REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 426 OF 1982

IN THE MATTER OF THE ESTATE OF MWANGI MACHANGA (DECEASED)

JUDGMENT

1. The estate herein relates to the estate of Mwangi Machanga who died on 24th April 1977. Representation to his estate was sought by the Public Trustee, in a petition filed herein sometime in 1982, the Public Trustee's cause being Number 149 of 1979. He was expressed to have been survived by four widows, being Wambui, Waithera, Mwithaga and Njoki. He was expressed to have died possessed of two assets, Chania/Kanyoni/758 and Chania/Ngorongo/731. A grant of letters of administration intestate was duly made to the Public Trustee on 29th July 1982. The said grant was confirmed on 5th November 1986 on a chamber summons filed herein on an unknown date in 1986. The estate was to be shared equally between the four houses in equal shares.

2. The record before me reflects that a summons for confirmation of grant dated 24th July 2001 was filed herein on 12th July 2001 by John Wambiri. It sought distribution of the estate among the surviving widows and children of the deceased. There is also a summons dated 19th April 2006 by a purchaser, Edward Gatiba Mbugua, asking that a portion of the property of the estate be curved out. There is also a summons for rectification of the grant dated 24th May 2006 by John Wambiri. The applications dated 24th July 2001 and 19th April 2006 were ill-conceived as they were brought by a non-grant holder who had no capacity to mount applications of such nature. Wisdom prevailed and the two applications were withdrawn by consent on 8th May 2007. Regarding the application dated 19th April 2006, it was directed that if all the beneficiaries were agreeable that Edward Gatiba Mbugua had acquired a 1.5 acres interest in the estate then they ought to file a consent to that effect.

3. The application for determination is dated 7th June 2007. The same was brought at the instance of John Wambiri, who seeks revocation of the grant on grounds that it had become useless and inoperative following the death of all the persons in whose favour it had been made save for one. In the affidavit in support the applicant concedes that the grant was made to the Public Trustee in 1982 and was confirmed in 1986. It is argued that the grant was confirmed erroneously as all the widows had died, save for one, while some of the children were minors and were not considered. It is stated that the beneficiaries and the assets have since been ascertained and the shares apportioned in the manner stated in the affidavit.

4. There are responses to the application. One is by Ngugi Muhindi, through his affidavit of 24th November 2015. He states that after the confirmation of the grant the Public Trustee sought to have the property distributed as per the confirmation orders, but one widow, Pauline Njoki Mwangi declined to sign the relevant papers. He states that upon the demise of the deceased the family met on 22nd August 1978, sat and agreed that the estate be shared out equally between the four houses. The four subfamilies occupied portions that were more or less equal in size, and upon death family members from each side on the family were buried on the portions they occupied. He urges that the distribution confirmed by the court in 1986 be upheld.

5. The reply by the Public Trustee is vide an affidavit that was sworn on 19th April 2016 by Mary Njoki Njuya. She states that the deceased died before the Law of Succession Act, Cap 160, Laws of Kenya, came into force. She asserts that the consents of the widows and the adult children were obtained prior to the grant being made. The grant was confirmed in 1986, where the estate was distributed equally to the four houses of the deceased in accordance with the Kikuyu customary law. Upon confirmation, the Public Trustee sought to have the confirmation orders executed but the fourth widow declined to sign the relevant documents. She is accused of having been a stumbling block to the finalization of the matter. The deponent concedes that some the beneficiaries are now deceased, and there is need to have the confirmation orders reviewed to account for that. She says that the claim by Edward Gatiba Mbugua is misconceived, add that the claimant ought to pursue the person who sold that land to him, and that ought to be after the estate has been distributed. It is argued that the persons to whom the grant had been made have not died since the Public Trustee is still the administrator.

6. The other reply is by Edward Njuguna Muhindi, whose affidavit was sworn sometime in April 2016. He takes a similar position with Ngugi Muhindi, and supports the distribution proposed by the Public Trustee and confirmed by the court. There is also an affidavit by Paul Njoroge Mwangi, sworn on 12th June 2017, he is the one who sold a portion of the estate to Edward Gatiba Mbugua. He would like the buyer to be treated as a beneficiary to minimize costs.

7. The applicant swore a further affidavit on 3rd December 2015 in response to some of the replies. He asserts that the children of the deceased were not consulted at the point the grant was sought and also at its confirmation. It is also argued that the surviving widow declined to sign the transmission forms as she had not been consulted. It is also argued that Kikuyu customary law did not provide for equality of all and was contrary to the Constitution. The Public Trustee lodged a further affidavit herein on 13th March 2018, sworn on even date, by Lucy W. Mugo, to place on record the documents that the Pubic Trustee relied on in 1982 to obtain representation in the estate.

8. The application was disposed of orally. The hearings commenced on 19th June 2017. The first on the stand was the applicant John Wambiri Mwangi. He described himself as a child of the deceased. He said that all the wives of the deceased have since died, save for the fourth widow. He claimed that he and his siblings were not consulted when the Public Trustee sought representation to the estate. He stated that the deceased had three parcels of land at Chania Ngorongo, Chania Kanyoni and Kericho. He said that the Kericho was transferred to Flavian Mwangi, of the second house, by the deceased during his lifetime. He asserted that equal distribution of the estate would disadvantage some members of the family, pointing out that the four houses did not have an even number of children. He proposed that the estate be distributed equally amongst the children of the deceased. He asserted that his side of the family was not party to the alleged family meetings where the mode of distribution of the estate was allegedly discussed and agreed upon. During cross-examination, he said that he was aware that the deceased died before the Law of Succession Act had come into force, and that he was aware that the estate was to be distributed according to Kikuyu customary law. He stated that the Public Trustee did not follow Kikuyu customary law in her administration of the estate. He accused the Public Trustee of not consulting and of not taking into account the prevailing circumstances on the ground. He conceded that the distribution reflected in the certificate of confirmation of grant was done in 1977, when he was still a toddler. He stated that he wanted the distribution approved by the court varied.

9. The next on the stand was Ngugi Muhindi. He said he was from the first house. He stated that most of the property was shared out amongst the widows shortly after the deceased's death, including the lands, money and cattle. He said that family members met and agreed on the distribution. He said that the first three houses of the deceased supported the distribution by the Pubic Trustee and it was only the fourth house that did not agree with it. It wanted the property distributed as per the number of children in each house. He stated that Flavian Mwangi had bought land from the deceased. On cross-examination, he said that the same followed what the widows had agreed upon.

10. Njuguna Muhindi came next. He said there was a family meeting in 1978 which agreed on distribution. It was agreed that the estate be distributed amongst the wives. He claimed that Flavian Mwangi bought land from the deceased. He said the lands, the money in the bank and cattle were shared out amongst the wives. He indicated the younger widow did not agree that distribution be based on custom law. Flavian Mwangi was the last witness. He stated that he was opposed to the application to revoke the grant. He said that all the assets had been shared out equally between the spouse, that is to say the lands the coffee bushes, cattle and money. He said that the family members cultivate the portions of land as allocated then, and the remains of the widows of the deceased who have since died were buried in the portions allocated to them. Similarly, the sons have each put up homes in the areas allocated to their mothers. He asserted that the estate be shared equally as had been ordered earlier.

11. At the end of the oral hearing directions were given for filing of written submissions. There has been compliance. The parties have filed written submissions which I have perused through and noted the arguments made.

12. Revocation of grants of representation is provided for in section 76 of the Law of Succession Act. A grant can be revoked on account of three general grounds. One, is where there were problems with the process of obtaining the grant, such as where the process was defective in some material way, or where it is attended by fraud or misrepresentation or concealment of matter from the court. The second general ground is where the grant was obtained regularly, but the administration of the estate is fraught with difficulties, such as where the administrator fails to apply for confirmation of his grant within the period allowed in law or fails to proceed diligently with administration of the estate or fails to render accounts as and when called upon to. The third general ground would be where the grant has become useless and inoperative on account of some specific circumstances.

13. The application before me is predicated on the third general ground, the allegation that the grant had become useless and inoperative. The circumstances cited are that all the persons to whom the administration of the estate had been committed had died. The record herein indicates that the grant in this cause was made to the Public Trustee, and that that position has not changed to date. There is nothing on record to indicate that the said grant was ever revoked and administration committed to someone else. To that extent I would hold that the said application is misconceived.

14. The said grant was confirmed. The estate was shared out equally between the four widows of the deceased. It has emerged from the evidence that some of the widows have since passed on. I believe that this could be what the applicant is alluding to. The widows were not the administrators of the estate, and the grant of representation in the estate was never made to them. The issue therefore of the grant becoming useless and inoperative following their subsequent deaths is a matter of no consequence to the grant. I should also mention that the fact that the beneficiaries named in a certificate of confirmation of grant have died does not also affect the grant. That cannot be good enough reason to have the grant revoked.

15. During the oral hearing, the applicant raised questions about the process of the obtaining of the grant, which he had not raised in his written application. It emerged that the grant was obtained when the applicant was a minor, his consent could not have been obtained. In any event, his interest in the administration of the estate were taken care of by his mother, who was alive then as she still is. When the administrator sought to have her grant confirmed, the mother of the applicant did not protest at the proposals placed before the court, neither did she challenge the outcome of the confirmation proceedings at the Court of Appeal. From the material before me I am not persuaded that the said grant was obtained in a flawed process or that the administrator did not administer the estate in accordance with the requirements of the law. I am not persuaded that I should exercise the discretion given to me by section 76 of the Law of Succession Act to revoke the grant herein.

16. The applicant appears to be unhappy with the outcome of the confirmation proceedings, particularly the fact that the court ordered distribution of the property equally between the four wives of the deceased as opposed to the houses according to the number of children in each house, given that the houses did not have an even number of children. The deceased herein died in 1977, before the Law of Succession

Act came into force on 1st July 1981. According to section 2(1) of the Law of Succession Act, the substantive provisions of the said legislation applied only from the date the statute became operational, which therefore meant that the substantive provisions did not apply to estates of persons dying before 1st July 1981, like the deceased herein. Section 2(2) of the Law of Succession Act, provides that the law to govern distribution of estates of persons dying before the commencement of the Act was to remain the law or customs that applied as at the date of death. See *In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura* (*deceased*) Nairobi High Court Succession Cause number 935 of 2003.

17. The deceased herein died intestate. The law that governed the intestate estate of a deceased Kikuyu at the time of his death was Kikuyu customary law. The substance of Kikuyu customary intestate succession is notorious, having been documented in various several treatises and texts, among them being Jomo Kenyatta's *Facing Mount Kenya* and Eugene Cotran's restatements on customary law. There is also wealth of case law thereon. I will only cite two, *Kanyi v Muthiora* [1984] KLR 712 and *Koinange and thirteen others v Koinange* [1986], KLR 23, where it was stated that under Kikuyu customary law of inheritance observance of equality amongst the different households of the deceased is the cardinal principle. The property is shared equally amongst the houses of the deceased regardless of the number of children in each house.

18. The distribution of the estate herein was done in keeping with that law. it was distributed equally between the four houses of the deceased. It would appear that there were discussions and deliberations on the matter even before the cause herein was commenced. From the evidence before me it would appear that the family has settled on the ground in accord with the said distribution. It has also emerged that the coffee trees, the cattle and the money were shared out equally between the four houses. It would be unjust to reopen the matter and work out a fresh distribution to redo a distribution that had been done in accordance with the law that prevailed then.

19. In view of what I have stated so far, it is my finding that the application before me, dated 7th June 2007, is without merit. I shall accordingly dismiss the same. This being a family matter, I shall make no order as to costs. As the bulk of the estate appears to fall within Kiambu County, I shall direct that the court file be transferred to the High Court at Kiambu for final disposal. Any party who is aggrieved by the orders above is at liberty to challenge the decision at the Court of Appeal within twenty-eight (28) days.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH DAY OF OCTOBER, 2018.

W. MUSYOKA

JUDGE