



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MILIMANI
SUCCESSION CAUSE NO. 2803 OF 2011
IN THE MATTER OF THE ESTATE OF WAIGI KIBIRU (DECEASED)

RULING

1. The proceedings in this matter relate to the estate of Waigi Kibiru, who died on 1st August 1978 at the age of forty-eight (48) years.
2. Representation to his estate was sought in a petition lodged in Limuru SPMCSC No. 15 of 2011 on 18th February 2011 by Margaret Njoki Waigi and Karanja Waigi, in their respective capacities as widow and son of the deceased. He was expressed to have been survived by the widow, four daughters and a son. He was said to have died possessed of Limuru/Ngecha/793.
3. The petition was gazetted on 18th March 2011, vide Gazette Notice No. 2325. A grant of letters of administration intestate was duly made to the petitioners on 19th April 2011. The grant was confirmed on 1st November 2011 on an application dated 18th October 2011. A certificate of confirmation of grant was issued on 7th November 2011, where Limuru/Ngecha/793 was to be registered jointly between the two administrators.
4. On 19th December 2011, a Summons for Revocation or Annulment of Grant, of even date, was lodged in this cause by Ruth Njoki Mungai, seeking revocation of the grant made in Limuru SPMCSC No. 15 of 2011. From the grounds on the face of the application and the averments in her affidavit sworn on 16th December 2011, she bases her application on the reasons that the application for grant of letters of administration intestate was obtained in her absence and without notice to her, there was fraud as there were untrue allegations of fact essential in point of law to justify the grant, and that the petition was filed secretly and other beneficiaries were left out.
5. The application is opposed, for there is a reply to it in the form of an affidavit sworn on 28th February 2012 by one of the administrators, Margaret Njoki Waigi, who is named in the application as first respondent. She avers that the applicant was unknown to her and their family. She states that her husband was registered as proprietor of Limuru/Ngecha/793 during his father's lifetime, the property having been given to him as an absolute gift during his father's lifetime. She asserts that her husband was not registered as a trustee of the said land for anybody and the claim that there was a trust was being made rather late in the day.
6. There is an affidavit on record sworn on 21st January 2013 by Loise Njeri Muthumbi. She states that

the deceased, Waigi Kibiru, was her brother. Their father, Kibiru Waigi, also dead, had married twice, and his estate therefore comprised of two houses. He owned a piece of land described as Limuru/Ngecha/207. The deceased herein, Waigi Kibiru, caused the same to be registered in his name alone, and later subdivided the same into Limuru/Ngecha/791, 792 and 793. All this, she pleads, was done without her knowledge and consent. She states that she was not aware that proceedings relating to her deceased brother's estate had been commenced. She asserts that she is entitled to half share of the house of their mother with the deceased from the estate of their deceased father.

7. The applicant filed another supporting affidavit, sworn on 21st January 2013. She explains that Limuru/Ngecha/793 was excised from Limuru/Ngecha/207 which had been registered in the name of their deceased father. She mentions that the deceased had married twice, to her mother and the mother of the deceased herein. The deceased had been registered as proprietor of Limuru/Ngecha/207 in his capacity as administrator of the estate of their deceased father and therefore he held the said property in trust for the two houses of the deceased. She asserts that her mother's house was not involved in the lower court proceedings and therefore it did not get its share of the property held in trust by the deceased. She also alleged that the deceased sold a portion of the property he held in trust and did not account for the proceeds of sale of the property to the applicant's house. She has attached green cards to her affidavit to demonstrate how the property was originally registered in their father's name before it passed to the deceased through succession.

8. It was directed on 7th May 2012 that the application be disposed of by way of *viva voce* evidence. However, the said directions were varied on 15th October 2012, when it was directed that the application be disposed of by way of written submissions to be highlighted. The parties complied with the said directions and filed their respective submissions. The same were never highlighted however for it was directed on 14th July 2014 that the application be determined on the basis of the written submissions on record.

9. Revocation of grants of representation is provided for by section 76(a) of the Law of Succession Act. Section 76 provides as follows –

'A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion –

(a) That the proceedings to obtain the grant were defective in substance;

(b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from court of something material to the case;

(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either –

(i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court may order or allow; or

(ii) To proceed diligently with the administration of the estate; or

(iii) To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced an account which is false in any material particular; or

(e) That the grant has become useless and inoperative through subsequent circumstances.'

10. From the averments in the affidavits of Ruth Njoki Mungai and Loise Njeri Muthumbi, it would appear that there are other persons outside the immediate family of the deceased who would seem to have sufficient interest in the estate to warrant their participation in the proceedings. This is not to say that I have found for a fact that the deceased held the property in trust for anyone, far from it, I am only saying that Ruth Njoki Mungai and Loise Njeri Muthumbi have put up a case that is worth investigating.

11. I cannot venture in these proceedings to make a determination as to whether or not there was a trust over the subject property as the material before me does not appear to me to be sufficient for such a determination. That is a matter can only be determined in a full trial where *viva voce* evidence is presented. It was not so presented here and the averments of Ruth Njoki Mungai and Loise Njeri Muthumbi have not been subjected to testing by the respondents.

12. The circumstances of the case support a finding that a case has been made out for the participation of Ruth Njoki Mungai and Loise Njeri Muthumbi in the matter of the estate of the deceased and consequently for the revocation of the grant. I am not inclined to allow the application dated 19th December 2011 and revoke the grant in question for Ruth Njoki Mungai and Loise Njeri Muthumbi still have to prove their case for declaration of trust.

13. I shall retain the administrators appointed in Limuru SPMCSC No. 15 of 2011, but set aside the confirmation orders made on 1st November 2011 and order the cancellation of the certificate of confirmation of grant dated 7th November 2011. The court file in Limuru SPMCSC No. 15 of 2011 shall be returned to that court, where the administrators shall apply afresh for confirmation of grant. Ruth Njoki Mungai and Loise Njeri Muthumbi shall be at liberty to file protest affidavits raising the issue of trust. The trial court shall determine the said issue in the protest proceedings or otherwise deal with the matter in terms of rule 41(3)(4) of the Probate and Administration Rules. It is so ordered

DATED, SIGNED and DELIVERED at NAIROBI this 5TH DAY OF FEBRUARY, 2016.

W MUSYOKA

JUDGE

In the presence ofadvocate for the applicants.