



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 371 OF 1997

IN THE MATTER OF THE ESTATE OF DAVID KIONGERA KINYANJUI (DECEASED)

JUDGEMENT

1. The deceased herein died on 10th November 1996. Representation to the estate was sought in a petition filed herein on 19th February 1997 by Serah Njoki Kiongera, in her alleged capacity as a widow of the deceased. The deceased was expressed to have been survived by his widow, Serah Njoki Kiongera, and their seven children – Paul Munga, Abraham Ikere, John Kang’ethe, Margaret Wanduru, Ann Wambui, Daniel Njoroge and Martha Nyokabi. He was said to have died possessed of four (4) assets, being Kiambaa/Kihara/1931, 1932, 1933 and 1934. A grant was accordingly made to the petitioner on 22nd April 1997. The said grant was confirmed on the 24th July 2001, on a summons dated 26th July 2000. The estate devolved as follows - Kiambaa/Kihara/1931 to Paul Munga Kiongera, Kiambaa/Kihara/1932 to Abraham Ikere Kiongera, Kiambaa/Kihara/1933 to Jedidah Wanjiru Kang’ethe (the widow of John Kang’ethe Kiongera) and Kiambaa/Kihara/1934 to Daniel Njoroge Kiongera.

2. A summons dated 14th September 2012 was lodged herein on 12th October 2012 by Amos Ikere Kiongera. He sought orders that would restrain the administrator from handling the estate assets and revocation of the grant. He argued that the process of obtaining the grant was defective and it was obtained fraudulently through concealment of material facts. He avers, in his affidavit sworn on 14th September 2012, that the deceased was a polygamist who had married twice. He was a son of the deceased’s second wife, Mercy Wambui Mwaura. He says his mother had four children, being himself and Peter Munga, George Ngugi Wambui and Stephen Mwaura (deceased). He complains that the administrator had obtained representation to the estate without consulting the second family. He further states that the confirmation of the grant was contrary to orders that had been made in Kiambu CMCCC No. 18 of 1992. He asserts that his side of the family was also entitled to a share of the estate of the deceased.

3. The administrator swore an affidavit in reply on 20th December 2012. She asserted that her children were beneficiaries of *inter vivos* gifts from their father, the deceased, and the succession process was only meant to confirm gifts for the purpose of transfer. She states that the deceased had in fact commenced the process of having the assets transferred to the beneficiaries, and that it was only that he died before the transfers were completed. She states that the applicant was not related to the deceased. She says that the deceased was never married to the applicant’s mother, although the two had had a relationship years ago. She allegedly went on to marry another man with who she had children. She points to the judgment made in Kiambu CMCCC No. 18 of 1992 to support her contention.

4. The applicant swore an affidavit on 30th January 2013, in response to the respondent’s affidavit. He argues that Kiambaa/Kihara/1931, 1932, 1933 and 1934 were originally registered in the name of the

deceased, and documents that show that he was in the process of transferring them to the sons of the respondent were forgeries. He points out some anomalies in the alleged applications to the land control authority. He states that the applications were made in 1994 while the deceased died in 1996, and argues that the failure to have the transfers effected within the two (2) years has not been explained. He also argues that the transfers were prompted by the suit in Kiambu CMCCC No. 18 of 1992. He asserts that he is a son of the deceased, and points at his birth certificate and national identity card as proof. He further argues that the administrator has acknowledged that he was a son of the deceased even though she alleges that his mother was not married to the deceased. He points to the proceedings in Kiambu CMCCC No. 18 of 1992 as proof of his parentage. He also states that at the funeral of the deceased he was recognized as a child of the deceased in the burial programme.

5. Directions on disposal of the matter were given on 27th November 2013. The revocation application was to be heard orally and the parties were directed to file witness statements, which they dutifully did.

6. The oral hearing commenced on 15th December 2014. The first on the stand was the applicant. His testimony breathed life to the averments made in his affidavits. His first witness was his mother, Mercy Wambui. She described the deceased as her husband. She was allegedly married under customary law, and dowry was allegedly paid. They begat four children. She left after she had had the four children after she differed with the deceased. She allegedly went to stay with her brother, before she moved out to Gachie to live alone. Her children later followed her. She alleged that the deceased used to visit her at Gachie. The next witness was a cousin of the deceased called Gitau Munga. He testified that the deceased had two wives, including the applicant's mother. He identified the applicant as a child of the deceased.

7. The respondent's case opened on 25th October 2016. The respondent was the first on the stand. Her testimony largely gave vent to the averments in her various affidavits. She asserted that she was the only wife of the deceased. She alleged that the applicant's mother was a woman that she used to give casual jobs at her farm. She said that she saw the applicant for the first time in court. She called a close relative of the deceased, called Wanjiku Karanja Kanjuki, who testified that the deceased had only wife, the administrator. That particular witness was an elderly woman, whose testimony was not very coherent. The respondent's last witness was her son, Daniel Njoroge Kiongera, whose evidence largely covered the events surrounding the applications to the land control board.

8. At the conclusion of the oral hearing, the parties were ordered to file written submissions. Both sides did comply with the directions by filing their respect written submissions. I have read through them and noted the arguments advanced. I have also noted the authorities cited by the parties.

9. According to section 79 of the Law of Succession Act, Cap 160, Laws of Kenya, the court has discretion to revoke a grant on three general grounds. The first ground is where there were problems with the manner or process of obtaining representation, especially where the proceedings were defective, or were founded on fraud and concealment of matter from the court. The second ground is where there are difficulties with the administration of the estate, such as where the administrator fails to obtain 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 when ordered to by the court. The last ground would be where the grant has become useless and inoperative, usually where the sole holder of the grant dies.

10. The applicant in the instant application anchors his application on the first general ground – defects in the process and fraud. He argues that the administrator did not disclose to the court that the deceased had a second family. That information was concealed. The court was misled into believing that there was only one wife and the children disclosed.

11. The question that faces me, and which I have to determine, is whether the deceased had a second family. I have considered the material before me, inclusive of the affidavits and the oral testimony. I find the proceedings conducted in Kiambu CMCCC No. 18 of 1992 of particular interest. The deceased had been sued in that cause by the applicant herein and his brothers. The deceased testified in those proceedings. He claimed that he had cohabited with the applicant's mother for ten (10) years. He talks of

the cohabitation having started in 1962 and terminating in 1972. He claimed that he did not pay dowry. He acknowledged the applicant as his child. He denounced the rest of the children. The trial court did not make a definite conclusion on the parentage of the applicant and his brothers, but refers to them generally as sons of the deceased.

12. When I look at the deceased's testimony in Kiambu CMCC No. 18 of 1992 as against the evidence given in this court by the applicant and his mother I find that there is corroboration in material particulars. There was cohabitation that produced four children, those still alive were born in 1963, 1965 and 1967, within the period of the alleged cohabitation. I have no doubt in my mind that the applicant and his brothers were children of the deceased. The alleged transfers that the deceased, if indeed he was the one who attempted them, were meant to defeat the spirit of the suit in Kiambu CMCCC No. 18 of 1992. Clearly, the administrator concealed the existence of the second family. She misled the court. Her petition was fraudulent, and the proceedings founded on it were defective. I am satisfied that there is sufficient material for me to revoke the grant on record.

13. I am moved in the circumstances to make orders on the application dated 14th September 2012 in the following terms: -

- a. **That the grant made herein on 22nd April 1997 to Serah Njoki Kiongera is hereby revoked;**
- b. **That I hereby appoint new administrators, being Serah Njoki Kiongera and Amos Ikere Kiongera, a grant of letters of administration intestate shall issue to the two accordingly;**
- c. **That as a consequence of the revocation in (a) above the confirmation orders made on 24th July 2001 are hereby vacated, and the certificate of confirmation dated 24th July 2001 is hereby cancelled;**
- d. **That I hereby direct the Land Registrar responsible for Kiambu County to cancel any transactions or dealings or transfers on or with or in Kiambaa/Kihara/1931, 1932, 1933 and 1934 carried on the strength of the said certificate of confirmation of grant and to revert the property to the registration as at 24th July 2001;**
- e. **That the names of Amos Ikere Kiongera, Peter Munga Kiongera and, George Ngugi Wambui shall be entered into the list of the survivors of the deceased;**
- f. **That new administrators appointed under (b) above shall apply for confirmation of their grant within sixty (60) days of this order;**
- g. **That as the estate comprises of assets situated exclusively within Kiambaa of Kiambu County the cause herein shall be transferred to the High Court of Kenya at Kiambu for final disposal; and**
- h. **That each party to bear their own costs.**

DATED, SIGNED and DELIVERED at NAIROBI this 12TH DAY OF MAY, 2017.

W. MUSYOKA

JUDGE