



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO.430 OF 2007

IN THE MATTER OF THE ESTATE OF KING'ORI MBOGO BEN alias KING'ORI MBOGO (DECEASED)

PATSON NDIRITU KING'ORI

ANDREW KIMATHI KING'ORI.....PETITIONERS

J U D G M E N T

What is before me is the Summons for Revocation of Grant/annulment of grant dated 24th September 2014 supported by the affidavit of Simon Matu King'ori (the protester).

He seeks that the grant of letters of administration intestate made to Patson Ndiritu King'ori, Andrew Kimani King'ori and Mary Wanjiru King'ori (petitioners) on 20th May 2008 and confirmed on 17th June 2011 be revoked for reasons that: -

- 1) They were obtained fraudulently and by concealment from court of material relevant to the case.
 - a. That there was no family agreement or mode of distribution.
 - b. That the protester never attended any meeting where he gave his consent to the mode of distribution.
 - c. That there were persons who were listed as beneficiaries yet they were not children of the deceased and the deceased estate comprised of UNS Industrial Plot Kiganjo LR.9395/218 distributed to them.
 - d. That deceased's movable properties were sold irregularly before distribution of property.
 - e. That the protester was denied his share of the estate in Nyandarua/South Kinangop/762, Nyandarua/South Kinangop/937 where there was disproportionate distribution.

The deceased King'ori Mbogo Ben died on 15th June 2007 and left 10 children: -

- a) MARY WANJIRU KING'ORI
- b) TABITHA WAMUCII N. KARIUKI
- c) MOSES MBOGO KING'ORI
- d) PETERSON NDIRITU KING'ORI
- e) JANE MURUGI KING'ORI
- f) MARTIN NDUNGU KING'ORI
- g) SIMON MATU KING'ORI
- h) ANN WAKARIMA KING'ORI
- i) MICHAEL NDIRANGU KING'ORI

j) ANDREW KIMATHI KING'ORI.

His wife had pre-deceased him. He had the following properties: -

- a) Nyandarua/South Kinangop/937- 0.30 Ha
- b) Nyandarua/South Kinangop/762 -36.0 Ha
- c) Thegenge/Kianjogu/122- 1.4 Acres
- d) A/C No.030525005600 in Consolidated Bank Nyeri Branch
- e) A/C No.4874612700202291 in Barclays Bank Naivasha Branch -027-8144992
- f) Nyandarua/Magumu Township/27
- g) UNS.Industrial Plot –Kiganjo-Alternative plot
- h) Nyandarua/Magumu/Township 19

The members of the family agreed on who were to be the administrators and upon filing of the cause the grant was issued to the three of them. Patson and Andrew filed Summons for Confirmation of Grant on 7th March 2011 in which they distributed the deceased estate. It is clear from the confirmed grant that the protester was to receive a plot of 60 X 105 ft out of Nyandarua/South Kinangop/937 and 3.4 acres out of Nyandarua/South Kinangop/762 while the rest each got more than 10 acres of land with Patson getting an additional 1.4 acres of Thegenge/Kianjogu/122, Martin Ndungu –Nyandarua/Magumu Township plot 27 and others get additional plots out of UNS Industrial Plot Kigango LR.9395/218 of 50 X 100 ft, Mary Wanjiru King'ori , Nyandarua/Magumu Township Plot 19.

The protester's contention is that the additional 6 persons namely:

- i. Wilfred Ndoria Karangi
- ii. Geoffrey Maina Wahome
- iii. Washington Gitonye Wangamba
- iv. George Mathenge Mwangi
- v. Monica Wambui Mwangi

Simon Muchoki Ndirangu

who shared his father's estate were not his father's children and that he never gave his consent to that mode of distribution.

It turned out that these were buyers and he contended that he never consented to any sale of his father's estate, and never obtained/received any share of the proceeds of the sale.

The matter was part heard by Mativo J.

In his testimony, the protester reiterated the contents of his affidavit in support of the protest. During cross-examination he conceded that he had attended the family meeting of 1st July 2007 but denied that there was any discussion of his father's estate. He conceded that in the meeting they agreed on the names of the administrators and that the chosen administrators would proceed to obtain a letter from the chief in order to commence the process of succession. He conceded to signing Form 38 – consent to have letters of administration issued to the three petitioners and that the grant was issued.

He also said he was aware that some people had purchased land from his father's estate after his father had died but denied any knowledge of their identity. Shown one of the sale agreements dated 7th April 2008 he conceded that though one of the signatures was indeed his, he could not remember anything else on the document. Referred to the 2nd sale agreement dated 30th January 2008 he denied that that was his signature and went on to state *"In fact all the signatures are not mine. I produce my ID card. They are not mine. Even for Exh.No.7 (the agreement of 7th April 2008) I know nothing about the agreements"*.

He denied receipt of any money from the sale of the properties. He said he was disputing the mode of distribution because he did not get fair share of the estate, never consented to the distribution. He further conceded that before his father died he had been given land Block 1/218 and his sister as well and that these 2 properties were not in the list of the deceased's estate. He did not call any witness.

In his testimony the 1st petitioner testified how the family met after the death of their father and agreed on the succession proceedings.

He told the court that the family agreed to sell some of their father's land and he produced the sale agreements that the buyers were included as beneficiaries so that they would get their shares of the estate.

He revealed that there were three properties that were not in their father's name and these were not included in the list. There was one in Laikipia in the applicant's name. He conceded that some properties were sold but the applicant was not given a share. Asked how much each was sold for and for evidence of receipt of the proceeds, he could not produce evidence of how much the properties sold had fetched or how much each beneficiary had been given from the proceeds.

He also conceded that one of the brother's Moses Mbogo suffered from mental illness, and though the grant showed he had been allocated 11.8 acres of land he was not even aware of his share of the estate and no guardian had been appointed for him and his property. He could not explain who had made alterations on one of the sale agreements marked as Petitioner's Exhibit no .6.

On re-examination he said the applicant received a share of the sale proceeds just like everyone else and signed for the same.

DW3 Martin Ndung'u King'ori reiterated the evidence of DW2. He explained that the applicant's share was small because the administrators took into consideration that he had been given property before their father died. He gave the example of their sister Mary who had been given 25 acres and had not claimed anything while the applicant was given a share out of Nyandarua/South Kinangop/937.

He conceded that the summons for confirmation of grant contained names of persons who were not children of the deceased but that it was their father, the deceased, who had told them to sell his Kiganjo Plot to pay his debts.

On cross-examination he said that applicant was given "something" out of the sale of the Kiganjo plots.

Wilfred Ndoria Karangi –DW4 was one of the 6 buyers of the Kiganjo Plots. He said he bought 2 plots of 50" X 100" at Kshs. 520,000/- and the members of the family received the money. He said the protester was present. Absent was Moses King'ori the one with mental illness, and one Tabitha their sister who was said to be out of the country. That it was the family that had put his name in the grant.

On cross-examination he told the court that the protester had signed the sale agreements. He could however not confirm whether the protester had received a share of the money.

Parties then agreed to file written submissions.

The issue for determination is whether the applicant has established sufficient ground to warrant orders as required by s.76 of the Laws of Succession Act.

I have carefully considered the rival submissions.

The applicant relied on **In the Estate of Stanley Kori Kiongo alias Kori Kiongo (deceased) (2016) eKLR** on the proposition that the burden of proof is on he who alleges.

It is not in dispute that the deceased died intestate and was pre-deceased by his wife hence the applicable provision of the Laws of Succession Act is s.38 where the intestate has left surviving children but no spouse ***"the net estate shall, subject to the provisions of s.41 and 42, devolve on the surviving child if there be one, or shall be equally divided among the surviving children"***.

Of relevance there is s.42 which provides that where

a. An intestate has during his lifetime or by will paid, given or settled any property to the benefit of a child.... that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child....."

In this case the applicant does not deny having been allocated L.R Tigithi/Matanya/Block 1/228 said to be 7.5 acres which explains why in the distribution of the estate he was only given 3.4 acres of Nyandarua/South Kinangop/762. He also got one plot of 60 X 105, while others got plots of 50 X 100, others got more than the others, and Moses Mbogo said to be of unsound mind was given 11.8 acres.

Clearly therefore in the distribution of the estate even with the consideration of what the applicant was given, the principle of equality was not applied. In any event the alleged gift to the applicant only came up during the hearing. It was not mentioned by the administrators in the affidavit in support of the summons for confirmation of grant. In addition, Mary Wanjiru is said to have received 25 acres *inter vivos* yet in the confirmed grant she was added another property without explanation.

Hence, the administrators did not comply with the law.

On the issue of the sale of the deceased's estate before the issuance of the grant- the Law of Succession Act speaks for itself. S.82 (b)(ii) clearly states that *no immovable property shall be sold before confirmation of the grant*.

Hence none of the beneficiaries had any legal authority to sell any part of the deceased property before the grant was confirmed. Any sale that took place was therefore unlawful, and s.93 of the Act only protects transactions made by a ***"person to whom representation has been made"***.

Hence whether or not the applicant was a signatory to the sale of the said parcels of land or not the sale was unlawful. These acts of

excitement when a person dies by relatives, children, to dispose of the property of the deceased before proper succession is done surely must be discouraged. It is '**kuchukua sheria mkononi**' taking the law into their own hands, and that is why it is prohibited. It is a practice that is not only in flagrant violation of the laws of succession but gives a bad picture, it is like people had been waiting for that death so as to dispose of the deceased's property. Persons who buy property of the deceased persons, from relatives of deceased persons who have no title to those properties, when they can still see that the title is in the name of the deceased person, and the person who is selling is not the registered proprietor of that land, nor the administrator of that estate, are in my view, equally guilty of the offence of intermeddling with the property of that deceased persons. They have themselves to blame when during succession, matters do not turn out in their favour.

What is this rush to sell the property of a deceased parent, yet and those selling were not dependent on that parent for their day to day needs- were not even aware that some of the properties they are quick to dispose of were in existence? It is a practice that the law prohibits it and cannot and ought not be reinforced in any manner.

That is why I must state here that the parties herein had no interest to pass to purported buyers before the grant was confirmed –period. The 'buyers' did not buy from the deceased. They are not beneficiaries of the estate of the deceased. The allegations by the DW1, one of the co-administrators that the deceased told them to sell the Kiganjo property to pay his debts is not supported by the Form P&A 5, on the part where they were supposed to file the deceased's liabilities they have stated –**nil**. They could have waited for the grant to issue as it was issued on 20th May 2008 and the sale agreements were made on 30th January 2008 and 7th April 2008.

The respondents obviously concealed from the court that the 6 strangers were buyers and not children of the deceased. Nowhere in the affidavit in support of the Summons for Confirmation of Grant did the administrators mention the fact that there were some of the beneficiaries who had been given property in *inter vivos* and which was taken into consideration during the distribution.

Clearly this was in violation of s.71 of the Laws of Succession Act especially the proviso on the identification of persons beneficially entitled to and their shares of, the estate. Parties could not have agreed to carry out an illegality as the purchasers did not purchase from the deceased or from the administrators as envisaged by law.

Clearly therefore the grant is up for revocation on the foregoing grounds.

I order therefor that;

1. The grant issued to the petitioners on the 20th May 2008 and confirmed on the 17th June 2011 be and is hereby revoked.
2. A fresh grant to issue to the petitioners and the protester jointly
3. The petitioners and the protester, or each of them be at liberty to file summons for confirmation of the grant taking into consideration all the concerns raised.
4. The same be filed and served 30 days from the date hereof

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

Mumbua T Matheka

Judge

In the presence of:

CA Ester

Mr. Okinda holding brief for Mr. Gaceru for Respondent

Mr. Muthee for the Applicant