



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO.123 OF 2005

IN THE MATTER OF THE ESTATE OF GERALD GAKUHA S/O RUORO

GERALD GAKUHA MAKURI.....PROTESTOR

VERSUS

PETER MUCHURI NDEGWA.....PETITIONER

J U D G M E N T

1. Gakuya s/o Ruoro alias Gerald Gakuha s/o Ruoro died intestate on 12th October 1993. He had neither wife nor children.
2. On 25th February 2005 one Peter Muchiri Ndegwa petitioned this Court for Letters of Administration Intestate of the estate of the deceased as the grandson of the deceased by reason that his deceased grandfather was a brother to the deceased.
3. This position was confirmed by a letter dated 24th February 2005 from the area chief of Muhoya Location, one Simon M. Waweru.
4. The Petitioner sought to inherit the deceased's sole property, Tetu/Ihururu/158.
5. The grant was issued on 29th July 2005 and on 5th December 2005, he filed the Summons for Confirmation of Grant.
6. This provoked the affidavit of protest from the Gerald Gakuha Makuri stating that the deceased was his maternal uncle as he was a brother to his mother, one Regina Wanjiku Ruoro also deceased; that she was the one who assisted the deceased as her brother and even kept him at her house when he was ill, and he was named after the deceased. That it was wish of the deceased that he the protester would inherit his property upon his death.
7. The Petitioner in his response to the Affidavit of Protest dated 13th November 2008 conceded that the deceased was a brother to the protester's mother. He however denied that the protester's mother helped the deceased before his death or ever lived with him. His contention was that the deceased had bequeathed his estate to him, the Petitioner in presence of witnesses.
8. At the hearing, the protester reiterated the averments in his Affidavit. He further stated that the deceased started suffering from pneumonia way back in 1978 and used to visit them in Nakuru where he would be taken treatment. He stated that his mother could not take the deceased to hospital and he would be requested to escort the deceased there. He said that the deceased told his parents that he wished him to inherit his property upon his death. That in 1992 he went to see the deceased in Nyeri and they discussed his utilizing that land. That the deceased told him he would notify the person, one Muriithi who had leased the land so that he could start developing the land in 1993. However, it never came to pass as he died suddenly in 1993.
8. The protester testified that by then he was jobless and had no resources to file for letters of administration. He was surprised when he found out that the Petitioner had filed for succession and was utilizing the land.
9. The protester told the court that the deceased had other sisters other than his mother who also had children. That his mother had six children including himself.
10. The protester's witness, one Simon Wagura Nderitu, testified that the deceased was his grandfather, and uncle to the protester. He stated that he was aware that the deceased desired that his property should be inherited by the protester upon his death. That the deceased died of lung illness in 1993 and it was the protester who used to take him to the hospital.
11. PW3 was the chief who was summoned by the court having written the introductory letter for the petitioner dated 24th February 2005 stating that the Petitioner was the deceased's grandson. He stated that he knew the Petitioner was the deceased's grandson. That some clan

members went to him to say that the Petitioner had taken care of the deceased since childhood; that the deceased used to say that the Petitioner was his son and that he should inherit his property. He said he did not know the protester.

12. On cross-examination, he admitted that he did not know whether the people who spoke to him were indeed relatives of the deceased, neither did he know whether the deceased had a brother and was not sure if he had not been lied to.

13. The Petitioner testified that his grandfather, one Muchuri Maria was a brother to the father of the deceased. He said that the deceased was taken care of by his father, Samuel Ndegwa Muchuri, before he died. The said Samuel Ndegwa Muchuri was alive at the time of hearing but he did not call him to testify. He also testified that the deceased sold part of his property, Tetu/Ihururu/158 to the said Muchuri Maria. He stated that the deceased had no wife and children and that his father took care of him in his old age. He testified that it was him who used to fetch water and firewood for the deceased, and wash his clothes before he died in 1993. He stated that the deceased had indicated that upon his death his property should be taken by the one taking care of him, himself.

14. He testified that there were witnesses to the deceased's utterances one Jackson Kiraguri Nderitu and Shelmith Wanjiku (Both deceased). That it was these two witnesses who told the villagers that the property of the deceased had been left to the Petitioner.

15. He testified that his father had begun the process of transferring the property to him by filing the instant succession cause. He conceded that the protester was the son to the sister of the deceased, but that he and his father filed the cause to fulfil the deceased's wishes. He put reliance on the introductory letter from the chief urging the court to read it.

16. On cross-examination, he stated he did not know where the deceased was born. He also stated that when the deceased died in 1993, he was merely 13 years old having been born in 1979. That the deceased lived alone. Both his parents were alive. He stated that he only came to know of the protester in 2005 when he filed the instant succession cause. He denied that his family were mere neighbours to the deceased, stating that the deceased had sold part of the land to his grandfather. He accused the protester and his family of neglecting the deceased.

17. Both parties filed written submissions reiterating the facts in their pleadings and testimony.

18. The issues for determination in this case are; who between the Petitioner and the Protester is ought to be the administrator of the deceased's estate and, who is beneficially entitled to the estate of the deceased.

19. In determining who should be the administrator courts are guided by Section 66 of the Law of Succession Act which states: -

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference –

a) Surviving spouse or spouses, with or without association of other beneficiaries;

b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided in Part V;

c) The Public Trustee; and

d) Creditors.”

20. Section 39 (1) of the Law of Succession Act sets down what ought to happen to the property of the deceased who dies intestate leaving no surviving spouse or children like in the instant case. The provision states as follows: -

“Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority: -

a) Father; or if dead

b) Mother; or if dead

c) Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

d) Half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

e) The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.”

21. It is not contested that the protester is the nephew of the deceased. Although the Petitioner claims to be the grandson of the deceased, he is not a direct grandson, but alleges that his grandfather and the deceased were brothers making him something like a grandnephew. The protester has clearly indicated that the deceased only had sisters and no brother.

22. It is noteworthy that the Petitioner did not bring his father to court to testify that indeed he is a step-brother of the deceased as alleged by the Petitioner. It is also noteworthy that he says it is his father who was to transfer the land to him. He did not establish how his father could transfer what did not belong to him in the first place. The chief who testified in favour of the Petitioner admitted that the people who came to

him to state that the Petitioner was the sole heir to the estate of the deceased may have lied to him. It is also noteworthy that the Petitioner despite claims to be related to the deceased did not know where the deceased was born.

23. From the testimony, it is plausible that the Petitioner could be a mere neighbor to the deceased because he accepts the protester as a nephew to the deceased but says he only came to know him when he filed this cause.

24. It is clear that on the evidence before court the Petitioner is not a grandson of the deceased. Even if he was, the protester would rank in priority over him in inheritance according to Section 39 (1) of the Law of Succession Act in taking out Letters of Administration according to Section 66 of the same Act as set out above.

25. On what basis should a grant be revoked? **Section 76 of the Law of Succession Act** provides: -

“76. 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;

c) 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;

d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

ii) to proceed diligently with the administration of the estate; or

iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

e) That the grant has become useless and inoperative through subsequent circumstances.”

26. Rule 26(1) and (2) of the Probate and Administration Rules provides: -

“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

27. When applying for the Letters of Administration for the estate of the deceased, the Petitioner contravened both Section 76 of the Law of Succession Act and Rule 26 of the Probate and Administration Rules by not stating that the deceased had a surviving nephew and did not notify the said nephew of the process.

28. The grant herein was obtained fraudulently by the making of the false statement that the petitioner was the grandson of the deceased, and by the concealment from the court that he had other living relatives who could have an interest in his estate.

29. The petitioner by his claims and concealment of facts obtained the grant by means of an untrue allegation of a fact, which was essential in point of law; s.66 and 39(1) of the Law of Succession Act with regard to succession of the estate of a person who dies intestate without a spouse or children surviving him. Had the court been aware of the said facts it would not have granted the grant to the petitioner.

30. From the foregoing it is inevitable that the grant made on 29th July 2005 to the petitioner is and is hereby revoked.

31. A fresh grant to issue to the protester.

32. The protester to file Summons for confirmation of the grant within 30 days hereof

33. The petitioner to pay the costs of the protest.

Dated, delivered and signed at Nyeri this 16th day of November 2018.

Mumbua T. Matheka

Judge

In the presence of:

Both parties