



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
SUCCESSION CAUSE 935 OF 2004
IN THE MATTER OF THE ESTATE OF NJOROGE MUGO (DECEASED)

JUDGMENT

This matter pertains to the estate of the late Njoroge Mugo (“Mugo/the deceased”) who died on 31/1/1988. He had two wives and had been blessed with several children, but his second wife, Muthoni bore him several daughters and two sons namely Gichura Njoroge, who died after his father, and Charles Kangethe Njoroge, while one Evan Kamau was his son with his first wife, Mumbi.

Charles Kangethe (‘Charles’) instituted this cause on.....when he petitioned for letters to administer his late father’s estate. He indicated that the said estate comprises of tow parcels of land, namely, Kiambaa/Kihara/542 and Kiambaa/Kihara/T471, which I shall now refer to as ‘the estate’, and he obtained the grant on 14/7/2004. It was confirmed on 24/5/2005 and the whole estate was allocated to him in his capacity as the only son of the deceased.

Robert Njoroge Gichura (‘Robert’) and Ndungu Kabande (‘Ndungu’) have now moved this court seeking orders to have the said grant revoked on the grounds that it was obtained fraudulently by the making of a false statement and concealment from the court of some material facts.

The application is however opposed and Charles maintains that he did not act fraudulently neither did he fail to disclose material particulars. All in all, he maintains that all his actions were proper and that he cannot be faulted.

Having taken directions, the matter proceeded for hearing and the parties adduced evidence in support of their cases.

I have, as is expected of me evaluated the evidence on record with a view to establishing whether the application for revocation is meritorious.

Charles Kangethe Njoroge. I live in Gachie in Kiambaa. Robert Njoroge is by brother’s son. Njoroge Mugo was my father. He died in1980 and I as his only surviving son am the administrator of his estate. My father had 2 wives, Muthoni my mother is deceased. She was the eldest. Mumbi was the younger wife. Muthoni had 9 children but only 3 are alive, that is Margaret Mweru, Priscilla Njeri and I. Mumbi’s children are all dead. 3 of my siblings were alive at the time when I petitioned in this cause, Agnes Ngendo was alive then, she died after I filed this cause. My sisters consented to my application to administer our father’s estate.

My father's estate comprised of parcel numbers 542 and T471. He had another farm in Loitokitok, which he had acquired in 1967. It was a 6 acre plot, which he subdivided into 2 equal parcels which he allowed my brother Gichura and my step brother Evan Kamau to occupy. My father bequeathed his estate in 1983 as follows:

2 acres of the Loitokitok land to each of his wives Muthoni and

Mumbi. He took the remainder portion of 2 acres.

I wasn't given any land in Loitokitok. Evan Kamau still resides in Loitokitok. It is my family which resides there because he is no longer alive. The objector's father resided in Loitokitok between 1967 and 1976. We originally lived on T471 as a family after which Gichura and Kamau moved to Loitokitok leaving us behind. My sisters got married thereafter and vacated T471. I vacated T471 in 1988 and moved to 542. I left my parents and Gichura's wife behind. Gichura's wife had come from Loitokitok to seek medical attention.

Robert Njoroge was brought to my home to seek medical treatment in 1972. He was brought from Loitokitok by his father. He stayed with me and started his schooling career while living with me. He stayed with me even while in Karuri High School. I realized that the distance between my home and his school was great and I requested my sister Priscilla who lived in Ndenderu, to take him in which she allowed and he lived with her until he completed his studies.

He then came back to my home. I managed to secure a job for him at General Plastics. My father bequeathed parcel 542 to me. That was in 1983. T471 was to be allocated to the one who fed him. Gichura was present at that meeting and he didn't question my father's decision. I was the one who took care of my father then.

Stanley Waweru, George Njogu, Kahiga Njoroge, Nganga Njoroge, Archibold Hinga, John Njuguna, Humphrey Karanja Njoroge, Charles Kangethe Njoroge, Wakamunya Njoroge were present at that meeting. This is the document on which his wishes were recorded. I wish to produce the document in Kikuyu and its translation as exhibit D1 (a) and (b). He allowed T471 as aforesaid during that meeting. Kahiro Njoroge and George Njogu who were present then are still alive. T471 wasn't allocated to the objector's father. My father had several grandchildren. They are more than 20. Robert occupies T471. His sister Lillian Nduta is married and she lives in Kawaida near Nazareth Hospital.

I know James Kinuthia. He approached me and requested me to leave T471 to him for the purposes of running a school. I declined principally because my nephew and niece resided in it and I didn't want their stay interfered with. I later noticed that the plot had been developed with a nursery school and I filed a cause in Kiambu Court and sought an order to evict him.

I have never had the intention of disposing of the plot. I have never received any rental income from the tenants of T471. The estate has never received any such income. The current tenants took possession without my authority. His prayers are not meritorious. I am not guilty of non-disclosure. I had procured a letter from the Chief before I lodged my petition.

CROSS-EXAMINATION BY MR. MBUGUA

T471 is currently registered in my name in my capacity as the administrator of the estate. I am not registered as a Trustee of that land. I obtained the document on 6th June, 2006. My father died on 31/1/1988. My mother Gichura died in 1999. Yes, the chief issued me with the aforementioned letter.

Gichura, Ngendo, Priscilla, Margaret Mweru and I survived my father. Our mother had predeceased in. Gichura's wife is known as Njeri Gichura. My father was survived by 20 grandchildren who are all alive. Yes, I stated that I was the only surviving son of my father. Yes I stated that I was the only child who survived my father. That was in the affidavit in support of application for confirmation. I entered Ngendo's name, but not my brother's because he was dead by then.

I didn't enter my sister's names because they were married and had moved to their matrimonial homes. I didn't give my father's grandchildren name because it was my application and not their father's. The farm in Loitokitok was registered in the name of Evan Kamau as a trustee. Yes, he allocated my mother's house 2 acres of land in Loitokitok. I only mentioned what I was to inherit from my father and nothing else. Wakamunya Njoroge whose name appears in exhibits D (a) & (b) is the same person as Gichura Njoroge.

Yes I had obtained consents of all who would have been interested in that confirmation. I didn't obtain the consents of the objector, his sister or even the children of Evan Kamau. My sisters consented to the application. Form 38 is not defective. They signed the form. I didn't specify those who died between 1988 and the date which I filed my petition. I don't know why my father bequeathed parcel 542 to me. Yes, the clan members met in the year 2008 in Njoroge's house.

RE-EXAMINATION BY MR. WAHOME

I filed my petition on 5th April 2004. At that time Gichura was already dead. I gave the names of those who were alive then. P38 was executed by my sisters. I didn't include the Loitokitok property in the inventory because it was registered in Evan's name. My siblings authorized me to petition in this cause.

PW2 – TAKES OATH IN KIKUYU

I am Margaret Mweru. I live in Gachie. Njoroge Mugo was my father. He is dead. Charles Njoroge is my brother. I allowed him to petition to administer my father's estate. Of my siblings only Priscilla Njeri, Charles Ngethe are alive. Ngendo was alive when Ngethe filed this petition. I know Robert Njoroge, he is my nephew. His father was known as Gichura. Robert left Loitokitok to seek medical attention. He came to live with my brother Ngethe in Gachie. Robert currently occupies the other parcel of land. I don't know the numbers of the land parcels.

I was brought up in the plot which Robert currently occupies, so were all my siblings. My father had land in Loitokitok. It was occupied by Gichura and Kamau. Robert cannot inherit T471, otherwise we would all be entitled to it. My father bequeathed it to whoever would take care of him. It was Charles who took care of our father. My father had 9 grandchildren. He had more than 29 grandchildren.

I have faith in the administrator of my father's estate. I was opposed to the rental of T471.

CROSS-EXAMINATION BY MR. MBUGUA

I have never been to school. I cannot read or write but I can sign my name. (She signs her name. The signature differs from that on P&A 37 and 38). Looks at P&A 38 – and states, I cannot see my signature on that document. I remember signing document in the presence of an advocate. I cannot remember his name or the date when we went to his offices.

I thumb-printed some documents and I was thereafter asked to sign the said documents. Ngendo, Priscilla Njeri accompanied me on the day when I signed the documents. We executed the documents in Nairobi. I cannot write my name. The farm in Loitokitok is occupied by Kamau family. Kamau died. I cannot remember the date of my father's death. My father was survived by Gichura, Charles Kangethe, Ngendo, Priscilla Njeri and I. I don't know how old Priscilla is, she is my senior. I am the last born in that family. Four of my siblings were born after Priscilla but before me. Njeri attended school but Ngendo didn't. Ngendo is dead. I authorized Charles to administer our father's estate.

I consent to the mode of distribution. T471 was to be allocated to Ngethe because he took care of my father. My father was alive at the time of my marriage. My home was near T471. It is a walking distance from the said parcel of land. Gichura lived in Kibera with his second wife. She didn't vacate the plot after she came for Loitokitok. The plot belongs to Kangethe. Nobody has asked Gichura's children to vacate T471. It should be subdivided between Gichura's children and Kangethe.

RE-EXAMINATION OF MR. WAHOME

I cannot write or sign. I can sign as I signed that paper. I stated that I had no objection to his petition and I allowed somebody to sign on my behalf. I also consented to the mode of distribution. Kangethe took care of my father till his death. Gichura would come occasionally.

DW3 – TAKES OATH IN KIKUYU

I am George Njoge. I live in Gachie. I am a farmer. I knew the late Njoroge Mugo. He was my father's younger brother. He invited me to a meeting a long time ago. I cannot remember when it was, or when he died. He had 2 wives. He told us that 2 acres of his land in Loitokitok would be allocated to each of his wives. He said he would retain 2 acres of the said land. He allocated his farm in Gachie, to Kangethe and T Plot to whoever took care of him. He didn't tell us who the person who gave him was.

We signed the document which contained his wishes. My name appears on that document (exhibit D (a)). Gichura was present then.

DW3 – TAKES OATH IN KIKUYU

His wishes on T471 weren't reduced into writing. I knew Gichura well. Gichura his parents lived on T471 so did Gichura's wife and children. Gichura had only one wife whom he lived with on T471. Gichura's wife died after the death of Gichura's father. She died while living on T471. Kangethe lived on the farm (in the other plot). I don't know the parcel numbers.

RE-EXAMINATION BY MR. WAHOME

Gichura lived on T471 initially before he went to Loitokitok and with his family after they came back from Loitokitok.

MR. WAHOME

That is all for this witness. I close our case.

MR. MBUGUA: Our application is dated 20th June, 2006. The applicants/petitioner's gave incomplete information. Probate and Administration 80 contained incorrect information because others had not consented to the petition.

Probate and Administration 38 doesn't contain the names of all survivors of the deceased I rely on rule 26(2) of Probate and Administration rules. His father was dead by then.

Probate and administration 9 – paragraph 2 omitted the names of all survivors; including his mother and step-mother, both of who died after the deceased in the cause. His brother Githure had also survived the deceased in the cause.

His replying affidavit of 29th September, 2006 – see paragraph 9. Section 29 of Cap 160 caters for grandchildren, who should have been listed. I also rely on section 42 of the Succession Act, as well as Section 29, 38, 31, rule 40(3) of the Probate and Administration rules.

MR. AMBANI : Objector is a grandson to the deceased. Petitioner filed as a dependant under Section 29 of the Succession Act. He had obtained consents of all his siblings – see Probate and administration 80. Though he indicated that he was the only son, he was the only living son of the deceased at the time when he filed his petition. Therefore he had no intention to defraud. Petitioner conceded that he didn't list the names of the deceased's grandchildren. Omissions are curable under Section 51(4) of Succession Act.

Kiambaa/Kihara/T471 is the property which is in dispute, which the objector wants to himself. The

petitioner claims a stake to it too. They haven't proved any fraud. The administrator is merely administering the estate and there would be no purpose served by revoking the grant.

Objector ought to be dismissed with costs.

Where several children of the deceased are dead by time when petition is lodged, a petitioner must declare all the survivors of his siblings.

No consents – Probate and Administration 80

rule 44 (1) of the Probate and Administration rules stipulates that

44. (1) Where any person interested in the estate of the deceased

seeks pursuant to the provisions of section 76 of the Act to have a

grant revoked or annulled he shall, save where the court otherwise

directs, apply to the High Court for such relief by summons in Form

107 and, where the grant was issued through the High Court, such

application shall be made through the registry to which and in the

cause in which the grant was issued or, where the grant was issued By a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.

Gichura's father and the petitioner were the sons of Muthoni.

If there was land in Loitokitok it would presumably have been given by Mugo to Mumbi during his lifetime.

He has never met Muthoni – doesn't know who many children she had or where they lived had a rough idea they lived in Loitokitok.

He will accept the T Plot where his father always lived. Petitioner can retain 542 which is the parcel that he has always occupied.

If as the petitioner alleges, the deceased (Mugo) owned land in Loitokitok, why didn't it form part of the inventory.

OMISSIONS :

1. He omitted his brother's name – from Chiefs letter and he omitted names of his late brothers survivors therefore omitted in Probate and Administration 5 of 5th April, 2004.
2. Only included his sisters' names.
3. His sisters consented to the making of the grant – signatures on Form 38 and 37 differ substantially.
4. Probate and Administration 80 – stated he was the only son.
5. Form 9 – in support of summons for confirmation – he was the only child – no other survivors.
6. Current Chief confirms the mode of occupation of the subject properties.

7. Objectors father died in 1999.
8. Objectors sister doesn't know about property in Loitokitok – she also wants a share of the T Plot.
9. Minutes of meeting in which Mugo gave his sons the specified parcels of land. T471 where he lived to go to whoever took care of him – Gichura and his family lived on T471.

PETITIONER

10. Petitioner concedes that though he was the only son who survived his father.
 11. Muthoni had 9 children.
 12. Mumbi's children are all dead.
 13. Land in Loitokitok – 6 acres divided into 3 portions, one for each wife – Mugo retained the remaining 2 acres.
 14. He concedes that T471 would be allocated to whoever fed his father – He claims to be the one who fed and took care of his father Mugo.
 15. Has no intentions of disposing of the property.
 16. Properties registered in his name absolutely therefore he can deal with them in whatever manner he pleases.
 17. “He didn't allocate any asset to his late brothers children because it was his application and not their fathers”.
 18. Farm in Loitokitok registered in the name of Evan Kamau as trustee – this is his stepbrother and that's why he didn't include it in the inventory of assets of the estate.
- Pw2. 19. See issue of signatures and thumbprints.

No need to revoke, but I do order that the entries in the register be rectified and T plot to the 1st applicant.

The respondent shall retain the other plot. Effected within 30 days.

Parties shall be at liberty to apply. Costs to the applicants.

Dated and delivered at Nairobi this 1st day of July 2009.

JEANNE GACHECHE

Judge

Delivered in the presence of:

For the applicant –

For the respondent -