



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 1073 OF 2008

IN THE MATTER OF THE ESTATE OF WAMBURU WAMUNYU (DECEASED)

NEHEMIAH KABERI NJUIOBJECTOR/APPLICANT

- Versus -

NGAMI WAMBURU PETITIONER/RESPONDENT

R U L I N G

1. Nehemiah Kaberi Njui (hereinafter the Objector) filed summons in respect of the Estate of Wamburu Wamunyu, the deceased, who died on 26th May 2003, seeking for an order that the confirmation of grant made to the Deceased's widow Ngami Wamburu (hereinafter the Petitioner), on the 11th October 2006 by the High Court at Nairobi in the succession cause No. 2729 of 2005, be revoked and/or annulled. The grounds he advanced were that the said grant was obtained fraudulently by concealing material facts from the court; that the Petitioner carried out the succession process very secretly, in conspiracy with her immediate family and without informing the Objector who is a beneficiary and lastly, that the grant was obtained by means of untrue allegations of facts essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
2. In his supporting affidavit the Objector averred that the proceedings herein arose out of **Nairobi High Court Succession Cause No 2729 of 2005** which was filed secretly by the Petitioner herein who was the Respondent. His application for revocation of grant was supported by other beneficiaries namely, George Ngigi, Harrison Gathogo Njui, Jenifer Wanjiku Wanjiru, Mariam Muthoni, Joel Mungai Njui, Nehemiah Kaberi Njui and Alice Nyathira Njui.
3. The objector deponed that the land in question is parcel No. Chania/Makwa/1157 which was registered in the name of the Deceased.

That another cause relating to the Estate of the Deceased had been filed in Thika Chief Magistrate's Court being **Succession Cause No.496 of 2006**, in ignorance of the one filed herein. That in the cause in Thika all the dependants of the deceased including the Respondent herein were included. That they became aware of the on-going Succession Cause in the High Court when they were served with an application to strike out the petition in the Thika Chief Magistrate's court.

4. The Objector called two witnesses. In his affidavit sworn on 25th May 2009 the first witness Michael Muriu Muiruri, stated that before 1957 the suit land belonged to one Kaberi who had two

sons namely; Gathogo Kaberi the Objector's grandfather and Wamburu Kaberi the Petitioner's husband. That during demarcation the land was subdivided and registered in the name of Wamburu Kaberi who was of age and the only surviving son since Gathogo Kaberi was already deceased by that time. That Wamburu Kaberi was to hold the land in trust for Gathogo's family. The Objector asserted that Gathogo's grand children by his daughter Wanjiru Gathogo and who include the Objector are therefore entitled to the share due to his estate.

5. The Objector stated in the affidavit dated 25th May 2009 that the deceased was registered to hold the suit land in trust for himself, his immediate family and the family of Gathogo Kaberi his brother. That the deceased later maliciously changed his name from Wamburu Kaberi to Wamburu Wamunyu and in 1980 after the Clan's decision of 1974, he sold 0.4 acres out of 3.4 acres as disclosed in the green card No. 623 attached to the affidavit.
6. In a further affidavit filed on 11th March 2011, Muiruri stated that in 1974 the clan subdivided the land physically although the subdivision was not registered, so that Wamburu could surrender his brother's (Gathogo) share to his two children, Gabriel Tuchuhi and Wanjiru Gathogo (mother to the Objector), who are now deceased. That since then and even prior to that time Gathogo's family were in possession of their designated part of the land parcel No. Chania/Makwa/115, but during demarcation the land had been registered in the name Wamburu Kaberi since he was the only family member who had attained the age of majority by then.
7. The Petitioner/Respondent, in answer to the Objector's supporting affidavit, deponed that the Objector and the other persons named in paragraph (3) of his supporting affidavit are not beneficiaries of the Estate of the deceased since they are distant relatives, because their grandfather was the deceased's brother. She denied having filed High Court succession cause No. 2729 of 2005 secretly and averred that she included the correct beneficiaries to the Estate of the Deceased who are Paul Gathogo Wamburu, Wamburu Wamuhu, Michael Ngugi Wamburu, Francis Kairuki Wamburu, Teresia Njoki Kabaya and herself.
8. The Petitioner/Respondent further averred that the Deceased was registered absolutely as the proprietor of parcel No. Chania/Makwa/1157 and did not hold the suit land in trust for any other person, including his extended family, especially the family of Gathogo Kaberi, the grandfather of the Objector. That the Objector filed **Succession Cause 496 of 2006** in Thika after the Petitioner had already obtained a certificate of confirmation of Grant from the High Court on 11th October, 2006.
9. The Petitioner/Respondent in her further affidavit in reply asserts that the letter dated 15th October 2003, written by the area Chief, which the Objector referred to as proof that his family is entitled to her husband's Estate was written with her knowledge, on condition that the Objector would give her Kshs.2,000/=, one he-goat and one tin of honey as instructed by her husband before his death. That since the Objector failed to comply she requested the chief to write another letter indicating only the true beneficiaries who were entitled to her husband's Estate, and that is the letter she used to petition for the grant.
10. The Petitioner/Respondent further avers that she requested the chief to cancel the letter dated 15th October 2003 because after they left the Chief's office together with the Objector's family, the Objector seemed to form the wrong notion that they were equals in sharing her late husband's Estate.
11. The Petitioner/ Respondent depones that when she got married in the 1940s she found her husband and his brother called Gathogo Kaberi. That although delineation and demarcation had not yet been done the two brothers had distinct and undisputed pieces of land identified as owned by each because they tilled and cultivated them. That Gathogo sold all his parcel of land and moved to settle in Embu sometime between 1944 and 1948, leaving nothing behind which could be said to have been held in trust for his family. That during demarcation Wamburu only consolidated and registered in his name those parcels that were identified as his. He did not

therefore, hold them in trust for any of his family members.

12. The Petitioner/Respondent was categorical that the parcel of land her late husband intended to give to Gathogo Njui in the presence of the elders measured only 0.25, and that he did this out of the benevolence of his heart for a grandson of his brother and not because the grandson was entitled.
13. Mr. Karanja Kangiri learned counsel for the Objector submitted that the Petitioner filed succession cause No. 2729 of 2005 secretly in the High Court Nairobi in which the Objector and his siblings were disinherited. Mr. Kangiri pointed out that Petitioner/Respondent, during cross examination, stated that she did not know that her deceased husband Wamburu Wamunyu had a brother, one Gathogo Kaberi who died in 1940's. That she was not able to explain why the local chief authored the letter dated 15th October 2003 and why she declined to file a petition using the said letter and chose to run away to a faraway Nairobi High Court, instead of Thika law courts to which the 2003 letter was addressed. That Petitioner was not able to explain why the deceased relatives of Gathogo Kaberi are buried on the land parcel No. Chania/Makwa/1157.
14. Mr. Gachoka Mwangi learned counsel for the Petitioner/Respondent submitted that the summons ought to be dismissed as it did not meet the threshold of requirements. That the Objector did not prove that the Respondent obtained the grant by means of fraud or by concealing material facts.
15. Mr. Gachoka asserted that during the hearing it emerged that the Petitioner/Respondent committed none of what was alleged. That infact the Objectors were trying to enforce an act of generosity extended to their mother by the deceased herein since, during her lifetime, she kept running away from her matrimonial home yet her father (Gathogo Kaberi) had no land or home where she could run to, in such times of turmoil in her marriage. That there is nothing in the title to show that the present registered owner was registered in trust for their grandfather Gathogo Kaberi and there is no proof that the said grandfather is actually deceased. Mr. Gachoka asserted that the position was that Gathogo Kaberi sold his parcel of land before he moved away.
16. I have considered the summons before the court together with the affidavits for and against, as well as the rival submissions of the respective parties and concluded that the question for determination before this court is whether the Applicant/Objector together with his siblings are entitled to a share of the Estate of the deceased and whether for reason of their non-inclusion in the list of beneficiaries the grant issued herein should be revoked and/or annulled.
17. The circumstances that can lead to the revocation of grant have been set out in **Section 76 Law of Succession**. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.
18. A grant may also be revoked if the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the Estate. See - **Matheka and anor v Matheka [2005] 1 KLR pg 456**. It may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.
19. The clear provisions of **Section 66 Law of Succession** are that when a deceased has died intestate, the Court shall, save as otherwise expressly provided, have the final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made. The court shall however, without prejudice to the said discretion, 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 of the Law of Succession Act;

(c) The public trustee; and

c. Creditors.”

20. In the summons before me the Petitioner/Respondent, being the widow of the Deceased has priority in filing for grant of representation. In the elders’ meeting of 8th September 2002 the elders appear to have been confirming that the portion of land given to Gabriel Tuchui Gathogo by the Deceased herein, would devolve to the children of his sister, since Tuchui had already died leaving behind no wife or children to inherit it. There is therefore no evidence that the elders apportioned the suit land equally between the Deceased and his long lost brother Gathogo Kaberi.

21. The portion that the elders concerned themselves with was the one the Deceased gave to Gabriel Tuchui Gathogo when the young man returned with his sister Margaret and introduced themselves as the children of the Deceased’s brother and reported further that their father and mother were both dead.

22. It would appear from the evidence on record that when Gathogo Kaberi left home in the 1940’s he intended to relocate permanently to Embu. He does not appear to have communicated with anyone at home at all after he left, and he was never seen again in that home. There is no evidence that the land registered in the name of the Deceased during demarcation, was to be held in trust for any other family member since the Deceased’s father had already died and Gathogo Kaberi had relocated to Embu.

23. From the foregoing I am persuaded by the arguments of the Petitioner/Respondent that the piece of land given by the Deceased to Tuchui Gathogo when he returned with his sister was given out of filial duty to provide for his brother’s orphaned children and not as a matter of right. From the evidence of the objector, it is not clear whether his position is that the suit land was registered in the Deceased’s name because Gathogo had already died or because only Wamburu had obtained the age of majority at the time. In any case Gathogo had already relocated to Embu.

24. In my considered view the entitlement of the children of Margaret Gathogo is that portion which had been given to Tuchui Gathogo if they fulfil the conditions imposed by the Deceased thereto. The elders reasoned that they were entitled to this portion because their own father never made the mandatory visit to their mother’s home nor paid dowry for her. He was therefore not considered to have married her. This explains why both Tuchui and Margaret were buried in the Deceased’s land when they died.

25. In sum, the objector has not placed before this court evidence to prove the existence of a trust relationship between the Deceased and his brother Gathogo Kaberi. There is also no evidence that Gathogo Kaberi is Deceased and it is not disputed that the objector and his siblings do not reside on the suit land. The parties’ may however transfer the portion of land measuring 0.25 acres, on the conditions imposed by the Deceased and confirmed by the elders.

For the foregoing reasons, the summons dated 23rd August 2008 is found to be lacking merit and is hereby dismissed, with no orders as to costs.

SIGNED DATED and DELIVERED in open court this **8th day of July 2015.**

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L. A. ACHODE

JUDGE