



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1374 OF 2012

IN THE MATTER OF THE ESTATE OF HENRY KAGUTA GATHUA (DECEASED)

JUDGMENT

1. The deceased herein died on 21st May 1995.
2. Representation to his estate was sought in a petition lodged in Kiambu CMSC No. 697 of 1995 on 20th November 1995 by Regina Muthoni Kibocha, in her alleged capacity as widow of the deceased. The deceased was said in that petition to have been survived by the widow and six (6) children, being Alice Wangui Kaguta, Joseph Njenga Kaguta, Esther Waceke Kaguta, Paul Kimiri Kaguta, James Karwera Kaguta and Mary Wangari Kaguta. He allegedly died possessed of LR No. 13537/23, Gilgil/Karunga/Block 5/417 (Mikinye) and Gilgil/Karunga/Block 1/421.
3. A grant of letters of administration intestate was duly made and issued to the petitioner on 5th February 1996. The grant was confirmed on 15th May 1996, and a certificate of confirmation of grant duly issued.
4. Another succession cause was initiated at the Thika law courts in respect of the same estate, being Thika CMSC No. 245 of 2009. The cause was at the instance of Mary Wanjiku Gathua, Leah Nyambura Gathua and Margaret Muthoni Gathua, in their alleged capacities as stepmothers of the deceased. The deceased was said to have died possessed of a property described as LR No. 13537/23. He was said to have been survived by some twenty-eight (28) individuals, whose relationship with the deceased was not disclosed. A grant of letters of administration intestate was made in Thika CMSC No. 245 of 2009 on 6th August 2009. The grant was confirmed on 10th August 2011. In the said confirmation LR No. 13537/23 was distributed amongst some fifty-four (54) individuals.
5. What I am called upon to determine is a summons for revocation of grant dated 22nd June 2012. The application is brought at the instance of the administrators in Thika CMSC No. 245 of 2009, and it seeks revocation of the grant made in Kiambu CMSC No. 697 of 1995 on 5th February 1996 and the setting aside of the confirmation thereof.
6. The grounds upon which the application is premised are set out on the face of the application, while the facts are deposed in the affidavit sworn on 22nd June 2012 by Margaret Muthoni Gathua, one of the administrators/applicants. It is pleaded that the administrator in Kiambu CMSC No. 697 of 1995 did not disclose all the persons who had an interest in the estate of the deceased. It is stated that the deceased held the property in question in trust for his father's survivors and all such survivors ought to have been disclosed in the petition.
7. On the facts, it is averred that LR No. 13537/23 originally belonged to Gathua Mwangi, the father of the deceased in Kiambu CMSC No. 697 of 1995, and the husband of the administrators in Thika CMSC

No. 245 of 2009. Upon the death of Gathua Mwangi, the deceased herein initiated a succession cause at the Thika law courts, SPMCSC No. 355 of 1982, where he was appointed sole administrator of the estate of Gathua Mwangi. At the confirmation of the grant in Thika SPMCSC No. 355 of 1982, LR No. 13537/23 devolved upon the deceased absolutely. The applicants' case is that they were not involved in the process in Kiambu CMSC No. 697 of 1995 and that was why they initiated Thika CMSC No. 245 of 2009 and obtained a second grant to the estate of the deceased.

8. Attached to the affidavit in support of the application are several documents. There is a certificate of death for Gathua Mwangi to show that he died on 10th April 1979. There are also attachments designed to demonstrate that the latter was the initial owner of LR No. 13537/23, and that the deceased herein acceded to the property through succession. There are also papers that show that the rest of the family have had issues with that since the early 1990s, and that there have been tussles between the administrators in Kiambu CMSC No. 697 of 1995 and Thika CMSC No. 245 of 2009.

9. Directions were given on 22nd October 2012 that the application be served on the administrator in Kiambu CMSC No. 697 of 1995, among other directions. There were further directions on 4th February 2015 that the said administrator be served through a notice in the *Daily Nation*. There is evidence that a notice to that effect was carried in the *Daily Nation* of an undisclosed date.

10. I have scrupulously perused through the file of papers before me, and I have not come across a reply by the administrator in Kiambu CMSC No. 697 of 1995 to the application dated 22nd June 2012.

11. According to the directions given on 4th February 2015, the application was to be disposed of by way of affidavit and oral evidence. Four individuals testified. Their testimonies gave vent to the averments made in the affidavit sworn on 22nd June 2012 by Margaret Muthoni Gathua. They dwelt on how Gathua Mwangi acquired LR No. 13537/23, and how the same subsequently ended up in the name of the deceased herein in his capacity as administrator of the estate of Gathua Mwangi. The emphasis was on the fact that the said asset was trust property which ought not to have passed absolutely to the deceased, and which ought not to have been treated as his estate at the distribution thereof.

12. I have not had opportunity to peruse through Thika SPMCSC No. 355 of 1982, as the said court file was not called for, and the parties hereto have not exhibited any documents from the said file as evidence that LR No. 13537/23 devolved upon the deceased absolutely in those proceedings. That being the case, I am not able to tell whether or not the said asset ought to form part of the estate of the deceased or he held the same in trust for the rest of the family of Gathua Mwangi.

13. In my view the issues that the applicants are raising before me ought to have been raised in Thika SPMCSC No. 355 of 1982. I note from the testimony of the witnesses that they were unaware of what happened after Gathua Mwangi died, for the widows and a majority of the children were illiterate. That could explain why no action was taken by them to participate in Thika SPMCSC No. 355 of 1982 to advance their interest there.

14. I have noted that Kiambu CMSC No. 697 of 1995 was filed earlier to Thika CMSC No. 245 of 2009. Ideally, the applicants ought to have filed objections in Kiambu CMSC No. 697 of 1995 rather than filing Thika CMSC No. 245 of 2009. The issues that they raise in the instant application ought to have been addressed in Kiambu CMSC No. 697 of 1995. They say they were unaware of the earlier proceedings, and generally plead illiteracy. I am prepared to give them the benefit of the doubt, especially noting that the administrator in Kiambu CMSC No. 697 of 1995 has not responded to the application despite service.

15. There is an arguable case that the property, LR No. 13537/23, was family property held in trust by the deceased. It was incumbent on the administrator in Kiambu CMSC No. 697 of 1995 to prove that it was not. She was given the chance but chose to stay away. I am convinced on the basis of the material before me that the same was trust property.

16. Having so found, I need to consider whether I should revoke the grant in Kiambu CMCSC No. 697 of 1995.

17. The jurisdiction to revoke a grant of representation is given by section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The said provision states 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 the 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. ...’

18. What ought to be contained in the application for grant of letters of administration intestate is set out in Section 51(2)(g) of the Law of Succession Act and Rule 7(1)(e) of the Probate and Administration Rules. Section 51(2)(g) states as follows: -

‘An application shall include information as to – in cases of total or partial intestacy, the names and addresses of all surviving spouse, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased.’

Rule 7(1) (e) states as follows: -

‘...the application shall be by petition...supported by an affidavit...containing...the following particulars – 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 spouse or child, like particulars of such person or persons who would succeed in accordance with section 39(1) of the Act.’

19. Rule 7(7) of the Probate and Administration Rules, is also relevant, it states as follows:-

‘Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant representation intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –

a. renounced his right generally to apply for a grant; or

b. consented in writing to the making of the grant to the applicant, or

c. been issued with a citation calling upon him either to renounce such right or to apply for a grant.’

20. These provisions are in mandatory terms. There must be a full disclosure of all the survivors of the deceased as set out in the two provisions, whether or not they were to take a share in the assets that he or she died possessed of. All the categories of survivors set out in Section 51(2) (g) of the Law of Succession Act and Rule 7(1) (e) of the Probate and Administration Rules must be disclosed. Failure to disclose would be fatal to the grant. The complete disclosure of all the survivors, as envisaged in section

51 and Rule 7, is meant to cater for such situations as the one alleged in this case, that the deceased held property in trust, for his parents, siblings and others.

21. Section 66 sets out the preference to be given to certain persons to administer where the deceased died intestate. The provisions states as follows –

‘When the deceased has died intestate, the court shall...have a final discretion as to the person or persons to whom a grant of letters of administration shall...be made, but shall...accept as a general guide the following order of preference –

- a. Surviving spouse or spouses, with or without association of other beneficiaries;*
- b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*
- c. ...’*

22. If the property in question was trust property, as I have found in this judgment, it follows naturally that all the other members of the family of Gathua Mwangi ought to have been involved in the process as required by the relevant law. Failure to involve them made the process of obtaining the grant defective. The non-disclosure of the other family members would also mean that there was concealment of material information from the court. Ideally, the grant in Kiambu CMSC No. 697 of 1995 is fertile for revocation.

23. My perusal of the file in Kiambu CMSC No. 697 of 1995 discloses that the deceased died possessed of assets other than LR No. 13537/23. All these were distributed at confirmation. The cause in Thika CMSC No. 245 of 2009 deals with only one asset, LR No. 13537/23. A revocation of the grant in Kiambu CMSC No. 697 of 1995 and the upholding of the grant in Thika CMSC No. 245 of 2009 will mean that these assets, that is to say Gilgil/Karunga/Block 5/417 (Mikinye) and Gilgil/Karunga/Block 1/421, will remain undistributed as they are not listed in the schedule in Thika CMSC No. 245 of 2009.

24. I am satisfied that the applicants have established as case for revocation of the grant made in Kiambu CMSC No. 697 of 1995 for it was obtained on the basis of proceedings that were defective and there was non-disclosure of all the survivors of the deceased contrary to Section 51(2)(g) of the Law of Succession Act and Rule 7(1)(e) of the Probate and Administration Rules..

25. In view of what I have stated above, that the cause in Thika CMSC No. 245 of 2009 does not address the estate of the deceased in its entirety, for some of the assets making up his estate are not listed, I am persuaded that the grant in the Thika cause should also be considered. I believe the cause of justice would be met if the two causes are brought together and the estate distributed afresh.

26. The orders that I am disposed to make are as follows:-

- a. that the causes in Kiambu CMSC No. 697 of 1995 and Thika CMSC No. 245 of 2009 are hereby called up to the High Court and consolidated, and shall hereafter be handled under the cause file herein;**
- b. that the grants made in Kiambu CMSC No. 697 of 1995 and Thika CMSC No. 245 of 2009 are hereby revoked;**
- c. that orders in both causes confirming the grants are hereby set aside, and all transactions conducted on the basis of the said grants and certificates of confirmation of grant set aside or nullified;**
- d. that as the principal asset in the estate, that is to say LR No. 13537/23, is situated within Kiambu County, I do hereby order transfer of the instant cause to the High Court registry at Kiambu for

finalisation ;

e. that a fresh grant letters of administration intestate in respect of the estate of the deceased shall be made out of this cause by the Court at Kiambu to such persons as the said court shall appoint; and

f. that there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 1ST DAY OF JULY, 2016.

W. MUSYOKA

JUDGE