



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT CHUKA
MISC SUCC. NO. 3 OF 2016
(FORMERLY CHUKA SPM SUCCESSION CAUSE NO. 10 OF 2009)

IN THE MATTER OF ESTATE OF THE LATE NKOROI NGARI

AND

PHYLIS CIATHARAKA.....APPELLANT

- VERSU-

JORAMSON MUTEGI IKENDA.....RESPONDENT

J U D G M E N T

1. Nkoroi Ngari (“*the deceased*”) is said to have died in or about 1963 or 1968. He left Magumoni/Mwonge/415 (*plot No. 415*”). He left behind two widows who also died thereafter. On 3rd February, 2009, Joramson Mutegi Ikenda swore that the deceased was survived by Phylis Nkoroi, Ciambuba Nkoroi, Jemimah Thathi and Oliver Ciambuti all who were deceased and he was the deceased’s grandson and the only surviving beneficiary. That Affidavit in lieu of a death certificate for purposes of commencing these succession proceedings. On the same date, Joramson Mutegi Ikenda (hereinafter “*the Petitioner*”) petitioned for the grant of Letters of Administration Intestate for the estate of the deceased. In form No. P& A5, he indicated that all those survivors of the deceased were dead and he as the grandson of the deceased was the only survivor, and beneficiary. He disclosed Plot No.415 as the only asset constituting the estate.

2. On 20th March, 2009 a grant was issued to the Petitioner which was subsequently confirmed on 27th May, 2009 and plot No.415 distributed to one Erick Mugungi Simon (0.50 acres) and the balance to the Petitioner.

3. On 10th February, 2016 Philis Ciatharaka Kirimo (hereinafter “*the Applicant*”) applied for the revocation of the grant. She contended that the succession cause was lodged Nkoroi and Gakirue Nkoroi. That the deceased was blessed with six children all who have died. That in 2009 when the Petitioner commenced the Succession two children of the deceased, herself and one Oliver Ciambuti, were still alive. That Oliver Ciambuti died on 26th November, 2015. She denied that the Petitioner was either grandchild of or in anyway being related to the deceased. That the Petitioner had been prosecuted and convicted to one (1) year probation in Runyenjes Criminal Case No. 738 of 2009 for having fraudulently lodged and prosecuted this Succession cause. She maintained that the Petitioner had lied to court in the documents he filed in these proceedings as she was still alive and not dead. Justus Mutegi Mboa (PW₂) a

73 year old man of the Chuka sub-tribe told the court that under Chuka customs, the property of a deceased parent inherited by his children. He was unaware of any circumstances under which such property is to be inherited by an outsider. In cross-examination he denied that the Petitioner had buried either the deceased or any of his wives. He admitted knowing the Petitioner but denied that he had any relationship with the deceased.

5. The Petitioner (RW1) testified that the deceased was a brother to his father done Gitemba Ikenda. That while his father buried the deceased, the Petitioner buried the deceased the deceased's widows when they died. That before the deceased died, he had bequeathed him his property. That he had lived in the estate property for 30 years. In cross-examination he admitted that he was not a grandson of the deceased. He denied that he had indicated that all the children of the deceased were dead since the Applicant and her brother Oliver were alive in 2009. He admitted not having informed them about the Petition and that he applied for confirmation in less than six (6) months. That he was 15 years and alone when the deceased bequeathed him his properties in 1960 including the beehives, goats and cows. That before he occupied plot No.415 he was living in his father's land. Abon Bainsi Mbutu (RW2) testified in support of the Petitioner Case. He told the court that he comes from the same clan as the Applicant and the Petitioner. That the deceased was buried by the Petitioner's father while the Petitioner buried the deceased's widows. That according to Chuka tradition, it was the Petitioner who is entitled to inherit the property of the deceased. In cross-examination, he stated that under Meru customs it is the person who buries another who inherits his property.

6. Having considered the evidence on record, the following are the issue for determination; firstly, whether the deceased bequeathed the Petitioner his property; Secondly, should the grant be revoked, thirdly, who are the beneficiaries of the deceased and finally how the estate of the deceased should be distributed.

7. On the first issue, it was the Petitioner's testimony that before the deceased died, he had bequeathed all his properties to him. He stated that the bequest was made to him in 1960 when he was 15 years. That deceased gave him his beehives, cows and goats. That he was alone when the bequest was made. Section 9 (1) of the Law of Succession Act Cap 160 (hereinafter "*the Act*") provides:-

“9 (1). No will shall be valid unless-

a. it is made before two or more competent witness; and

b. the testator dies within a period of three months from the date of making the will:

.....

8. For an oral will to be valid, the same must be made in the presence of two (2) witnesses and the deceased must die within three (3) months of making the will. In the instant case, the Petitioner told the court that he was alone when the oral will was made; that it was made in 1960 and the deceased died in 1965. It is therefore clear that the said will did not satisfy the provisions of section 9 of the Act. Accordingly, if there was any bequest, the same fell short of the law and cannot therefore stand.

9. The second issue is whether the grant should be revoked. The Petitioner and his witness admitted that in 2009, the Applicant and her brother one Oliver Ciamboti were alive; that although they were children of the deceased he did not consult them before lodging the Petition in this cause. He admitted that he was not a grandson of the deceased as he indicated in the Petition. As if this was not enough, while he indicated in the form No. P& A 5 that all the children of the deceased, it turned out that as at 2009 the Applicant and one of her brothers who has since died were still alive. In this regard, it is clear that there was concealment of material facts; that the statements contained in the Petition were false and that the grant was obtained fraudulently. Section 76 of the Act provides:-

“ S76. A grant of representation, whether or not confirmed, may 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."

In view of the foregoing, there is sufficient material to show that the grant was obtained fraudulently, was based on false statements and that the Petitioner concealed material facts from the court. The grant cannot stand. It is for revocation and it is hereby revoked.

10. The other issue is who are the beneficiaries of the deceased? The Applicant's case is that as the deceased's daughter she was the sole beneficiary entitled to inherit her father's land. On the other hand, the Petitioner testified that he was the one entitled to inherit the property under Meru customs; that he had buried the deceased and his widows and under Chuka customs, he was the correct beneficiary. This version was supported by RW₂, Abon Mbaini Mbutu.

11. Firstly, neither the Petitioner nor his witness claimed to be experts in Chuka or Meru Customary Law. This court is not satisfied that any custom to the effect that he who buries another inherits his property was proved. The existence of this custom was disputed by Justus Mutegi Mboa (PW₂) who told the court that he was a 73 year old man of the Chuka sub-tribe. Secondly, if there exists such a custom, the same will fall foul with the Law. The law of Succession Act has made elaborate details on who constitutes a beneficiary and a dependent of a deceased person under Sections 26 to 39 of the Act. Indeed section 39 of the Act sets out the priority of beneficiaries and there is no room for tribal customs recognized thereunder. In any event, both under Article 159 of the Constitution and section 3 of the Judicature Act, customary law applies if it is not in conflict with statute and is not repugnant to justice and morality. A custom that will disinherit children of a deceased person arbitrarily such as the one propagated by the Petitioner is not only illegal but unconstitutional.

12. Further, I did not find the Petitioner to be truthful. His testimony was full of contradictions. In form No. P & A 5, he indicated that he was a grandson of the deceased and the only one surviving him as all the named children of the deceased were dead. He later admitted that that was false. He stated in his affidavit that his entitlement to inherit the property of the deceased was based on the fact that he had buried the deceased, he admitted in court that he was not the one who buried the deceased. That he only buried his widow. He swore that the deceased died in 1968, yet in court he stated that he was bequeathed the deceased's property in 1960 and the deceased died in 1965! With such contradictions, the Petitioner cannot be believed at all.

13. Accordingly, under section 39 of the Act, this court finds that since there was no dispute whatsoever that the Applicant was a daughter of the deceased and was the only alive. In this regard, the Applicant is the beneficiary of the estate of the deceased.

14. Having found that the only beneficiary of the estate of the deceased is the applicant;

I make the following orders:-

a. The application is allowed. The grant issued to the Petitioner is hereby revoked and all other consequential orders set aside.

b. The property known as LR Magumoni/Mwonge/415 is distributed to Philis Ciatharaka Kirimo wholly.

c. Costs to the Applicant in any event.

It is so decreed.

DATED and delivered at Chuka this 3rd day of November, 2016.

A.MABEYA

JUDGE