



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 2814 OF 2003**

**IN THE MATTER OF THE ESTATE OF THIBU GICHIEYA (DECEASED)**

**RULING**

1. The deceased person, the subject of these proceedings, Thibu Githieya, died on 5<sup>th</sup> August 1980 at Muthiga Village, Kiambu, at the age of 115 years.
2. Representation to his estate was sought in **Kiambu SRMCSC No. 60 of 1988**, by a petition for letters of administration with written will annexed lodged in that cause on 8<sup>th</sup> April 1988, by Daniel Hinga Muchigi and James Muthama Thibu, in their respective capacities as executor and son, respectively, of the deceased.
3. The deceased was expressed to have been survived by two individuals, being his widows – Martha Wanjiru Thibu and Jane Wangari Thibu, and to have died possessed of only one asset, Dagoretti/Kinoo/534.
4. A grant of letters of administration intestate was made on 15<sup>th</sup> July 1988 appointing the two petitioners administrators of the estate of the deceased. The said grant was subsequently confirmed and a certificate of confirmation of grant duly issued on 20<sup>th</sup> January 1989. According to the said certificate of confirmation of grant the estate of the deceased devolved upon James Muthama Thibu and Jane Wangari Thibu.
5. The application I am called upon to determine is a summons for revocation of grant dated 23<sup>rd</sup> September 2003. It seeks revocation of a grant of probate made on 20<sup>th</sup> January 1989 to Daniel Hinga Muchigi and James Muthama Thibu in **Kiambu SRMCSC No. 60 of 1988**.
6. It was brought at the instance of one Ephraim Matindi. He swore an affidavit on 23<sup>rd</sup> September 2003. He alleges that the distribution of the estate left out four beneficiaries, all being children of the deceased. Those left out were listed as Williamson Githieya Thibu, Francis Muongi Thibu, Ziphorah Njeri Waweru Thibu, and Ephraim Matindi Thibu.
7. He avers that the proceedings to obtain the grant were defective for they did not disclose all the beneficiaries as required by the law. He further avers that the petitioners obtained probate and confirmation without the consent of the other beneficiaries, alleging that James Muthama Thibu was relying on a forged power of attorney.
8. The response to the application takes the form of grounds of opposition dated 27<sup>th</sup> November 2003 and a replying affidavit sworn on 9<sup>th</sup> December 2003 by James Muthama Thibu. It is stated that the only asset was distributed between James Muthama Thibu and Jane Wangari Thibu, the mother of the applicant. He asserts that all the beneficiaries as per the will were disclosed, and in

any event the applicant was not a beneficiary and therefore his consent was not required. He also asserts that the power of attorney referred to by the applicant was valid and not forged.

9. Directions on the disposal of the said application were made on 3<sup>rd</sup> February 2004. It was to be disposed of by way of oral evidence in addition to the application on record and submissions. Those directions were revised on 26<sup>th</sup> November 2014 by consent of the parties. It was agreed that the application be disposed of by way of written submissions. Both sides complied with the directions of 26<sup>th</sup> November 2014 by filing their respective written submissions.
10. The applicant's principal case is that the administrators concealed certain pertinent facts from the court, principally that the deceased had other survivors. He argues that the respondent did not disclose the other children of the deceased, did not involve them in the process and therefore the process of obtaining the grant was defective. He states that the grant of probate was based on a fake will and a fake power of attorney.
11. The respondent's case is that the deceased died testate. His estate was bequeathed to his two widows, and upon confirmation of the grant, the estate was distributed as per the will of the deceased. He states that the applicant ought to have benefited from his mother's share. He urges that the property was subdivided after confirmation of the grant and it does not exist anymore. He alleges that the allegations that the will and power of attorney were fake have not been subjected to proof. He argues further that the lower court found the will to be valid.
12. The deceased died in 1980, that is before the Law of Succession Act, Cap 160, Laws of Kenya, came into force. By dint of section 2(1)(2) of the Act, his estate did not fall for distribution in accordance with the substantive provisions of the Act, but rather according to the law in force prior to the date the Act became operational. However, by virtue of section 2(2) of the Act, Part VII of the Act, which deals with administration of estates, applies to all estates, including those of persons who died before the Act came into force.
13. The law on the process of applying for a grant of representation is set out in section 51 of the Law of Succession Act and Rule 7 of the Probate and Administration Rules. Section 51(2) states as follows –

*'An application shall include information as to –*

- a. *The full names of the deceased;*
- b. *The date and place of his death;*
- c. *His last known place of residence;*
- d. *The relationship (if any) of the applicant to the deceased;*
- e. *Whether or not the deceased left a valid will;*
- f. *The present addresses of any executors appointed by any such will;*
- g. *In cases of total or partial intestacy, the names and addresses of all surviving spouses children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;*
- h. *A full inventory of all the assets and liabilities of the deceased; and*
- i. *Such other matters as may be prescribed.'*

Rule 7(1) states that –

*'...the application shall be by petition in the appropriate Form supported by an affidavit... containing ...the following particulars –*

- a. *The full names of the deceased;*
- b. *The date and place of his death, his last known place of residence, and his domicile at date of death;*
- c. *Whether he died testate of intestate and, if testate, whether his last will was written or oral, and the place where and the date upon which it was made;*

- d. *A full inventory of all his assets and liabilities at the date of his death (including such, if any, as may have arisen or become known since that date) together with an estimate of the value of his assets movable and immovable and his liabilities;*
- e. *In cases of total or partial intestacy –*
  - (i) *the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39(1) of the Act;*
  - (ii) *whether any and if so which of those persons is under the age of eighteen years or suffering from any mental disorder, and, if so, details of it;*
  - (iii) *for the purposes of determining the degree of consanguinity reference shall be made to the table set out in the Second Schedule;*
- f. *The relationship (if any) which the applicant bore to the deceased or the capacity in which he claims;*
- g. *If the deceased died testate leaving a written will, the names and present names and present addresses of any executors named therein ; and*
- h. *The postal and residential addresses of the applicant.'*

14. The deceased herein is said to have died testate, having left a will whose date of execution is not clear from the face of the copy attached to the petition filed in Kiambu SRMCSC No. 60 of 1988. That being the case, and going by the provisions cited above in section 51 of the Law of Succession Act and Rule 7 of the Probate and Administration Rules, there is force in the respondent's argument that as the deceased died testate there was no need for inclusion or involvement of the applicant and others as survivors of the deceased, for such disclosure appears to be required only in respect of intestacy.

15. From the material before me it would appear that there were intestate succession proceedings in **Kiambu SRMCSC No. 23 of 1987**, in respect of the this same estate, where the instant applicant had raised certain objections, and the court in that matter ruled that the deceased had left a valid written will and directed the executors, and the instant respondent, to move the court in a separate cause for grant of probate of the written will. The said orders were made on 19<sup>th</sup> February 1988 by RK Mwangi, Resident Magistrate.

16. It is the orders of 19<sup>th</sup> February 1988 that prompted the filing of **Kiambu SRMCSC No. 60 of 1988**. In any event the finding of the court in **Kiambu SRMCSC No. 23 of 1987** was not challenged by any party by way of appeal or review, and stands valid to date. Furthermore, there was opportunity for the applicant to raise objections to the representation of the estate being founded on the alleged will, but he did not avail himself of that opportunity.

17. I have noted that the applicant in his application for revocation of the grant made in **Kiambu SRMCSC No. 60 of 1988** has sought to challenge the validity of the will the basis of that cause on the grounds that it was fake, yet he has not sought to demonstrate that the will was not valid. A will may be invalid either on the ground of lack of capacity on the part of the testator to make or on the ground that the formalities for making had not been followed. These matters are dealt with in sections 5 to 14 of the Act. No effort was made by the applicant to show that the will did not meet the requirements set out under those provisions.

18. I have noted though that although the deceased had died testate, going by the order made in **Kiambu SRMCSC No. 23 of 1987**, and the deceased in the will on record had appointed executors, being Daniel Hinga Muchigi and Binhas Mungai, the petition lodged **Kiambu SRMCSC No. 60 of 1988** was not for a grant of probate, as should have been the case where there are executors, rather it was for a grant of probate with the will annexed with the petitioners being one of the executors and a non-executor. No explanation was given for the inclusion of the non-

executor, nor for the exclusion of the other executor, Binhas Mungai. There is no evidence that the said executor had died or renounced probate.

19. More importantly, although the grant sought was of letters of administration with written annexed, oddly the grant issued eventually on 15<sup>th</sup> July 1988 was of letters of administration intestate. That was the grant that was confirmed on 20<sup>th</sup> January 1989, and the basis for the issue of the certificate of confirmation of even date. The effect of this is that although the deceased had been adjudged in **Kiambu SRMCSC No. 23 of 1987** to have had died testate, the administration of the estate on account of the proceedings in **Kiambu SRMCSC No. 60 of 1988** were conducted on the basis of a grant of letters of administration intestate as if the deceased had died intestate. That being the case then, at the point of petitioning for representation section 51(2)(g) of the Law of Succession Act and Rule 7(1)(e)(i) of the Probate and Administration Rules ought to have been complied with.

20. I have noted that although administration was carried out on the basis of a grant made in intestacy, the respondent asserts that the estate was distributed in accordance with the will of the deceased, as if the deceased had died testate.

21. Furthermore, the will named only two beneficiaries, Martha Wanjiru and Jane Wangari Thibu, being the wives of the testator. Martha Wanjiru and Jane Wangari were given 0.90 hectare and 0.45 hectare each out of Dagoretti/Kinoo/534. It is not indicated in the will what should happen to the gift of either beneficiary should they die after the deceased but before distribution. The only close related to that is that providing that in the event of the decease of any of the beneficiaries prior to the testator's death the property shall revert to the testator. It transpired that the testator predeceased both beneficiaries.

22. What is of concern to me is that at the confirmation of the grant the gift made to Martha Wanjiru was allocated to the respondent, James Muthama Thibu, ostensibly on the grounds that the original beneficiary had previous to her death given a power of attorney to the respondent over the said gift. With respect, a power of attorney by a beneficiary named in a will cannot have the power to transfer a gift by will made to that beneficiary from her to another. A gift by will is not transferable, for the will represents the wishes of the testator. A beneficiary purporting to transfer a gift made to them in a will would literally be usurping the powers of a testator and pretending to be the testator. Such gift should pass to the person named in the will or to her estate if she dies after the deceased. There cannot be any legal basis for the allocation of the share due to Martha Wanjiru to the respondent.

23. The High Court may revoke a grant under section 76 of the Act, if –

**(a) the proceedings to obtain the grant were defective in substance,**

**(b) the grant was obtained fraudulently by the making of a false statement or concealment from court of something material.**

**c. the grant was obtained by means of an untrue allegation of a fact essential in point of law.**

24. The respondent argues that the deceased died testate, and indeed that was the finding of the court in **Kiambu SRMCSC No. 23 of 1987**. It was that finding that prompted the filing of **Kiambu SRMCSC No. 60 of 1988** for administration of the estate of the testate on the basis of a grant of probate. Curiously, although the will appointed executors, the petitioners in **Kiambu SRMCSC No. 60 of 1988** did not seek grant of probate, instead they applied for grant of letters of administration with written will annexed. What is more, despite the cause being founded on a will, the court granted administration in intestacy. At confirmation the estate was distributed to a person other than the beneficiaries named in the will. To my mind, the process of obtaining the grant was attended by fundamental defects, and the said grant ought to be revoked.

25. Consequently, I do hereby make the following orders:-

- a. **I revoke the grant made on 15<sup>th</sup> July 1988, and with it all the transactions carried out on its basis;**
- b. **The court file in Kiambu SRMCSC No. 60 of 1988 shall be returned to the Kiambu registry for issuance of the grant that had been sought originally by the parties, to be confirmed upon the requisite application being filed and served on all those interested in the estate of the deceased;**
- c. **The applicant shall have costs of the application.**

**DATED, SIGNED and DELIVERED at NAIROBI this 5<sup>TH</sup> DAY OF FEBRUARY, 2016.**

**W. MUSYOKA**

**JUDGE**