered in his name alone. They occupy and have developed their respective portions. He affirmed that the deceased had two daughters, the petitioner and objector. He is not aware of elders concluding that the petitioner is the only heir of the deceased but the deceased acknowledged Mukomurimi as his daughter.

[8] **Evidence de benese of Ciomwirichia M'Irimba** she stated that her father was M'Mungania Mungania, brother to the deceased. She affirmed that the deceased had only one daughter, the petitioner. That the objector was the daughter of one M'Naivasha of Kaguanga village. When the mother of Mukomurimi was married to the deceased she was left at her father's home. His father M'Mungania Mungania had his own lands which were Kamakawa, Inoono, Muregwa and Karumo which were disposed off. When his father was ailing he went to live with the deceased who took care of him. That the 1st Interested Party was a son to Mukomurimi who has no relationship with the deceased. The 2nd and 3rd Interested Parties who are children to her sisters disposed of their father's land and have no right to claim. Since her sisters were married in the same area where the Suit Land is situate they invaded the land for the petitioner being the only daughter of the deceased was married.

[9] **IP2 Damaris Karwitha** stated that her mother Beatrice Kinaitore was a daughter to M'Mungania Mungania, brother to the deceased. That she was given the Suit Land which she, Silas Muriuki, Gakii Karemu, Lydia Sorove use. She stated that Mukomurimi is the daughter of the deceased. The Suit Land was divided into five portions of one (1) acre each for Kinaitore, Karoki, Mukomurimi, Sara Kimene and Sarah Mitiri which she is in agreement with. That they do not have their land as they sold it to Paul Mathenge. The deceased died a long time ago and her mother had the permission of the deceased.

[10] **IP3 Sarah Kithira** stated that the deceased was her grandmother's brother. She found her mother in law, Maria Kanyili, and father in law on the Suit Land and who are buried there. By the time she was on the Suit Land the deceased had already died. She has developed it and constructed a semi-permanent house. They did not invade and occupy the Suit Land for they entered lawfully after the clan members authorized.

[11] At the close of their case the petitioner called two witnesses. **PW1 Silas Kibiti** stated that his mother Sarah Kamenwa was the only daughter of the deceased. The deceased's brother M'Mungania Mungania died and left his 8 acres to his family. The children of M'Mungania became ill and sold their father's share of four (4) acres.

[12] **PW2 Kanikoo Harriet** testified that she is also Ciomwirichia M'Irimba for her father called her so. Her father was M'Mungania Mungania who died and was left under the care of the deceased. They sold the land at Kamakagwa and Mathenge to meet the children's needs. The Suit land belongs to the deceased of which they have a right as it belonged to their father as well.

[13] This matter was canvassed by way of written submissions. The objector/Interested Parties reiterated what they had stated and relied on the case of **Zipporah Wanjiru Mwangi v Zipporah Wanjiru Njoroge Civil Appeal No. 320 of 2013**. The petitioner submitted by restating what he had stated earlier. He added that this court has no jurisdiction to determine the issue of existence of the alleged trust by the Interested Parties. However, they have failed to prove their claim of trust on a balance of probability. They relied on the case of **In the Matter of the Estate of Peter Igamba Njoroge Succession Cause No. 432 of 2009 (unreported)** and **Patrick Mathenge Gachi & 3others v Karumi Wambugu & Another [2010] eKLR**.

ANALYSIS AND DETERMINATION

[14] The issues for determination are:

- a) Whether the Objector is a daughter of the deceased?
- b) Whether the 2nd and 3rd Interested Parties are entitled to the estate of the deceased?
- c) Is revocation/annulment of the grant merited?

[15] The first issue is whether the objector is the daughter of the deceased. Under **Section 29 of the Law of Succession Act** it states who a dependant is, and includes a child of the deceased. Section 3 (2) of the Act defines a child as follows:

“(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

According to the petitioner, the objector is the daughter of M'Naivasha of Kaguanga village which has been refuted by the Interested Parties. Ciomwirichia M'Irimba daughter of M'Mungania Mungania who gave evidence de benese told the court that the Objector is not a daughter of the deceased as she is a daughter of M'Naivasha. When the objector's mother Ciokonge married the deceased the objector was left at her father's home. But she then stated that by the time they were marrying the objector was a small child. It is not in dispute that the objector is buried on the Suit Land. In spite of it being alleged that it was in contempt and in disregard on the ongoing cause there is no evidence that shows that anyone attempted to stop the said burial. Nonetheless, nothing much turns on this point.

[16] 1st Interested Party being the son of the objector and who claims that the deceased was his grandmother seems not to know much about his family. He neither knows his grandmother's name nor the children of the petitioner whom he claims to be the aunt. He then sought to mislead the court when he stated that he has never lived on his father Bunogane's land as he had no land at all. Hence he was brought up on the Suit Land. During cross-examination he stated that his father left land to his three brothers who live there. His evidence is full of unexplained turns and circumlocutions.

[17] The evidence shows two things. First, that objector's mother married the deceased. Two, that the objector was not sired by the deceased. The question begging for an answer is; whether the deceased assumed responsibility of the objector.

[18] The Interested Parties who claim that the objector was a child of the deceased had the burden of proving so. The evidence available show that the objector was left at her father's home when her mother married the deceased. There is no evidence that the deceased took in the objector as his child or maintained the objector. Therefore, they did not discharge their burden of proof. Thus, I find that the objector is not a daughter of the deceased.

[19] The second issue is whether the 2nd and 3rd Interested Parties are entitled to the estate of the deceased. The 2nd and 3rd Interested Parties claim that the Suit Land belonged to the deceased and his brother M'Mungania Mungania. However, the deceased caused the whole land to be registered in his name and died before the same was distributed accordingly. The function of the probate and administration court was stated in **In re Estate of Alice Mumbua Mutua (Deceased) [2017]Eklr**; collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets. However, the Court of Appeal in the case of **Zipporah Wanjiru Mwangi v Zipporah Wanjiru Njoroge [2017] eKLR** seems to widen this court's jurisdiction when it stated the following:

“In succession proceedings where, as here, existence of trust is alleged in respect of land claimed to be family land, it is appropriate for the court to give directions on the procedure to be followed for adduction of evidence. Such procedure cannot be discredited merely on account of the fact that succession proceedings are designed to determine heirs and distribution of estate and not issues of trust. The fact that the court was called upon to determine whether the suit land was beneficially held and therefore not subject to distribution or whether it was family land and therefore liable to distribution among the heirs in the succession in itself justified the determination of the issue of trust. Where, as here, the issue (of trust) arises in succession proceedings whether the land is family land and therefore is subject to trust or whether it is owned absolutely by the deceased, and therefore is not subject to distribution, the court hearing the succession proceedings has jurisdiction to determine the issue and to give appropriate directions on the hearing. This is in line with the jurisdiction vested in the High Court by Article 165 (3) (a) of the Constitution and Section 47 of the Law of Succession Act, Cap. 160. Moreover, the Constitution of this country enjoins and expects the courts to determine the dispute fairly and with expedition, and without undue regard to technicalities of procedures - see Articles 159 (2) (d), 48; 50 (1); 10(1) (A); 10 (2) (b); 20 (2); 21(1), 165 (3) (a) and 164 (3).”

[20] The burden of proving that a trust existed rests on the Interested Parties for they are the ones alleging so. Their claim is that the land is ancestral land which was then divided by the clan into five portions which they are in occupation of. But from the evidence of the daughter of M'Mungania, brother to the deceased, the Suit Land belongs to the deceased. She was categorical that she and her siblings sold all the land that was left to them by their father. Thereafter, they invaded the Suit Land. This was also stated by **PW2 Kanikoo Harriet** also known as Ciomwirichia M'Irimba in her statement. When she testified before the court she confirmed that they had sold lands that belonged to their father. She ascertained that the Suit Land belonged to the deceased but she is entitled to a share as she took care of the deceased when he passed away.

[21] From the foregoing it is apparent that the Interested Parties claim of trust has not been proved. They did not prove that the suit land was ancestral land. What is emerging is that their father and the decease had each been given own and separate pieces of land, except, the children of Mungania sold their father's land. It seems they entered the suit land after they sold their inheritance. Such are trespassers to whom no right accrues. Consequently, I find that the 2nd and 3rd Interested Parties have failed to prove their claim that the Suit Land is trust land. Therefore, I find and declare that suit property is estate property. I dismiss their claim.

[22] The third issue is whether the revocation/annulment of the grant is merited. The grounds upon which a party may revoke and or annul a grant are stipulated under **Section 76 of the Law of Succession Act**. The Interested Parties stated that the petitioner filed the cause secretly, obtained the grant fraudulently by making a false statement or concealment for the court and by means of untrue allegation of essential fact in point of law. Thus, the proceedings to obtain the grant were defective in substance. The grant was confirmed back on 13/02/2009 because the objector went silent for about four years without pursuing her application. The Interested Parties have not explained the reason as to why this occurred. I have found that the objector was not a dependant of the estate of the deceased. I have also affirmed the estate property is not trust property. The petitioner's son was just substituted on 11/12/2012 after the death of the administrator herein which is a legal necessity where administration of the estate is not yet completed. Therefore, from the foregoing I find nothing on which to revoke or annul the grant.

[23] Accordingly, the application herein is unmeritorious and is dismissed with costs to the petitioner.

Dated, signed and delivered in open court at Meru this 4th day of December, 2019

F. GIKONYO

JUDGE

In presence of

M/s Soy for petitioner

Basilio for Rimita for objector/interested parties.

F. GIKONYO

JUDGE