



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCC. CAUSE NO. 169 OF 2013

IN THE MATTER OF THE ESTATE OF ELIJAH M'IMANYARA NTHAI.....DECEASED

M'MUGAMBI M'MAINGI.....PETITIONER/RESPONDENT

VERSUS

MAINGI M'ITHINJI.....OBJECTOR/APPLICANT

J U D G M E N T

1. The objector MAINGI M'ITHINJI through an application dated 30/5/2006 brought pursuant to Section 71(2) and 76 of the Law of Succession Act, Rule 44 of the Probate and Administration Rules sought annulment of the grant herein and for orders of inhibition under Section 128 of the Registered Land Act on the grounds that the petitioner M'Mugambi Maingi filed the Succession Cause secretly and without seeking the objector's consent, that the objector had filed another Succession Cause No.30/1998 which is pending confirmation of grant concerning the same estate and that the petitioner herein had conceded the fact that the objector is his only brother living on the land and occupying half of the portion. The objector filed supportive affidavit dated 30th August, 2006 in support of the application. The court granted orders of inhibition on 14/6/2006 pending the hearing of the application on 21st June, 2006. The petitioner filed replying affidavit dated 27th November, 2007.
2. That on 21st May, 2007 directions were given to the effect that the application for revocation of the grant dated 30th May, 2006 be heard by way of viva voce evidence and limited to the distribution. The objector in support of his application gave evidence and called two witnesses whereas the petitioner gave evidence and called two witnesses as well. That after the close of the parties respective cases court directed that parties do file written submissions in support of their respective positions in the matter and get a date for highlighting, however when the matter came up for highlighting both counsel opted not to highlight on their submission but sought for a judgment date.
3. The court has carefully perused the pleadings, the evidence by the respective parties, and submissions by the parties advocates and the issues for determination can be summarized as follows:-
 - a. *Whether the objector has established sufficient grounds to warrant revocation or annulment of the grant?*
 - b. *Who should in case the grant is revoked be appointed the administrator or administrators?*
 - c. *How should the deceased estate be distributed?*

4. The objector's case is that the deceased was father to both the petitioner and objector and he was the proprietor of Abogeta/Kithangari/91 measuring 1.22 acres which he had not distributed to his sons when he gave the objector Abogeta/Kithangari/390 and the petitioner Abogeta/U-Kithangari/304. That their father intended that Abogeta/Kithangari/390 be shared equally between the two. The objector testified that he works at that land and has coffee, macadamia, yams, bananas, Meru oak, trees, and gravellia trees and that their respective portions are clearly demarcated and have been using the land since their father died and none interferes with the others. That portion the petitioner filed this cause without informing the objector and he got to know of it through a relative who told him about it hence he lodged a caution as the objector was not included in the distribution but instead the petitioner distributed the land to his two sons Muriungi and another one, went on to sub-divide the land. He denied that he has a bigger portion than his brother which was gifted to him by his father at his own discretion and that the petitioner did not complain then or at any time during the lifetime of their father.
5. The objector's two witnesses JUSTUS M'ITHINJI and TARCISIOUS MUTWIRI described themselves as cousin and grandson to the deceased respectively. They testified that on 15th August, 1976 they were called together with the deceased two sons, four daughters and other family members by the deceased to witness his subdivision of his land amongst the objector and the petitioner. That amongst those who attended apart from the deceased children included Salesio Kaburu, Mboroki Kirima, M'Marete, M'Mwirichia Karuka, Daniel Mutwiri Mburugu, Bendan Koome M'Mboroki M'Miriti Ntabo amongst other members of family. The witnesses testified that the deceased showed them the boundary between his two sons lands running from the home to the valley which had live fence with poles which is still there to date. That since then each of the sons uses the land separately as shown by the deceased. The objector has coffee, yams, bananas and fruit trees on one side whereas the petitioner utilizes his late father's yams, and bananas. The witnesses testified when the deceased had shared his other lands amongst his sons he effected transfer into their names and that the only land in dispute is ABOGETA/KITHANGARI/91.
6. The petitioner's case is that the objector is his elder brother and that they had 4 sisters. That his father gave him 2 acres and his brother 3.35 acres, he produced register as exhibit P.1 over Abogeta/U-Kithangari/390 being a portion given to the objector and Exhibit P2 Abogeta/U-Kithangari/304 given to himself. The petitioner testified that the deceased kept the disputed land for himself being Abogeta/U-Kithangari/91 and said he had given it to the petitioner because he had given him 2 acres. The petitioner testified that was done in presence of the sisters and the objector in 1978 when the deceased was sickly. He averred the objector's witnesses were not there at that time.
7. The petitioner's witnesses Virginia Wanja Nthuranira and Celena Muthamia are daughters to the deceased. They testified that the deceased shared his lands amongst the two sons leaving himself with one acre. That the objector was given 3.30 acres and petitioner 2 acres and the daughters were not given anything but deceased said that his one acre be given to the petitioner upon his demise because the petitioner had been given 2 acres. PW2 stated that she was there with all the deceased other children and their uncle Kabiti and another Solomon Mboroki. That their father died 3 months after making of the will. PW3 Celina Muthamia testified that in a year she could not recall her father said that upon his death his one acre should go to the petitioner. That was said in presence of their uncle SOLOMON MUROKI, and BIDAN MIRITI. The petitioner did not in his evidence mention there being any other members of family or any other people at time the oral will was made. PW2 Virginia Wanja Thuranira testified the oral will was made on a date she could not recall, in presence of all her siblings and in presence of their uncle Kobiri and others including Solomon Mboroki. PW2 testified that his father died 3 months after making of the oral will. PW2 testified that the petitioner called them before petitioning for the grant and the objector was present. PW2 testified none of the deceased daughters are claiming anything from the deceased estate. PW3 in her evidence was in agreement with PW2 save on the size of land given to the objector. She stated the objector was given 5 acres whereas petitioner was given 2 acres. PW3 testified she was present when the deceased said that the objector should get his one acre

upon his demise.

8. The objector in his application avers that this cause was filed secretly without his consent and that the petitioner concealed material facts that the objector was his brother. The objector in his evidence was categorical that he was not notified of the filing of this cause but learnt of it from a family member. The objector in his replying affidavit has averred that his brother knew about the petition during the time he filed it. He did not in his evidence mention anything to do with notifying the objector of petitioning for the grant. He did not state that he gave any notice to his brother or filed a citation for the objector to accept or refuse the grant. None of his witnesses gave any tangible evidence to show that the cause was filed with notice to the objector. Rule 26(1),(2) of the Probate and Administration Rules states:-

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. An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

9. Having considered the requirements under Rule 26(1),(2) of the Probate and Administration Rules and the evidence before this court I am satisfied that the petitioner did not comply with the above rule but proceeded to file this petition without notice and knowledge of the objector. The court record reveals that whereas the petitioner sought renunciation of right to prove oral will from Celina Muthamia, Agnes Kathiru Marete, Virginia Wanja, he did not seek any from the objector. The petitioner did not disclose to the court that the objector was a heir to the deceased estate. Similarly the petitioner in his application for confirmation of grant, he did not list the objector amongst the deceased heirs or dependants nor did he obtain his consent to the mode of distribution and the confirmation of grant incomplete breach of Rule 40(8) of the Probate and Administration Rules which provides:-

Rule 40(8) of the Probate and Administration Rules provides:-

“40(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit”.

10. I therefore find that the petitioner obtained the grant through concealment of material facts. The petitioner acted fraudulently and I am satisfied that the objector has established sufficient grounds to warrant the revocation of the grant made to the petitioner.
11. The court by virtue of section 66 of the Law of Succession Act has discretion to determine who should be the administrator or administrators. From the evidence in this cause I find that both the objector and petitioners have conflicting interest. I am of the opinion that their interests would best be served by appointing both, the objector and petitioner as joint administrators.
12. Having considered all the contents of the petitioner’s affidavit and his evidence together with his witnesses there is no denial that there is a clearly marked boundary between the portion occupied by the objector from that of the petitioner and that the objector is in occupation and possession of the ½ of suit land. The objector’s occupation and possession presupposes that he has a beneficial interest otherwise the petitioner would not have let him to have continued enjoying possession of the land all the years since their father passed on in 1978. The petitioner in his own document filed

at the time of petitioning for the grant referred to “petition for proof of oral will” and “affidavit of attesting witness of oral will” by Bedan Miriti Kairu”Renunciation of right to prove oral will” by Virginia Wanja Thurair, Celina Ngeta, and Mrs Agnes Kithiru specifically deponed that the deceased oral will was made on 25th December, 1978 and the deceased passed on 28th December, 1978. The contents of the aforesaid document contradicts the evidence of petitioner who testified that the oral will was made in 1978 on a date that he did not disclose. PW2 and PW3 did not disclose the date but in their evidence they averred that the oral will was made between 3 and 2 months before the deceased death yet in their affidavits which I have referred to they stated it was made on 25th December, 1978 three (3) days before the death of the deceased.

13.The objector and his witnesses have contradicted one another as to who was present at the time of the oral will. Their evidence is not only contradictory but full of inconsistencies therefore unbelievable. The Petitioner though aware that the objector in his affidavit dated 30th May, 2006 under paragraphs 12 and 13 had deponed that he is currently living and working on the suit land and has coffee trees, tea bushes, have a clearly marked boundary between the objector and the petitioner on the said land he did not in his affidavit dated 29th October, 2012 controvert his siblings affidavit. The objector and his witnesses denied there being an oral will and stated that the land was shared by the deceased in presence of all his siblings and their witnesses on 18th August, 1976 and he has since been in occupation and possession of the suit land without any complain by the petitioner. The petitioner did not controvert the objector’s aforesaid evidence.

14.Section 9(1), (a) and (b) of the Law of Succession Act provides:-

(1) No oral will shall be valid unless-

(a) It is made before two or more competent witnesses; and

(b) The testator dies within a period of three months from the date of making the will:

Provided that an oral will made by a member of the armed forces

or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.

15.The petitioner was under obligation to prove that at time of the making of the alleged oral will the deceased was not of unsound mind. The petitioner asserted that when the will was made the deceased was getting sickly. That the deceased was ailing. The kind of sickness that the deceased was ailing from was not disclosed. The deceased as per documents filed by the petitioner and his sisters died three (3) days from the date of falling sick. The petitioner did not discharge the burden of proof to the required standard. In view of the foregoing it is my finding that the petitioner failed to prove the existence of the oral will bequeathing the disputed plot to himself.

16.It is of great significance to note that in the petitioner’s application for confirmation of the grant he did not mention of the Abogeta/L.Kithangari/91 having been given to him but instead prayed the land be transferred into his son’s names. I find that was a clear demonstration that the deceased had not made an oral will bequeathing the land to the petitioner otherwise he could not have acted contrary to the alleged oral will by seeking to have the land transferred to his sons.

17.The evidence on record which is not disputed by the petitioner and the objector is that each of the deceased’s son, that is the petitioner and objector were gifted with different parcel of lands. The petitioner was given 2 acres and the objector 3.30 acres. The disputed land was sub-divided between the objector and the petitioner equally which means the objector has a bigger portion of the land from their deceased father than the petitioner. The objector though has a bigger portion

of the land from the previous gift he has a beneficial interest to Abogeta/L-Kithangari/91 and in considering the distribution over this land the court is bound by the provision of Section 42(a) and (b) of the Law of Succession Act which provides:-

“42. Where-

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild

or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

18. This court is in view of the above section obligated to take into account the properties given to parties during the life-time of the deceased in determining the share of the net estate accruing to each child. The court has already formed an opinion that the objector though has a bigger share has by virtue of occupation and possession acquired beneficial interest of the suit property and cannot be let to go without a share of the land and after all the petitioner did not complain of having been given a smaller share during the lifetime of his father. The works of each party should be taken into account. I therefore direct that the objector shall get 3/8 of the land limited to where he has extensive developments and the petitioner shall get 5/8 of the land.

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

- a. **The grant of letters of administration issued to the petitioner and confirmed grant issued thereafter are hereby revoked.**
- b. **The petitioner M'Mugambi Maingi and the objector Maingi M'Ithinji are appointed joint Administrators to the deceased estate and the temporary grant do issue forthwith to the two administrators.**
- c. **Titles created from Abogeta/L-Kithangari/91 being Abogeta/1233 and Abogeta/L.Kithangari/1234 be and are hereby cancelled and title No.Abogeta/L.Kithangari/91 reverted into the name of Maingi Mbuchiari(deceased)**
- d. **Abogeta/L.Kithangari/91 be shared between the petitioner and the objector in the following proportions; petitioner to get 5/8 of the whole land and the objector to get 3/8 of the land.**
- e. **Each party to bear its own costs as they are brothers.**

DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF JULY, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. Anampiu for objector
2. Mr. Ringera for petitioner

J. A. MAKAU

JUDGE