



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 123 OF 2001

IN THE MATTER OF THE ESTATE OF

M'INIU M'AMAI.....(DECEASED)

M'MAITIMA M'INIUPETITIONER

VERSUS

JUSTUS KARIGICHA KANYAMU.....OBJECTOR

J U D G M E N T

The objector JUSTUS KIRIGICHIA KANYAMU through an application brought under Section 76 of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules dated 14th August, 2003. The objector was seeking several reliefs, some of which were granted by the court and the application set down for proceedings to hearing by way of viva voce on the main prayer seeking revocation of the grant and appointment of the objectors as the legal administrator of the deceased estate. The application is grounded on the grounds on the face of the application interalia:- That succession cause was filed secretly without the knowledge of the applicant. That the grant was obtained by means of untrue allegations of facts essential on the part of law amongst other grounds. The objector had on 22nd October, 2003 filed answer to the petition and a cross petition which was not pursued as the grant had already been confirmed before determination of the same.

The objector in support of his objection gave evidence and called two witnesses. The objector gave evidence as PW1. He testified briefly that the petitioner was his step-brother and the estate subject of Succession Cause was of his late father. That the dispute was over Ntima/Ntakira/1888 measuring ½ of an acre. That the deceased had before his death distributed all his lands to all his sons save plot Ntima/Ntakira/1888. That the deceased used to stay on plot 1888 neither the objector was also living and that it was his father's desire that he inherit the said portion. He averred that he has no idea about Koome and that he does not know him and one Margaret Karuku. He claimed that he was not informed of the filing of this cause and that the petitioner fraudulently obtained the deceased death certificate. He prayed that plot Ntima/Ntakira/1888 be given to him. PW2 introduced himself as brother to the objector and stepbrother to the petitioner. His evidence is that his father had two wives, four sons and he distributed his land to his sons before his death leaving Ntima/Ntakira/1888 in his name but continued to live there with the objector as he was taking care of the deceased. He averred that he was not aware when the Succession Cause was filed and that the same was filed without his consent. He testified that he does not know Koome M'Iniu nor one Margaret Karuku. He further testified that he had not known one Koome M'Iniu. He averred that his father wanted the objector to take land Ntima/Ntakira/1888. PW3 a friend of

the objector testified that the deceased had two wives, four sons and six daughters. That the deceased gave out his lands to his sons remaining with ½ an acre which he desired to give to his son who would care for him during his old age. He testified that he does not know Margaret Karuku nor Koome. He stated as the objector took care of the deceased it would be proper to have plot Ntima/Ntakira/1888 given to him.

The petitioner died before he had given evidence and was substituted with his sister Salome Kathambi who gave evidence and called three witnesses. The petitioner gave evidence as DW1. She testified that the initial petitioner was her step-brother whereas the objector is her real brother. That her late father M'Iniu M'Amari had 5 wives. She gave the names of the deceased's 5 wives and the respective names of all the deceased children from each house. She testified that the 5th wife Karimi was mother to Koome. That the deceased had shared all his lands according to three houses in respect of the 1st, 2nd and 5th wife, each wife getting land for herself and her children so as to share the same amongst her children. She produced official search to show the objector got Ntima/Ntakira/1889. She testified that the 5th wife was living at Kithoka with the deceased on land Ntima/Ntakira/1888 where upon the death of 5th wife she was buried. She averred that the objector Kanyamu was given Ntima/Ntakira/1889 by the deceased after he was chased from the family land by his brother Gichuru. She went on to confirm her father had a son called Koome with the 5th wife. She stated the son was living at Kibirichia with his sister Nkaimura. That Koome passed on after he was attacked by mob at Tigania and he was married with 3 children. His wife was called Margaret Karuku. That following the death of PW2's father the objector buried him the following day without involving other family members and entered on plot Ntima/Ntakira/1888 and ploughed over the deceased 5th wife grave. She testified that Ntima/Ntakira/1888 should go to Koome as it had been allocated his mother for her own use and that of her children. That the other family member's attempts to put Koome's family into possession of Ntima/Ntakira/1888 were thwarted by the objector leading Koome's family to continue to stay at Kibirichia. That Chief summoned the deceased family and the objector also attend so as to seek confirmation of the grant. That all were aware Ntima/Ntakira/1888 had been given to the 5th wife and her son Koome. She reiterated that Koome was son to the deceased contrary to the allegation by the objector that he was a stranger. She prayed that the grant should not be annulled or revoked stating that she has no grudge with the objector. DW2 a neighbour and a clan member by the deceased testified that he knows all parties in this cause. That the deceased had 3 wives and that he shared his lands to his children and wives. That the objector was given a portion of land from the land of the deceased's youngest wife and she remained with the balance for her children. He stated that the objector uses Koome's land by force. That the clan dealt with the issue and assisted Koome's family to put up a house and when that was happening DW2 was Assistant Chief of the area. He stated that objector's land, one Kanyamu is Ntima/Ntakira/1889 and Ntima/Ntakira/1888 belongs to Koome's family.

DW3 Chief of Ng'onji location initially chief of Ntakira testified to the effect that he knew the family of M'Iniu M'Amari and that he issued a letter for the family to petition for this grant. That Margaret wife of Koome and former Assistant Chief together with Koome's children informed him that they wanted to construct a house on Ntima/Ntakira/1888 but were stopped by Kanyamu the objector. That he met deceased family with clan members at the land in question and after deliberations all family members conceded that Koome was son of M'Iniu M'Amari. That the clan members present supported all family members. That it was resolved that the wife and children of Koome should construct on the land and that Ntima/Ntakira/1888 should go to Koome's family. DW3 then issued a letter dated 5/12/2000 in the presence of Kanyamu, the objector and other family members of the deceased. That the objector later refused Koome's wife to construct on Ntima/Ntakira/1888. That the family members agreed M'Maitima M'Iniu to petition for the grant in presence of Kanyamu, the petitioner. DW4 wife of Koome in her evidence stated that the deceased was known to her and was her father-in-law. She testified that she was wife of Koome and was married in 1979 while she had 3 children, however their union was blessed with 3 more children and gave their names. That they cohabited together as man and wife at his sister's place. She stated that Koome was burned in a house beyond recognition.

I have carefully considered the application, the evidence of both the objector and his witnesses and that of the petitioner and her witnesses. The written submissions by both counsel and authorities in support of

their differing positions. The issues for determination in this cause can be summarized as follows:-

1. ***Whether the deceased M'Iniu M'Amari had more than two wives and a child called Koome?***
2. ***Whether the object has established sufficient grounds to enable the grant of Letters of Administration to be revoked or annulled?***
3. ***Whether a fresh grant of representation should issue and to who?***

The objector and his witnesses stated that the deceased had two wives, four sons and six daughters. DW1 in her evidence she stated that her father had five wives, gave their names and children of each respective house. DW2 stated that the deceased had three wives and gave their names. DW3 and DW4 supported the evidence of DW2 and DW3. The petitioner and her witnesses corroborated each and all agree that the deceased had more than 2 wives. They stated the youngest wife was a mother of a child called Koome. The said wife is said to have been buried at Ntima/Ntakira/1888. The objector did not controvert the existence of more than one wife to his deceased father nor the burial of Koome's mother at Ntima/Ntakira/1888. The chief's letter was as per DW1, DW2, DW3 and DW4 written in presence of the objector and other family members including clan members and Margaret Karuuku M'Amiru wife of the deceased son of M'Iniu. The same was not challenged when the Chief DW4 gave evidence before the court. DW1 explained in detail about her further marital status and gave all the names of her father's wives. I believe the petitioner and her witnesses were telling the truth that the deceased was married to more than two wives and that he had a son called Koome from the 5th wife.

On the second issue the objector's contention is that the petition was filed secretly without his knowledge and was obtained by means of untrue allegations of facts essential on the part of law. PW1 stated that he was not aware of the filing of the Succession Cause. Similarly PW2 stated he was not aware of the Succession cause and his consent was not sought, however DW1, DW2, DW3 and DW4 testified that the objector and other family members were notified of the filing of the Succession Cause and the letter introducing the deceased family to the court was issued by DW4 in presence of all family members who never raised any objection including the objector. I believe the petitioner and the witnesses were telling the truth and I find that the Succession Cause was not filed secretly and without the knowledge of the objector. The objector had knowledge of the filing of the petition and if he was not in agreement with the other family members he was made aware of the filing of the petition in advance.

Rule 26(1) of the Probate and Administration Rules provides:-

“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”

The above rule is clear that before the letters of Administration is granted to any applicant notice should issue to every other person entitled in the same degree as or in priority to the applicant. The evidence on record for DW1, DW2, DW3 and DW4 clearly points that the objector and all family members had notice for the deceased petitioner.

On the ground of obtaining grant by means of untrue allegation of facts essential on the part of the law the same should not only have been pleaded but also particularized in the grounds on the face of the application or in the supportive affidavit. That notwithstanding the facts alleged by the objector in support of his application were disputed by the petitioner and the same were not proved and I further find and hold even if the allegation had been true, the same would not have been sufficient to require the revocation or annulment of the grant that had been sufficient to require the revocation or annulment of the grant that had otherwise been otherwise properly given by the court. Furthermore out of several children of the deceased only the objector who had been given Ntima/Ntakira/1889 comprising of 0.405 hectares is the only person claiming Ntima/Ntakira/1888 due to the family of Koome. I find the objector had not established sufficient grounds to enable the grant of letters of administration to be revoked.

Having come to the above conclusion I find and hold that as M'Maitima M'Iniu is deceased and was substituted by SALOME KATHAMBI it would be in the interest of justice that temporary grant issued to the said M'Maitima M'Iniu be rectified together with the confirmed grant by deleting the name of

M'Maitima M'Iniu and have the same issued in the name of Salome Kathambi and the land number Ntima/Ntakira/1888 be registered in the name of Margaret Karuku M'amuru.

The upshot is that the objector's application is dismissed and I proceed to make the following orders:-

- 1. That P&A 41 issued on 25th April, 2002 and confirmed grant issued on 22nd July, 2003 be and are hereby rectified by deleting the name of M'Itima M'Iniu and M'Iniu M'Mai respectively and substituting the same with the name of SALOME KATHAMBI.**
- 2. That land Ntima/Ntakira/1888 to remain in the name of Margaret Karuku M'Amuru.**
- 3. The objector's objection be and is hereby dismissed.**
- 4. The objector to meet costs of this cause.**

DATED AT MERU THIS 11TH DAY OF JUNE, 2014.

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:

- 1. Mrs. Ntarangwi for the petitioner**
- 2. Mr. Kaimenyi for the objector**

J. A. MAKAU

JUDGE