



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 348 OF 2013

IN THE MATTER OF THE ESTATE OF IMANYARA ITIRITHIA (DECEASED)

JACOB M. KIRIINYA MUGUNA.....PETITIONER

Versus

DORIS GLADYS KIAMBURA.....CAVEATOR

JUDGMENT

Redistribution of estate

[1] Although the application before me which is dated 12th November 2014 is for revocation of grant, the evidence adduced clearly shows that the quest is for redistribution of the estate of the deceased to include the applicant and the daughters of the deceased. The petitioner admitted that he did not inform the applicant of the filing of these proceedings because their brother was deceased and he had already been given his share by the clan. I wish to put this claim into perspective. The fact that a beneficiary has died, as long as he or she has a spouse and or children, their family should be notified of succession proceedings for they have a right in the estate and shall take the share due to their deceased parent under the principle of representation. For that reason, a grant issued in circumstances where the family of the deceased beneficiaries are not involved is amenable to revocation. Applying the test of law, the only logical inference that can be made is that the Grant was *inter alia* obtained by concealment of a fact material to the case. And the consequence of that lapse is that the grant becomes a candidate for revocation, and is hereby revoked. On this see the case of **SAMUEL WAFULA WASIKE -vs- HUDSON SIMIYU WAFULA CA NO.161 OF 1993** (Kwach, Omolo and TunoiJJA) where it was held that:-

“A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.”

See also what Koome J (as she then was) stated in **THE MATTER OF THE ESTATE OF NGARIGATUMBI ALIAS JAMES NGARIGATUMBI (DECEASED NAIROBI HIGH COURT SUCCESSION CAUSE NO.783 of 1993**(persuasively) that:

“A grant will be revoked where a person who is entitled to apply is not notified by the petitioner of their intention to apply and that person’s consent to the petitioner’s application is not sought.

[2] The foregoing notwithstanding, as I stated earlier, the real issue in controversy is redistribution of the estate. The Applicant complained that the distribution in the grant was oppressive and unfair. She advanced three arguments thereto. One, that her late husband, one Geoffrey Manyara was the son of the deceased. As such his family was entitled to a share in the estate. However, the family of her late husband was not provided for in the estate. She is claiming that the family be provided for in the estate. Two, it is wrong for the petitioner to hold the share of late Jeremiah Kiambura yet these two are of majority age and should hold the share of their later father absolutely in common in equal shares. Three, the daughters of the deceased are entitled to a share except one has shown any interest in the estate. She proposed the estate to be distributed equally to all sons of the deceased. She sated categorically that her late husband was given land parcel **No. NYAKI/THUURA/347** by the clan as of his own right and the said land should not be treated as gift inter vivos under section 42 of te Law of Succession Act. The deceased herein also received the land in question i.e. **NYAKI/THUURA/1356** from the clan and this is the estate property. Het witnesses supported her claims to the hilt. See the grounds set out in the application, the supporting and further supporting affidavit sworn on 12th November 2014 and 6th September 2016 respectively, statement by Simeon M’Rikura filed on 7th September 2018, statement by M’Amanja M’itithia filed on 1st September 2018, as well as her oral evidence. See also the submissions filed on 28th November 2018.

[3] The petitioner and all his witnesses stated that the late Geoffrey received land from the clan as he was old enough to so receive. The other siblings did not receive such gift for they were young at the time. His mother stated that 2 acres of land had been sold to educate the late Geoffrey. The other siblings were not educated like Geoffrey. She wondered what justice would give Geoffrey education, land from the clan as well as land in the estate. She saw this to be a great injustice. For those reasons, the petitioner beseeched the court to take into account the gift and exclude Geoffrey from the estate.

ANALYSIS AND DETERMINATION

[4] Section 28 of the Law of Succession Act, states some of the factors or circumstances the court should take into account in making order, inter alia, of distribution of the estate of the deceased. See the section below:-

28. Circumstances to be taken into account by court in making order

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

(a) the nature and amount of the deceased's property;

(b) any past, present or future capital or income from any source of the dependant;

(c) the existing and future means and needs of the dependant;

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

(e) the conduct of the dependant in relation to the deceased;

(f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

(g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

[5] The mother of Geoffrey has posed an important question which I understand to insinuate two things; (1) that 2 acres of the estate property were sold towards his education; and (2) he also received 5 acres of land from the clan after the deceased and she offered a goat to atone for the misdeed of the deceased; it is alleged that the deceased was of unstable mind and during the bad moments he fought the clan elder a Mr. M'Ibere. According to her, his children were not going to receive any land from the clan because of that transgression. But by the atonement goat the transgression was forgiven and his first born son received land No. 347 from the clan. I find this case to present unique circumstances. This piece of evidence was not controverted. In the old days in African tradition, befitting practices existed, for instance, assaulting an elder of the clan was a serious social evil which could disinherit you or cause the elders to curse or invite a curse upon you. It is not therefore strange that the mother of Geoffrey attached significant importance to the culture practiced at the time. It is not also strange that section 28 of the Law of Succession Act has placed importance on the conduct of a dependant in relation to the deceased as one of the matters a court may consider in making orders of distribution of the estate. No one has accused Geoffrey of any social evil or misdeed. The only issues are; (1) that he was given land from the clan after the deceased and his mother gave a goat to atone for the misdeeds of his father; and (2) following the atonement, he received land from the clan elders for he was old enough at the time; and (3) the said land should therefore be taken into account in determining his share in the estate. Evidence adduced show that Geoffrey was given land in 1973 by the clan because he was old enough to be given land. The other beneficiaries were young and could not be considered for such settlement of land. The gift is not from the deceased. However, circumstances of this case are that it is an important consideration because the deceased and the mother of the deceased unlocked the gate for his receipt of the land. I also tend to think that it is not far-fetched idea to consider the fact that estate land was sold specifically to educate a particular beneficiary- but this is subject to proof. In this case, there is evidence that two acres were sold towards education of late GEORGE; these were out of the original land of approximately 15.85 acres. The estate property is now approximately 13.85 acres. All the other siblings except the petitioner and Geoffrey did not have the advantage of being educated by the deceased. These are quite unique circumstances which I should think are envisaged under section 28 of the Law of Succession Act. As a matter of law, the situation and circumstances of the deceased's other dependants and the beneficiaries is an important consideration here. Accordingly, taking into account the general circumstances of the case, including the special factors I have evaluated above, the fact that late Geoffrey was given land in the circumstances I have stated shall be taken into account in determining his final entitlement in the estate.

Of daughters

[6] On daughters, I cannot agree more that by dint of the Constitution all children of the deceased are entitled to equal right of inheriting their late parent's estate. Emily Kanairi and Eunice Karuru intimated to court that they need to be provided for in the estate. Dennis is said to take the share of Susan Karuthi. I find that all the daughters of the deceased are entitled to a share in the estate.

Distribution

[7] Kanoti Manyara, the widow of the deceased suggested at paragraph 6 of her Replying affidavit that the land be shared amongst all the other six children of the deceased apart from late Geoffrey. However, at paragraph 9 thereof she has shared it amongst the four sons only. That stinks of patriarchal authoritarian; but surprisingly it is coming from a woman and mother of the children. That kind of distribution runs counter the Constitution. It cannot pass the test. I reject it. The Applicant suggests that it be shared amongst all the sons as daughters have not signified any interest. This has changed and all daughters must inherit as I have directed.

[8] Being of the above mind, I should consider other matters in this case to enable the court order a complete distribution in accordance with the law. The evidence shows that, whereas the late Geoffrey and his family never lived on the estate property, he build a house thereon. His remains were also interred on the estate land. The applicant argued that the deceased used to till the land and so his entitlement is not restricted to the area where his house is. I have considered the evidence of her witnesses also and I do not find anything concrete showing that the late Geoffrey or the applicant tilled the land. The evidence by the petitioner and the mother of Geoffrey show that the deceased was living in Nairobi. He only put up a house in the estate property after insistence by the parents that he should live and be buried next to them.

The claim by the applicant that the family used to celebrate Jamhuri day in the estate could be true. Families in Kenya cherish celebrating such important festivals in their ancestral or rural homes. What a sweet occasion for folks to catch-up? I think the family of late Geoffrey is saying exactly that here. I also have to consider that late Geoffrey's remains were interred in the estate land. When I take all these matters into account, although he has another land, his family is entitled to land around their house. Accordingly, I direct that his family of late GEORGE will be given ½ acre of land in the estate property around the house of late Geoffrey and with appropriate access road thereto. The balance thereof shall be shared equally amongst all the children of the deceased namely:-

a. Stanley Rugagu Manyara

b. Eunice Karuru Manyara

c. Susan Karuthi Manyara

d. Emily Kanairi

e. Jeremiah Kithamburu (deceased)- his share shall devolve upon his two children Linda Gaichugi Muguna and Emmanuel Kaimenyi absolutely in common in equal shares. From the original grant the petitioner provided for these two except he held their share in trust form.

f. Jacob Kiriinya Muguna

[9] The widow did not state where she lives or whether she needs provision. She distributed the entire portion of land in her proposal. I do not wish to read much from this lacuna for she conscientiously made the proposals herself. I revisit what I stated earlier, and whereas the petitioner did not seek consent of the applicant in applying, this case has unique circumstances and I still appoint him as administrator. I make a grant to him and confirm it in the terms I have stated above. As this is a family dispute I make no order as to costs. It is so ordered.

Dated Signed and delivered in open court at Meru this 11th day of December, 2018

F. GIKONYO

JUDGE

In presence of

Mrs. Ntarangwi for applicant

Karanja for Mutuma for petitioner

F. GIKONYO

JUDGE