



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 172 OF 2007

IN THE MATTER OF ESTATE OF GATHUI KAMAU NJANGO – (DECEASED)

JUDGMENT

The revocation application dated 16th January 2007 came up for hearing on 18th February 2013. Only the applicant attended court. The date had been fixed by the applicant on 23rd November 2013 in the absence of the respondents. There is an affidavit of service on record sworn on 31st July 2013 and filed in court on 8th February 2013 which shows that a hearing notice had been served on the advocates of the respondent, Ng'ani Olouch, Advocates on 31st January 2013. The said advocates did not attend nor instruct counsel to hold their brief. The matter was then cleared to proceed.

The applicant told the court that he had already said all what he could say in the matter, and invited the court to rule on the application based on the material that he had already placed before the court.

I have perused the file. I have noted that only one witness testified – the applicant herein. He was asked several times to avail witnesses but he has so far failed to do. As the respondent did not attend court they lost the opportunity to present their case.

The deceased in this case Gathui Kamau Njango alias Patrick Kamau Gathui, died on 25th August 2000 at the age of 82 years. Representation to his estate was sought by Njoki Gathui Kamau and Phillip Karonjo Gathui in their respective capacities as widow and son. In a petition lodged at the Kiambu Resident Magistrate's Court on 5th August 2003, the deceased was said to have been survived by his widow – Njoki Gathui Kamau, eight sons – Daniel Gathui Kamau, Philip Karonjo Gathui, Amos Waweru Gathui, Francis Njoroge Gathui, Onesmus Kinyanjui Gathui and Peter Kimani Gathui – and one daughter – Nyambura Gathui Kamau. That was supported by a letter from the Chief of Kiratina Location dated 19th June 2002. Representation was made on 11th March 2004 to the petitioners and a grant of letters of administration intestate was duly issued on 11th November 2004.

The grant was confirmed on 3rd February 2005. The estate was shared out between the survivors listed in petition filed in court on 5th August 2003. A certificate of confirmation of grant was duly issued dated 3rd February 2005. The certificate was amended on 9th August 2008 to correct some anomalies in the description of the assets.

It is the distribution of the estate proposed in the confirmation that prompted the revocation application. The applicant complains that the administrators concealed information from the court in obtaining the grant. In his affidavit to support the application he avers that he was a grandchild of the deceased, he had lived on the estate property and that he had even developed a portion of it. The respondents replied to the application through a joint affidavit sworn on 12th March 2007. They acknowledge that the applicant is a child of a daughter of the deceased called Lucy Wairimu Githinji, now deceased, who was married a person known as Githinji Muiruri, who is also deceased. They aver that there was an elders' meeting in 2006 involving both sides where it was resolved that the applicant do claim inheritance from the estate of

his father Githinji Muiruri instead of claiming from the estate of Gathui Kamau Njanjo. They further state that the applicant did not reside in any of the assets of the deceased.

The pertinent issue for determination is whether a grandchild is entitled to a share in the intestate of his deceased grandfather.

The deceased in this case died in 2000, long after the Law of Succession Act had come into force. His estate therefore fell for distribution in accordance with the provisions of the Law of Succession Act. He died intestate and therefore distribution of the estate was subject to Part V of the Law of Succession Act. He was a resident of Kiambu District and therefore **Sections 32 and 33** of Part V of the Act did not apply to the estate.

Under Part V of the Act (and especially **Section 35, 38 40 and 41**) children of the deceased are entitled to a share in the estate of their deceased parent. So long as the children are alive, grandchildren are not entitled to anything. However, such grandchildren can take advantage of **Section 26** of the Act and ask the court to make provision for them out of the estate if they were dependent on the deceased during his lifetime. Where a child of deceased is dead, his or her children are entitled to take the share that ought to have gone to their dead parent. This position is stated in **Section 41** of the Act. The provision states:-

“Where reference is made in this Act to the “net intestate estate,” or the residue thereof devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees in equal shares, the share which their parent would have taken had he not predeceased the intestate.”

The principle is called substitution or unrepresentation.

The facts of this case reveal that the applicant was a child of one of the children of the deceased. The said child is deceased. Consequently, the applicant is entitled to take the share that that child of the deceased was herself entitled to. It has been stated in many decisions that the reference to children under Part V of the Act does not discriminate between sons and daughters or between married and unmarried daughters. Part V of the Act treats all the children equally irrespective of gender and marital status. The dead mother of the applicant is entitled to a share in the estate of her father. Since she is dead, then the applicant qualifies to get her share. It must be stated that the applicant's entitlement to a share is not a matter in the discretion of the elders. It is a statutory right, it cannot be taken away from him. Only he can take it away by waiver or renunciation.

Is there justification of revocation of the grant? **Section 76** of the Law of Succession Act provides:-

“A grant of representation, whether or not confirmed, may at my 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 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...”**

The applicant was a survivor of the deceased by dint of being a child of a dead child of the deceased. That fact was not disclosed to the court. That amounted to concealment from the court of something material. It also amounted to an untrue allegation of a fact essential to the point. It is for such concealment and untrue allegations that grants are revoked. If the applicant's mother, Lucy Wairimu

Githinji, were alive she should have been listed as a survivor of the deceased, but as she was not her place ought to have been taken by her children. That did not happen and therefore that was a defect that would justify revocation of the grant. Even if she were alive and was omitted on account of her marital status that too would be good ground for revocation.

The deceased died in 2000. Revoking the grant now would set back the family in terms of having to start seeking representation afresh. I will instead set aside the confirmation orders made on 3rd February 2005 and cancel the certificate of confirmation of grant dated 3rd February 2005 and rectified on 21st March 2007. I direct the administrators to give to the applicant the share that ought to have gone to his mother, Lucy Wairimu Githinji. The court file in respect of Kiambu **SRMCSC No. 129 of 2003** shall be returned to the Kiambu Chief Magistrate's Court, where the administrators shall apply afresh for confirmation of the grant providing for the applicant in line with this judgement. Each party shall bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 8th DAY OF November, 2013.

W. M. MUSYOKA

JUDGE