



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO.706 OF 1985
IN THE MATTER OF THE ESTATE OF G K alias S G G (DECEASED)

JUDGMENT

1. The application for consideration is the Summons dated 10th April 2014. The same is brought under Rules 76, 49 and 73 of the probate and Administration Rules, Succession Act Cap 160.

- i. The applicant seeks orders that; Letters of administration made on 23rd June 1987 to C W G be revoked.
- ii. That L N G and P M G be appointed as joint co-administrators of the estate of the deceased.
- iii. That the honorable court be pleased to review mode of distribution contained in the certificate of confirmation issued on 13th May 1988 and redistribution contained in the certificate of confirmation issued on 13th May 1988 and redistribution of the estate to afresh and include the applicants and beneficiaries of the estate
- iv. The cost of the application be in the cause.

2. The application is based on grounds that the administrator of the deceased's estate died in 2012 and at the time of her death the deceased's estate had not been fully administered or distributed. As a result the same has become useless and inoperative and ought to be revoked and a fresh appointment of administrators be made. That the applicant and her siblings being children of the 2nd house have been omitted from the list of beneficiaries and proposed mode of distribution. That it is imperative that the applicant and her siblings be included as beneficiaries of the estate of the deceased and it is imperative that the application be heard to include the new beneficiaries who had not been disclosed to the court. That there is likelihood that the properties comprised under the estate may be under new owners and titles may be disposed of at any time unless prohibition orders are issued. Adding that once land is disposed to a third party recovery thereof may be impossible in the third party may not have notice as the respondents have all the requisite documents to effect the transfer. That no prejudice will be caused to the respondents if the prevailing status quo is maintained and that it is in the interest of justice to protect the subject matter of the cause herein.

3. In her affidavit in support of the said application L N G avers that the deceased to whom the estate belongs died on 21st July 1980 and a grant of letters of administration were issued to C W G who died on 23rd June 1987 but the same were confirmed on 13th May 1988. She avers that the said grant was defective in substance as their consent as beneficiaries was not sought prior to the petition. Further that the petitioner concealed from the court that the deceased was polygamous and had other children from the 2nd wife. Adding that at the time of his demise the deceased was survived by two wives and their children.

The house of late C W comprised of;

- i. P M G
- ii. K G
- iii. M M G
- iv. P W G
- v. R N M
- vi. R W M

The house of the late Grace Wakonyo Gitu comprised of the following;

- i. R M G
- ii. K G
- iii. L N G
- iv. E N W
- v. J N W
- vi. M N W

That though her late mother had separated with their father he continued to take care of all their needs till the time of his demise. That she and her siblings had been omitted from the distribution of the deceased's estate and the administrator only distributed the estate to her children thus disinheriting the children of the 2nd house. She added that at the time of her mother's demise she was residing at Kangemi on ***L.R. No. Dagoretti/Kangemi/[particulars withheld]*** while the other co-wife resided at Riruta which formed their respective matrimonial homes. That by 2012 some of the properties of the deceased remain un-administered while others have since been registered in the names of individual beneficiaries. Adding that prior to the deceased's demise he had given them ***L.R. No. Dagoretti/Kangemi/[particulars withheld]*** but the same has been subdivided and titles registered into the names of third parties. That this has been confirmed but there is partial distribution she urges the court to appoint the respondent as administrator to enable him conclude administration of the deceased's estate. That upon such appointment the confirmation order of 13th May 1998 be reviewed to allow redistribution of the estate along proposed lines. She also seeks prohibition orders meanwhile as she is apprehensive that she and her siblings stand to be disinherited.

4. The respondent in his affidavit dated 11th June 2014 denies allegations that the deceased was married to two wives and denies that there were 2 houses to be considered for distribution of the deceased's estate. He avers that the deceased was only married to one wife C W G. He avers that the deceased was not father to the applicant and as per her birth certificate her father is one J G who is not the deceased adding that she was born in Kangemi while all other children of the deceased were born in Karura. Further, he avers that the other children bear their mother's surname and not the deceased's. He avers that the late Grace Wakonyo Gitu deserted the deceased back in 1961 at the time she left with 3 children and neither she nor her children ever returned to the deceased during his lifetime. Adding that the deceased did not cater to the applicant's mother as alleged but her mother only returned upon the demise of the deceased. Further he avers that the deceased died in 1980 before the law of succession act come into force and hence the kikuyu customary law is applicable in this case and the same provides that when a woman deserts a husband and goes away with her children for the entitled lifetime of the deceased she is not entitled to inherit the estate of the deceased.

5. **L N G** testified that she was a daughter of the deceased and that he took care of them until his demise. That at the time her mother and the deceased separated they had 3 children together. She stated that her stepmother was the administrator of the deceased's estate. That they were not informed about the deceased is demise and as such could not attend his burial. She testified that she filed the matter on behalf of herself her brothers and sisters. That she did not attend the deceased's burial as she was in a boarding school at the [particulars withheld] Kabete at the time and that they were not informed by the other family of his demise. Adding that the administrator and her stepmother C was old and at the time could not properly administer the estate of the deceased. She stated that her brother suffers from depression adding that her siblings no longer talk to her and she claims that they have been compromised.

6. **P M G** a son to the deceased testified that the deceased married the deceased sometime in 1930's. That her mother had separated with their father and he had intended to return the dowry. At the time the deceased died her stepmother was married to another man and neither she nor her children attended the burial. That her mother gave G W what she was advised by her uncles. He acknowledged that the late G was his stepmother but states that he and his family did not help plan or attend her burial. He argues that the applicant N is not the daughter of S G. He stated that his mother was given 2 acres. That when her stepmother came back his mother referred her to the deceased remaining brothers K G and G K to decide what she should get. That the stepmother died and it was agreed on what her children should get and all got plots. He stated that his mother C was buried at Riruta [particulars withheld] While plot no. [particulars withheld] was subdivided among the beneficiaries while he got plot no.S.[particulars withheld] adding that he got the same as he paid for the land as he father was unable to do so though he had developed the same. That he got half of plot no. 143 as he had assisted the father pay the loan on the same. He however testified that plot 143 remained as part of his father's estate. That all his stepbrothers and sisters are provided for and that the entire estate of the deceased has been distributed and what was remaining was registration of transfers though some of the parcels of land have already been sold to third parties.

6. He denies allegations that the applicant her mother and siblings ever resided in Kangemi or that they had been given the same by the deceased as alleged and even her late mother was not buried there adding that all the assets of the deceased were administered according to the confirmation certificate issued by this court on 13th May 1988. He avers that the elders had directed the administrator to retain 2 acres for the work the applicant's mother had done in looking after the deceased's property but in her magnanimity she opted to only take one acre. That the said parcel of land was divided into 17 plots and the administrator commenced the process of transferring the said plots to the applicant and her siblings and it had been agreed he takes 3 extra plots. In the year 2002 the administrator called the applicant and her siblings and allocated each beneficiary their plot as follows plot numbers ;

1429 to P M G

1430 to K G

1431 to K G

1432 to the Surveyor

1433 to N M G

1434 to K G

1435 to L N G

1436 to N W

1437 to N W

1438 to K G

1439 to M G

1440 to W W d/o P W G and C W G

1441 to K M son of R N M

1442 to NW

1443 to N M G

1444 to N W

1445 to P M G

That the 1acre which was held by the applicant's mother translated to four plots which she gave her children. That in 2002 the administrator applicant and her siblings executed applications for Land Control Board Consent and consents were issued. That the administrators executed their respective transfers and gave them original titles for them to complete the registration process. From the foregoing the respondent avers that the applicant is not entitled to the prayers sought.

7. **M G D** is a son to G K and a nephew to the deceased, he testified that he did not know L N G and was not sure if she received a part of inheritance from the deceased. He acknowledged that the deceased had 2 wives G W with whom he had 3 children M, W and K but could not state with certainty if the other three children belonged to the deceased or not. He added that though the deceased was separated from the deceased but no ceremony was done to show that they were separated but the late Grace did not attend the deceased's funeral.

8. **M N G** a son to the late G K and a son to the late G W that W gave him 2 plots of land plot no [particulars withheld]. He testified that L N G was his elder sister adding that she and K went to Salvation Army children's home. He stated that his father died when he was in fourth form and that was the end of his education. He stated that he testified as he loved his brother and wanted to help him since he is a member of the family. Adding that Catherine assisted him and he was moved to Kangema about 10 years back. That he only learnt about his father's burial about a week after.

9. **M N** a sister to the applicant . She stated that the respondent helped them and it was a family matter. She stated that P G was deceased by the time she was born. She testified that C G gave her a plot no [particulars withheld] being a portion of Dagoretti/ Kangemi/[particulars withheld] adding that she was satisfied with the share she got adding that even the applicant was also give a plot of land.

10. **L N** in her further affidavit dated the 10th September 2014 avers that the respondent is not a biological son to the deceased and that he has been the biggest beneficiary of their father's generosity in terms of education but has been accommodated as such adding that despite the differences between the deceased and her mother he never denounced his children and took care of them until his demise. She avers that it's clear that as per the certificate of confirmation that no provision was made for the children of the 2nd house.

11. In his supplementary affidavit filed on 7th October 2014 .PMG reiterated his averments as raised in the replying affidavit.

12. M G in his affidavit dated 15th October 2014 though he acknowledges that the deceased had 2 wives namely;C W and G W with whom he established a home in Riruta. He however avers that the deceased never established a home in **Dagoretti/Kangemi/[particulars withheld]** during his lifetime. He avers that G deserted the deceased in 1961 with 3 children 2 sons and one daughter and never returned. The deceased lost contact with her and never provided for her or her children.

13. M N in her affidavit filed on 15th October 2014. She avers that she was born and raised in Karura by

her mother G W who was a single mother until her demise in 1999. That at no time did her late mother introduce the respondent's father to her as her father. That the late C WG did not know them and used emissaries to look for them with a purpose to give them a piece of land. That she was surmised by the respondent's mother generosity since she was not even a child of the deceased and denied authorizing the applicant to act on her behalf.

14. Parties filed written submissions. The applicant sought to withdraw prayer 3 seeking to appoint the respondent as an administrator as he is already an administrator. The applicant seeks for provision under the estate as rightful heirs adding that they were never informed of the petition only to learn of the same when her brothers were given copies of transfer documents. It was submitted that it is not in dispute that the deceased was polygamous and his 2nd wife bore him 6 children though she was legally separated but not divorced. That the Law of Succession defines a dependant as,

“(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, stepparents, grandparents, grandchildren, stepchildren, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; “

15. She submits that the respondent in her petition failed to mention the children of the 2nd house which confirms that they never intended them to benefit from the deceased's estate. She submits that the grant as issued was improper and it gave the respondents sole administration and an unfair distribution. It was further submitted that the term wife, spouse and widow as defined under section 3 of the Law of succession Act, *“wife” includes a wife who is separated from her husband and the terms “husband” and “spouse”, “widow” and “widower” shall have a corresponding meaning;”*

16. She submitted that the respondent is overseeing the distribution of his father's estate that was polygamous and he has an obligation under the law to place the facts fully before the court. It was submitted that section 40 of the law of succession Act provides,

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

17. She submitted that the estate of the deceased comprised of the following assets;

i. Dagoretti/Kangemi S. [particulars withheld]

ii. Dagoretti/Kangemi T. [particulars withheld]

iii. Dagoretti/Riruta [particulars withheld]

iv. Dagoretti/Kangemi/[particulars withheld]

18. It was submitted that the share ment to go to the 2nd house was manipulated by the respondent and was allocated to the 1st house. She proposed that the estate of the deceased be distributed as follows;

i. Subdivision carried out in **Dagoretti/Kangemi/[particulars withheld]** be cancelled and subsequent registration be annulled. In addition, the land be distributed to the 2nd house.

ii. That the purported purchasers and surveyors failed to appear to ventilate their case and as such they be assumed not to have any interest in the matter.

iii. The 1st family can retain Dagoretti/Riruta/[particulars withheld] they share as they wish

iv. That one of the other two properties one be given to the applicant with no preference.

19. The respondent in his submissions aver that section 2(2) of the Law of Succession Act provides that,

“(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

20. It was submitted that the deceased died in 1980 and as such his estate should be governed by the Kikuyu customary law with the administration of the said estate being governed by the Law of Succession Act. That the applicant's prayer that the court reviews the distribution of the deceased's estate under section 40 is not tenable. That the late Grace W G deserted her matrimonial home in 1961 and never returned to the deceased during her lifetime. That rule 64 of the Probate and Administration Rules any person willing to rely on customary law does so by calling oral evidence. She relied on the case of **Kimani Vs Gikanga(1965)E.A 735, at page 739 Duffus JA** expressed himself as follows on proof of customary law; “ . In KIMANI VS GIKANGA, (1965) EA 735, at page 739, Duffus JA expressed himself as follows on proof of customary law: *“To summarize the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case.”*. That under the kikuyu Customary Law there is no provision for inheritance by a divorced spouse.

21. That the applicant has no locus standi to apply for revocation of the grant made on 23/06/1987 as she is not a beneficiary of the estate of the deceased or in a class of persons under section 66 of the Law of Succession Act. She is not a surviving spouse, blood relative entitled upon intestacy or corporation or creditor. That the supplicant has failed to demonstrate to this court that she was a child of the deceased as the birth certificate adduced shows father is one J G. He relied on the case of **In The Matter Of Gichia Kabiti Nairobi High Court Succession Number 2559 Of 2002.**

22. That despite not being a beneficiary the applicant had been sufficiently provided for from the estate of the deceased. That the applicant's claim that the deceased had allocated the 2nd family **Dagoretti/Kangemi/[particulars withheld]** no evidence was adduced to support the said claim. That the respondents and her siblings equally benefited from the said parcel of land adding that the applicant is acting alone whilst claiming to be acting on behalf of unnamed beneficiaries.

23. He submitted that the deceased's estate had been fully administered an all assets distributed in accordance with the certificate of confirmation dated 13th May 1988 and denies applicant's allegations that the grant had become useless and inoperative.

24. It was further submitted that the court has discretionary powers to grant orders sought under section 76 of the law of succession in revoking or not revoking a grant as was held in the case of the estate of Joel

Nyoike Mugo (deceased). It was submitted that the deceased died in 1980 and a grant was made on 23rd June 1987 and confirmed on 13th May 1987. Revoking the grant would set the parties back a long way and it is not in the interest of justice.

DETERMINATION

25. The deceased was initially married to G W with whom they sired 3 children. However sometime in 1961 G parted with the deceased but no ceremony was carried out to show the two divorced. Later on the deceased married the late C with whom he sired 9 children. From the fore going, it is evident that the deceased was polygamous. Under the Succession Act it is provided that where a person dies intestate and was polygamous his estate devolves under section 40 of the Law of Succession Act which provides that, *“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”*

26. The respondent however, argues that since the deceased died in 1980 before the commencement of the Law of succession Act which commencement date was 1st July, 1981 which was after the death of the deceased. The Law of succession Act Section 2(2) provides that, *“The estates of persons dying before the commencement of this Act are subject to the **written laws and customs applying at the date of death**, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”* It is important to note that the application of customary law is only applied so far as the same is not repugnant to justice. The respondent argues that the Kikuyu customary law provides that since the late Grace deserted the deceased she and her children were not entitled to inherit anything from the deceased’s estate.

27. The Judicature Act (Cap 8 Laws of Kenya) Section 3 (2) provides, *“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”*

28. I find that seeking to disinherit the deceased’s children is repugnant to justice. Also other than the respondents sentiments that the same is the custom no evidence was called to prove this. I find that the custom alleged by the respondent is repugnant to justice and as such order that the proceedings of the deceased’s estate be guided by the provisions of the Law of Succession.

29. The applicant claims to be acting on behalf of her siblings but from the testimony by both M N G and M N the two have sided with the respondent and appear to contradict L N claims as against the deceased’s estate. They both indicated they were happy with what Catherine the administrator to the deceased’s estate who had given them despite them not being biological children of the deceased. The respondent argues that the applicant is not a biological child of the deceased and as such does not qualify to benefit as a beneficiary and has not proved dependency to qualify under the same. The birth certificate annexed by the applicant indicate the father is one J G while the deceased is G K alias S G G the two appear to be two different people and as such one cannot with certainty claim that the deceased is the applicant’s father. The applicant’s siblings claim no to have seen or known the deceased prior to his death. I find that the applicant has not proved the deceased was her father or if at all she is entitled to a share of his estate. The respondent claims he received a larger share than the other family members because he had helped his father to pay off a loan that was pending. No evidence has been adduced to contradict this and no beneficiary has raised issue with this. I find that without contradiction and any evidence stating otherwise the same could be the true position.

30. From a perusal of the certificate of confirmation the estate of the deceased has been distribute to the other children with each getting a share of the deceased’s estate despite some bearing their mother’s maiden and the same could not be ascertained to be children of the deceased or not. The applicant’s claim is brought under Section 76 which seeks revocation of the grant and certificate of confirmation so issued.

I find that other than the applicant all other parties are satisfied with the shares granted to each as such I find that revoking the said grant and certificate of confirmation will only set back the family. I find the applicant's claim holds no water and dismiss her application with no orders as to costs. It is so ordered.

Dated, signed and delivered this **8TH** day of **June**, 2017.

R. E. OUGO

JUDGE

In the presence of;

L N G in person

Applicant

Miss Wanjiku h/b Miss Njoki Gachihi

For the Respondent

MS. Charity

Court Clerk