



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 239 OF 1996

In the Matter of the Estate of Japheth Kithinji Mwirabua (Deceased)

JANET NKATHA KITHINJI..... PETITIONER

Versus

RODAH KAGWIRIA KITHINJI... INTERESTED PARTY

JUDGMENT

1. **JAPHETH KITHINJI (“the deceased”)** to whom this Succession Cause relates, died on 17th May 1996. On 21st August 1996 the Chief of Ntima Location wrote a letter of introduction and listed the dependents of the deceased as follows:

1. *Jane Nkatha Kithinji* – *Widow*
2. *Susyline Kithinji* – *Daughter*
3. *Pamela K. Kithinji* – *Daughter*
4. *Jadiel Mutembei Kithinji* – *Son*
5. *Judith Kananu Kithinji* – *Daughter Married*
6. *Beatrice Makandi Kithinji*– *Daughter*
7. *Frinda Maken Kithinji* – *Daughter*
8. *Purity Kajuju Kithinji* – *Daughter*
9. *Kagwiria Kithinji* – *Daughter*
10. *Kimathi Kithinji* – *Daughter*
11. *Kinyua Kithinji* – *Daughter*

2. His assets were listed in form P&A 5 as:

1. *Ntima/Igoki/4657*
2. *Kiirua/Naari/956*
3. *Kiirua/ Barrir/46*
4. *Plot No. 6 Barrier Market*
5. *Nyaki/Nkabune/130*

6. Plot No. 124 Meru Town

7. Plot No. 682 Meru Town

8. Kulamawe No. 32

9. Pulapesa No. 12

10. Ntima/Igoki/3772

11. Ruiru/Rwarera/825

And liabilities as hospital bills worth Kshs. 1.5Million.

3. On 22nd July, 1997 grant letters of administration intestate were issued to the petitioner and confirmed on 27th January, 1998. An application for revocation or annulment of grant dated 26th January, 2010 was brought under **Section 71 (2b) and 76(a), (b) and (c) of the Law of Succession Act, Rules 44 and 73 of the Probate and Administration Rules Cap 160 Laws of Kenya.**

4. The grounds upon which the application is grounded are contained in the application, the applicant's affidavit and supplementary affidavit sworn on 26th January 2010 and 28th November 2011 respectively. It is contended that this cause was filed fraudulently and without her knowledge and consent. Even though her name appears on the chief's letter it does not show in any way that she was aware of this cause. She has neither heard nor ever attended any meeting before any chief as alleged. She argued that the respondent should have produced minutes of the alleged meeting showing persons in attendance, the date, time and place to prove her allegations. She stated that it is not true that the respondent was the only wife of the deceased as she was the 2nd wife and her mother was the 1st wife. Her argument was that whether or not the respondent was the only wife it does not affect her right to inherit.

5. That Plot No. 124 and Plot No. Bulapesa/12 indeed exists and the latter has got permanent buildings. Plot No. Kulamawe 125 was owned and developed by the deceased contrary to what is alleged by the respondent for her intent is to take away her share. This similarly applies to Plot No. 682 Meru. The registration of L.R. NO. NTIMA/IGOKI/3772 to the alleged persons is fraudulent, and done stealthily pursuant to collusion and conspiracy between the said persons and the respondent.

6. She affirmed that she has never received any land from the respondent as alleged. But the deceased during his lifetime gave her 2 acres as a gift but after his death she sought to dispose of 1 acre. She is shocked to learn that the respondent had conspired with some people unknown to her caused the said land to be reduced to 1 Acre. However the said land cannot be subject to this cause since she received it from the deceased as a gift before his death. The revocation of the said grant ought to be made in order to pave the way for a fair and just distribution of the deceased's estate.

Petitioner's case

7. This application was opposed by the respondent vide the replying and supplementary replying affidavit sworn on 1st November 2011 and 17th January 2012. She deposed that she is the only wife of the deceased as the applicant's mother, Rebecca Stanley, has never been a wife of the deceased as she is the wife of Stanley Gatobu. She denied she brought this cause secretly. After the death of the deceased the family members met before their area chief and they agreed that she files this cause. When the chief issued her with the letter every family member including the applicant consented. Furthermore, the applicant, 4 other persons and her instituted Meru CMCC NO. 231 of 2011 and the applicant never complained about her being the administratrix of the estate.

8. She stated that Plot No. Bulapesa/12 does not exist and she is not aware of it. She is a stranger to the allegations about Plot No. 124 Meru Town as the same is part of the estate. Plot No. Kulamawe 125, Isiolo is her own property as in 1969 she applied for it from the county council of Isiolo and she was allocated the said plot but registration was done in the name of the deceased. She has extensively developed plot NO. 682 Meru Town from her retirement benefits. She already gave the applicant one acre of land from L.R. NO. Rware/825 but she has since sold part of the same and transferred to one Nyaga Mutiira. L. R. NO. KIIRUA/NAARI/956 and L.R. NO. NTIMA/IGOKI/3772 are now registered in the names of the deceased's daughters and it would be unfair to revoke the grant at this stage.

9. The applicant cannot prove any alleged fraud given her affidavit as her claim is a mere after thought and the same has no merits. She presented the petition and never dealt with the property without the applicant's knowledge. Prayers should fail because they should not be issued in this suit since she has benefitted. The application has no merits and the same should be dismissed with costs.

Viva voce evidence

10. This application was heard vide *viva voce* evidence. **DW1 Rodah Kagwira Kithinji** told the court that she had reiterated in her affidavits. She affirmed that she had no knowledge that the petitioner had obtained the grant without her knowledge. She is not aware whether the other dependants are complaining or whether the grant provides for her.

11. **PW1 Janet Nkatha Kithinji** tendered her affidavits sworn on 1st November 2011 and 17th January 2012 into evidence. She will give the applicant 1 acre out of L.R. KIIRUA/NKANDO/46. The land was initially 17 acres was subdivided by the elders. At that time the applicant was married and she was not there when she applied for the grant and subdivided the land. She will further give the respondent part of Plot No. 6.

12. This matter was canvassed by way of written submissions. The applicant in her submissions affirmed that the orders sought in her application be granted and provided a mode of distribution which she wishes this court to adopt. On the other hand, the petitioner has failed to file her submissions.

ANALYSIS AND DETERMINATION

13. The issue before this court is **whether or not to revoke and or annul the grant issued on 14th July 1997 and confirmed on 26th January 1998 to the petitioner.**

14. If a person seeks to revoke and or annul a grant s/he ought to meet the requirements spelt out under Section 76 of CAP 160. The applicant relies on following grounds of Section 76, which 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;

(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;

...”

15. The applicant states that the petition was filed fraudulently and secretly without her knowledge but came to know about it in 2011. The petitioner affirmed that they instituted Meru CMCC No. 231 of 2011 and the applicant never complained of being the administratrix. The applicant declared that they allowed the respondent to institute the suit and the consent was limited to that purpose.

16. From the record, this cause was filed in 1996. Thereafter, the petitioner was issued with the letter of administration on 14th July 1997 and confirmed on 26th January 1998. The application for revocation was made on 26th January 2010 thus it cannot be correct for the applicant to state that she knew about this cause in 2011. Secondly, she affirmed that they allowed the respondent to institute the suit but the consent was limited to that purpose. This again is not true as the petitioner had already been issued with the grant. This clearly demonstrates that the applicant knew about the succession cause but is trying to maneuver and find a way to have the grant revoked.

17. However, the certificate of confirmation of grant shows that the applicant has not been provided for as the petitioner gave the whole estate to self. The applicant is a daughter of the deceased she is entitled to be provided for. The Constitution and the Law of Succession Act enshrines the right of daughters to inherit the estate of their deceased parent or parent. I need not belabor the point as there is no dearth of judicial authorities on that point.

Gift *inter vivos*

18. The applicant told the court that her father gifted her 1 acre which was not refuted by the petitioner. According to **Section 28 (b) and Section 42 of Cap 160:**

“In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

...

(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;

....”

19. Further Section 42 of CAP 160 states that:

“Where—

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

20. Accordingly, the gift that the applicant got will be taken into account in determining her ultimate entitlement in the estate. I note also that

the petitioner averred during cross-examination that she will give the applicant 1 acre out of L.R. KIIRUA/NKANDO/46 and part of Plot No. 6. Of curiosity is that the petitioner distributed the entire estate to herself absolutely. That kind of distribution completely disinherits the applicant. The applicant has also not benefitted from this vast estate. In the circumstances of this case it is only fair that the applicant gets a fair share of the estate. The proposal by the petitioner to give her one acre and apportion of plot No 6 is not fair at all given the vastness of the estate. Similarly, the proposal by the applicant is also not fair and is oblivious of two matters, namely; (1) that the applicant is not the only child of the deceased; and (2) that the petitioner has rights on the property of the marriage, quite separate from the estate of the deceased and should ordinarily be set aside from the estate of the deceased. Courts should now start to tread the latter path in accordance with the Constitution, the Law of Succession Act and the Matrimonial Properties Act. I am aware that the latter reality is painful in a patriarchal society especially where the surviving spouse is a woman. But it is a position that is backed by the highest law of the land- the Constitution.

21. Consequently, taking into account all the above, I direct that the applicant shall get:-

(a) One (1) acre in KIIRUA/NAARI/46 (there is confusion as to whether this land is the same as KIIRUA/BARRIER/46 or KIIRUA/NKANDO/46),

(b) One (1) acre in **RUIRI/RWARERA/825** (this is apart from the 1 acre that was given to her as gift inter vivos by her late father) and

(c) The whole of plot No 682 Meru Town.

All the other items shall remain as is in the certificate of confirmation of grant dated 27th January, 1998. I will not however revoke the grant made to the petitioner except I order a new certificate to be issued to accord with the distribution I have directed. Grant confirmed in the foregoing terms.

Dated, signed and delivered in open court at Meru this 13th day of November 2018

F. GIKONYO

JUDGE.

In presence of

M/s Wanjohi for petitioner

M/s Nelima for Rimita for interested party.

F. GIKONYO

JUDGE.