



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 68 OF 1992
IN THE MATTER OF THE ESTATE OF JOEL NYOIKE MUGO – (DECEASED)

RULING

1. This cause relates to the estate of Joel Nyoike Mugo who died on 7th February 1980. Representation to his estate was sought on 23rd June 1992 by Simon Mugo Kiongo, in his capacity as son of the deceased. He expressed the deceased to have been survived by a widow and eight sons –being – Nduta Nyoike, Simon Mugo Nyoike, Enos Ngugi Nyoike, John Kamau Nyoike, Peter Ng’ang’a Nyoike, Peter Ng’ang’a, James Gathu Nyoike, Benson Ng’ang’a Nyoike, Njau Nyoike (John) and Kamau Nyoike. The deceased died possessed of a property known as Dagoretti/Ruthimitu/409.
2. A grant of letters of administration intestate was made to the petitioner on 28th October 1992. The administrator sought confirmation of the grant by his application dated 25th January 1995 wherein he proposed distribution of the estate among the eight sons of the deceased in the terms proposed in the said application. The grant was confirmed on 29th September 1995 by an order of Owuor J.
3. On 29th September 2008 a summons for revocation or annulment of grant, dated 26th September 2008, was lodged in court by one Gladwell Wanjiku Nyoike. Her affidavit in support of the application was sworn on 26th September 2008. She asserts that she is a daughter of the deceased. The deceased had married three wives, who were all dead by 2008. He had eight sons and three daughters by the said three wives. She states that she and her sisters are unmarried and live on the deceased’s land known as Dagoretti/Ruthimitu/409. She accuses her brothers of secretly filing the petition for grant and distributing the property amongst themselves and leaving out the sisters. She asserts that her father had given her 0.25 acres out of the said parcels of land, with the rest to be shared out between her eight brothers and two sisters. She alleges that the deceased had in 1978 advised her to lodge a caution against the title.
4. The applicant attached a bundle of documents to her affidavit. The first document is a copy of the green card in respect of Dagoretti/Ruthimitu/409. It shows that the said parcel of land was registered in 1958 in favour of the deceased and a title certificate issued to that effect in 1971. The applicant lodged a caution against the title in 1978. The second document is a letter dated 9th June 1987 by the applicant to the Land Registrar, Kiambu. She complains that the property, Dagoretti/Ruthimitu/409 had been surveyed for distribution yet her father had given her a portion of it and that there was an encumbrance in favour of the Kenya Commercial Bank which was yet to be discharged. She was urging the registrar to reject the proposed subdivision. The last document is a letter dated 16th April 1987 from the Chief of Kinoo Location addressed to the District Officer for Kikuyu Division, in the then Kiambu District. The chief alleges that the deceased had given some 0.25 acres of the land to the applicant and another 0.25 acres to her son, the remaining portion of the land was to be shared out among the sons of the deceased.

5. On 29th June 2010 it was directed that the said application be served on the beneficiaries. The respondent administrator swore an affidavit on 23rd April 2012 in reply to the application and so did Benson Ng'ang'a Nyoike on 8th May 2012.
6. The respondent avers that the applicant and their other two sisters were married, and he names the persons who allegedly married them. He states that none of the sisters live on the land. He denies having applied for letters of administration discretely. He also states that the applicant had charged a portion of the family land to access a bank facility of Kshs.30,000.00 which she did not repay and the property was exposed to disposal by way of public auction. He explains that the applicant had been engaged in protracted proceedings with the rest of the family before the provincial administration on the land issue.
7. The administrator has exhibited on his affidavit several documents in a bid to explain himself. The first document is a certified copy of an entry of marriage dated 16th November 1987 which reveals that the applicant married a Stephen Kenga Simeon on 7th April 1956 at the District Commissioner's Office Mombasa. The second is a letter dated 13th October 1978 from the deceased to the Land Registrar responsible for the Kiambu Land Registry. The communication was on Dagoretti/Ruthimitu/409, where the deceased complained about the prohibitory order filed against the title by the applicant even after he had allowed on to use the property as security to enable her access a loan facility, which she then refused to repay. He asserted that the land was his and that the applicant had absolutely nothing to do with it and had no interest whatsoever in it. The third document is a letter dated 3rd October 1988 from the family of the deceased to the Provincial Commissioner for Central Province relating to the struggles between the family and the applicant over the land. The last document is dated 29th March 1987 and it is on the distribution of the land as between the eight (8) brothers of the deceased.
8. The affidavit sworn by Benson Ng'ang'a Nyoike supports the application by the applicant. The deponent purports to have sworn the affidavit on his own behalf and on behalf of the two other brothers – Kenneth Njau Nyoike and Humphrey Kamau Nyoike. He states that their three sisters were unmarried.
9. To the administrator's affidavit, the applicant filed a further affidavit on 8th May 2012. She admits having married Stephen Kenga Simeon but states that she separated from him in 1958. She concedes too that her two sisters are married, but alleges that they separated from their husbands, and one of them in fact died and was buried at the deceased's land. She asserts that the administrator did not list all the beneficiaries and dependents. She contests the allegation that her father did not want her to inherit the subject land and asserts that she is in fact the one who paid for issuance of the title deed of the suit land at the deceased's request. She argues that the Land Central Board and the provincial administration had ruled that she should get a share of the subject land.
10. The applicant has attached to her further affidavit several documents. There is a letter dated 24th June 1991 from the Public Trustee addressed to the administrator and two other sons of the deceased warning them about intermeddling with the estate and urging them to take out letters of administration. There is a letter from the applicant dated 19th June 1991 alleging that the signature in the letter to the Public Trustee purported to be of Peter Ng'ang'a was in fact a forgery. The letter bearing the said forgery is attached also, dated 16th May 1991. There is also a certificate of official search dated 17th September 2008, showing that the title was by then registered in the name of the administrator as from 16th April 1996 and that the applicant had lodged a caution against the title.
11. The administrator filed his own further affidavit on 18th February 2013 in response to that of the applicant. He asserts that the applicant was also married to a James Njoroge Wang'ang'a and they had a son called Wang'ang'a. He also asserts that the applicant had not provided proof of her alleged separation from her husband. He says that the allegation that the three sisters were living on the deceased's land was a lie for one of them died years ago and the other was still with her husband at the Dagorotti Ruthimitu village. He further argues that his father could not have ordered the applicant to pay for the title deed given than they had fallen out over her refusal to repay the loan secured with the deceased's property.

12. It was directed on 18th February 2013 that the said application be disposed of by way of written submissions. Both sides filed written submissions. The applicant's submissions are dated 28th February 2013 and were filed in court on the same date. Those by the respondent are dated letter April 2013 and were filed in court on 17th April 2013.

13. The main plank, and indeed the only one, of the applicant's case is that the daughters of the deceased were not disclosed in the petition. She puts the total number of the daughters at six (6). She argues that their non-inclusion or non-disclosure was contrary to the provisions of the Law of Succession Act. On its part, the administration argues that sisters were all married and none of them lived on the land. Moreover, that the applicant was a married woman, and ostensibly did not qualify to inherit under customary law.

14. The law on revocation of grants is **Section 76** of the Law of Succession Act. Revocation may be ordered where there are problems at the stage of applying for the grant and where there are issues, at the stage of administration. The issues being raised in this matter touch on the process of the making of the grant. The relevant provisions of **Section 76** therefore are (a), (b) and (c) which state as follows:-

“Section 76. 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 fact essential in point of law to justify the allegation notwithstanding that the allegation was made in ignorance or inadvertently...***

15. The effect of **Section 76 (a)** is that where there are substantive defects in the process of obtaining the grant the same ought to be annulled, while **Section 76(b)** allows revocation where the petitioner relied on a false statement or deliberately concealed something material from the court **Section 76 (c)** is similar to **Section 76 (b)**, save that the untrue allegation should be one made innocently and with no intent to defraud.

16. The petitioner in the case before me is accused of deliberately concealing from the court material facts, to wit that the deceased was survived by daughters. The exact number of the daughters of the deceased is not clear from the record. The applicant in her initial papers talks of three daughters but later raises the number to six. The respondents/administrator appears to refer to only three daughters. That however is neither here nor there. What is patently clear is that at the time he sought the grant and its subsequent confirmation, the respondent/administrator disclosed only nine (9) survivors, being a widow, now deceased, and eight (8) sons. The daughters, whether they were three or six, were not disclosed. The applicant also mentions a son by the name of Joseph Njoroge Nyoike, whose name appears neither in the petition nor in the confirmation application, and in respect of whom the respondent/administrator has been silent.

17. The procedure for applying for a grant of representation is detailed in **Section 51** of the Law of Succession Act and Rule 7 of the Probate and Administration Rules. Both provisions require the disclosure of certain particulars in cases of partial or total intestacy-

“Section 51(2). An application shall include the following information as to-

(a)...

(b)...

(c)...

(d)...

(e)...

(f)...

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased and of the children of any child of his or hers then deceased..."

"Rule 7(1)...where an applicant seeks a grant of representation to the estate of a deceased person... the application shall be by a petition ... supported by an affidavit... containing ... the following particulars-

(a)...

(b)...

(c)...

(d)...

(e) in cases of total or partial intestacy –

(i) the names addresses, marital state and description of all surviving spouses and children of the deceased..."

18. Quite evidently, it is a requirement of the law in all applications for grant of representation that there must be a disclosure of all the surviving children of the deceased. Rule 7(1) (e) the Probate and Administration Rules goes further to require that their marital states be disclosed too. All then requirements are in mandatory terms.

19. An application for a grant of letters in intestacy which does not fully comply with the mandatory requirements of **Section 51(2) (g)** and Rule 7 (3) (e) (i) is defective. It would be a defect in substance if the names of persons who survived the deceased are omitted in the petition. I am satisfied in this case therefore that there was a defect in the process of obtaining the grant to the extent of the omission in the petition of the names of some of the surviving children of the deceased.

20. **Section 76 (b)** of the Act envisages the deliberate making and reliance on a false statement and the concealment of matter from the court with a view to defraud. The question I ask myself in this case is whether the list of survivors in the petition amounted to a false statement and a concealment of important matter. To the extent that it created impression that the deceased was not survived by daughters, it was a false statement. I also believe that the omission of names of the daughters amounted to concealment of important matter from the court.

21. Were the false statement and concealment of matter intended to defraud or to mislead the court so as to achieve a particular result? I think not. The deceased person in this matter died in the year 1980. By virtue of **Section 2** of the Law of Succession Act, the provisions in Part V of the Act, on intestacy, did not apply to his estate. Instead, the law applicable to his estate, by dint of **Section 2(2)** of the Law of Succession Act, should be the customs applying at the date of his death. From the names of the parties it would appear that the deceased was ethnic Kikuyu and therefore the law to apply to his estate should be Kikuyu customary law. Now Kikuyu customary law on inheritance of land by daughters is notorious. They are not entitled, especially if they are married. The administrator in this case, no doubt, tailored his application to accord with the dictates of Kikuyu customary law, under which only the sons were entitled to a share in the estate. The non-disclosure of the daughters should be seen in that context. There was therefore no intent to defraud in failing to disclose the names of the daughters, neither can it be said that

the same was done with an ulterior motive.

22. My conclusion would be that the administrator made an untrue allegation of fact out of ignorance. He created the impression that the deceased was not survived by daughters, not because he wanted the daughters excluded from benefit, but because under Kikuyu customary law, which should apply to the instant estate, daughters are not entitled to a share in the estate of their dead parents. The statement was, however, made in ignorance of **Section 51(2)(g)** and Rule 7 (1) (e) (i) – which require disclosure of all the children of the deceased.

23. **Section 51(2) (g)** of the Act does apply to the estate of a person dying before the commencement of the Act on the 1st of July 1981. This is by virtue of **Section 2(2)** of the Act – which provides:-

“The estate of persons dying before the commence of this Act are subject to the written laws and customs of applying at the date of death, but nevertheless the administration of the estate shall commence or proceed so far as possible in accordance with this Act.”

24. Administration of estates is governed by Part VII of the Act. Section 51 falls under Part VII of the Act, and therefore by dint of **Section 2(2)** of Act, it applies to estate of a person dying before the Act came into force. In this case the deceased died before the Act commenced. Although the law to govern the distribution of his estate is not the Law of Succession Act but kikuyu customary law, administration of his estate is subject to the Act. Consequently, the administrators are bound to comply with the provisions of the Part VII of the Act, including **Section 51** of the Law of Succession Act.

25. I believe I have said enough on the matter. The applicant has satisfied me that there are sufficient grounds under **Sections 76 (a)** and **(c)** of the Act to warrant the revocation of the grant made to the respondent/administrator.

26. The power given to me under **Section 76** is however discretionary. Where a case is made out for revocation of grant in terms of **Section 76** of the Act, I may or may not revoke the grant depending on the circumstances of the matter. The deceased person in the cause died a long time ago, in 1980. The cause itself was filed in 1992. The applicant is only complaining about not being disclosed in the petition. Revoking the grant will send the parties far back, and it would not be in the interests of justice to do so.

27. In exercise of my discretion, as guided in **Section 76** of the Act, I do hereby decline to revoke the grant herein. Instead, I shall make the following orders:-

(a) That all the surviving children of the deceased, including daughters, shall be included in the list of beneficiaries;

(b) That (a) above shall apply equally to children of any child or children of the deceased who are the already dead;

(c) That the confirmation orders made on 29th September 1995 are hereby vacated to pave way for a fresh confirmation application;

(e) That the certificate of confirmation of grant dated 29th September 1995 is hereby cancelled and

(f) That this being a family matter there shall be no order as costs.

DATED, SIGNED and DELIVERED at NAIROBI this 4th DAY OF September 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Wacira advocate for the applicants.