REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1140 OF 2004

IN THE MATTER OF THE ESTATE OF MUTIGA GATHIGE(DECEASED)

RULING

1. The deceased herein died on 31st August 1966. Representation to his estate was sought in Kiambu CMCSC No. 236 of 2000 by Nyaga Mutiga in his alleged capacity as son of the deceased. He was alleged to have been survived by the petitioner and eight(8) other persons, being his sons and a daughter in law. He was said to have died possessed of the property known as Ndumberi/Ting'ang'a/704. A grant was of letters of administration intestate was made to Nyaga Mutiga and Jona Njoroge Mutiga, when Jona Njoroge Mutiga died he was replaced as administrator by his widow on 14th October 2002. The grant was confirmed on 7th April 2004 and the estate was shared out equally amongst eight (8) individuals.

2. The application I am called upon to determine is a summons for revocation of grant dated 27th April 2004. It is brought at the instance of Mutiga Njoroge. He swore an affidavit on even date. It is alleged that the grant was obtained through defective proceedings, reliance on false statements and untrue allegations. The applicant is a grandchild of the deceased from his first house. The deceased is said to have had two (2) wives, Thira Mutiga and Njoki Muthiga. Thira had two (2) children, while Njoki had eleven (11).

3. The applicant's case is that the first administrator caused the second administrator, who is the applicant's mother, to sign the confirmation application without understanding how the estate was to be distributed. He accuses him of taking advantage of her advanced age and illiteracy. He also alleges that the second administrator was not involved in the distribution and did not even sign an affidavit in support of the application. He complains further that the initial petition had not disclosed that the deceased had two wives, and that it was only much later that the applicant's father moved the court to have the second family included. He argues that the estate should be distributed equally between the two houses as opposed to being distributed equally amongst all the survivors. She attaches copy of an agreement which he says ought to give an indication of how the deceased would have liked to see the estate divided. He states that there was a scheme to disinherit the first family. He asserts that the confirmation of grant was obtained on false allegations and concealment of facts, particularly that the estate ought to have been shared equally between the two houses. Several documents are attached to the affidavit in support. Most of them are processes from the lower court. The only document that is not from the court record is an agreement for sale of land, Ndumberi/Ting'ang'a/704, between the applicant's father, as seller, and another..

4. The applicant swore a further affidavit on 4th July 2011. He reiterates that the estate was improperly, wrongfully and inequitably distributed amongst the two houses of the deceased. He complains that the first house got 1/9, while the second house got 1/9. He has attached a copy of a mutation which proposes the distribution. He states that the second house had nine (9) sons, while the second house had only one (1) son. He says that two (2) of the sons in the second house were not entitled to a share, as one had died

unmarried while the other had been settled on two named parcels of land. He argues that Ndumberi/Ting'ang'a/704 should have been shared at the ratio 1/3:2/3. He pleads that the estate ought to be distributed as per section 40 of the Law of Succession Act, Cap 160, Laws of Kenya. He has attached a number of documents to the further affidavit. There is a mutation form, showing that Ndumberi/Ting'ang'a/704 was proposed to be divided into nine (9) equal portions. There are copies of green cards in respect of Ndumberi/Ting'ang'a/T463 and 716, which show the same were registered in the name of a son of the deceased called Kiruku Mutiga in 1958/1959. The applicant subsequently, on 20th September 2016, withdrew the affidavit sworn on 4th July 2011

5. The first administrator, Nyaga Mutiga Manguru, swore an affidavit in reply on 28th July 2011. He argues that the applicant did not have the capacity to bring the application as he was not a direct survivor of the deceased for he was a grandson of the deceased, and had not even participated in the lower court proceedings. He further avers that the land of the deceased had been subdivided during his lifetime and each beneficiary had settled on and developed their respective portions. He further argues that the applicant did not have the support of his mother for she had withdrawn her support for the application. He would like to have the confirmation orders affirmed.

6. The second administrator swore her own affidavit on 28th July 2011. She states that she had been deceived and duped by her son, the applicant, to bring the application. She states further that she and the other survivors of the deceased had amicably agreed to have the matter withdrawn. She states that she has withdrawn her support for the application. She says that she is content with what was given to her. She further says that the son had duped her husband to sell half of the suit property in the purported belief that she was entitled to half share thereof. She urges the court to adopt the distribution made by the lower court.

7. Directions had been given on 4th February 2014 for disposal of the application by way of written submissions, to be highlighted. There has been compliance with the directions, for either side filed their respective submissions. The submissions were highlighted on 20th September 2016. The applicant's submissions dwell a lot on facts that had not been fully averred to in his affidavits. However, his argument is that the estate of the deceased ought to have been shared out equally between the two houses. That is the customary law position, he pleads. He cites section 2(1)(2) of the Law of Succession Act. He has also cited case law where that position is stated. The respondent on his part has also dwelt with facts that are not in the pleadings. His case is that the two wives were not married at the same time, for the second wife was married after the first wife had died, and the children of the first wife were raised by the second wife. He argues that the process of distribution was done in accordance with the law.

8. It is clear that the applicant is unhappy, not about the process of the making of the grant, but about the confirmation thereof. The application dated 27th April 2004 is for revocation of the grant and not the review of the confirmation orders.

9. The law on revocation of grants of representation is section 76 of the Law of Succession Act. Under that law, a grant may be revoked for the reasons set out in the said provision. The power granted to the probate court by section 76 is for revocation of grants of representation not of certificates of confirmation of grant. The discretion to revoke is exercisable in respect of circumstances where the grant was obtained through a defective process, or where there were problems with administration of the estate, and where the grant has become useless and inoperative on account of subsequent circumstances.

10. Confirmation of grants is provided for under section 71 of the Act. Upon the making of confirmation orders, a certificate of confirmation of the grant is made founded on the distribution proposed by the administrator and confirmed by the court. A party aggrieved by the confirmation orders does not have the option of seeking revocation of the grant. There is no provision in section 76 which allows that. Section 76 of the Act draws a connection between revocation and confirmation, but only with relation to failure by an administrator to seek confirmation within the time provided in section 71 of the Act. A grant is revocable for failure to apply for its confirmation within the stipulated period, however it cannot be revoked because of problems with the process of applying for confirmation, nor for unhappiness with the

distribution. A person who has issues with the confirmation process, and orders, has the remedy of appealing against the orders or by seeking review of the orders, not revocation of the grant'

11. The sum total of the above is that the application before me is not properly conceived. There is no proper basis for seeking revocation of a grant based on the reasons advanced. The applicant should have appealed against the confirmation orders if he was aggrieved. That by itself is sufficient ground for me to dismiss the application before me. I have no jurisdiction to revoke a grant because a survivor is unhappy with the orders made by the court on distribution.

12. Be that as it may. It is argued that the deceased died in 1966, long before the Law of Succession Act became operational in 1981. Section 2(1) of the said Act sets out the scope of the Act, it applies to estates of persons dying after the Act became operational. According to section 2(2) of the Act, the substantive provisions of the Act do not apply to estates of the persons who died before the Act came into force, but the procedural provisions, found in Part VII, are of universal application, to either estates. The substantive law for the estates of persons dying before the Act came into force would be the law in force as at the date of death. That is the correct position in law.

13. In the instant case, the deceased died before the Act became operational, therefore the dispositive provisions of the Act do not apply to the estate, but the procedural law in Part VII does apply to the estate. The law that ought to govern the estate of the deceased should be the law then governing the intestate estate of a dead Kikuyu. That law was Kikuyu customary law. It is notorious that under customary law the intestate estate of a polygamist is shared out between the various houses of the deceased equally regardless of the number of children in each house. That is the mode of distribution that the applicant appears to be advocating for. That appears to be the correct position in law. I have looked through the record quite closely and carefully. The distribution adopted by the administrators was in accord with Part V of the Act rather than Kikuyu customary law on the subject. That was a departure from section 2(1)(2) of the Act.

14. I note however, that although the deceased died in 1966, representation to his estate was sought after the Law of Succession Act had come into force, which, although allowing the application of customary law, introduced a new notion to distribution of African estates, equity. This notion was reinforced by the coming into force of the Constitution of Kenya, 2010. The fact that the deceased had married twice during his lifetime is acknowledged. It could be arguable whether he was polygamist or not. Whatever the case, he had children from two wives. Distribution of his estate must no doubt take that fact into account. The administrators did. The applicant's house was represented by their mother, who has sworn an affidavit denouncing him as dishonest. The distribution took all the children of the deceased in each house into account, and ended up distributing the estate equally amongst all the children of the deceased. The distribution proposed by the applicant is inequitable and is founded on legal notions of yesteryears. It would be an incredible throwback to interfere with the proposed distribution so as to accommodate a law that was abandoned thirty-six (36) years. That is what retrogression is about.

15. Even if I were to go to merits, I would not find any basis for grant of the orders sought. The application dated 27th April 2004 is for dismissal, and I hereby dismiss the same. Costs to be paid to the respondent. The cause before me is for revocation of the grant made by the Kiambu lower court, which has the substantive cause. The determination of the application dated 27th April 2004 means that this cause is exhausted. That being the case, I shall direct that the lower court file in Kiambu CMCSC No. 236 of 2000 shall be returned to the relevant registry for final disposal. Thereafter the court file in respect of the instant cause shall be closed.

DATED and SIGNED at NAIROBI this 3RD DAY OF MAY, 2017.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE