REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, TUNOI & PALL J.A.)
CIVIL APPEAL NO. 270 OF 1997
BETWEEN

KINUTHIA.....APPELLANTS

AND

MARY NJOKI

KARANJA.....RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Hon. Mr. Justice Kuloba) dated 30th July, 1997
in
MISC. CASE NO. 1735 OF 1995)
****

JUDGMENT OF THE COURT

This is an appeal from the ruling of the High Court of Kenya at Nairobi (Kuloba J.) delivered on 30th July, 1997. Hannah Muthoni Kinuthia, (the deceased) who was the mother of Geoffrey Ndungu Kinuthia and Peter Ndirangu Kinuthia (the appellants) and the mother-in-law of Mary Njoki Kinuthia (the respondent) died on 6th July, 1994. The respondent applied in the Kiambu Resident Magistrate's Succession Cause No.49 of 1995 for letters of administration of the estate of the deceased. The estate comprised of only a parcel of land known as Muguga/Gitaru/805 (plot 805). On 13th March, 1995 the letters of administration intestate of the estate of the deceased were granted to the respondent and the grant was confirmed ON 13th July, 1995.

By a Chamber Summons brought under S.76 of the Succession Act and rule 44(1) of the Probate and Administration Rules, the appellants applied to the High Court for revocation or annulment of the said grant on the ground that the same was obtained fraudulently and by concealment of material facts namely that the respondent omitted to disclose in her petition, for the grant of letters of administration that the appellants were the sons of the deceased and as such the only beneficiaries of her estate. The respondent is the widow of James Karanja Kinuthia, a brother of the appellant's who died in or about June, 1994. It was alleged by the appellant's joint affidavit in support of the said Chamber Summons that the respondent had deliberately omitted to mention in her petition for the said grant that the deceased left them, the appellants surviving her so as to deprive them of their rightful share in the estate of the deceased.

By her replying affidavit sworn on 29th September, 1995 the respondent deponed that Muguga/Gitaru 265 belonged to her father-in-law, Mzee Amos Kinuthia who died in or about 1983. Upon his death, the said land was sub-divided into three equal plots known as Muguga/Gitara/803, 804 and 805 so that each

son's family would get a separate plot. Whereas the Appellants Peter Kinuthia got plot No.803, and Geoffrey Kinuthia got plot 804, the respondent's husband James Kinuthia was a very sick person when the said land was subdivided, and his share, that is plot 805 was registered in the name of the deceased on the understanding that it would automatically revert to the respondent's husband and her 8 children after the death of the deceased. She has further stated that the appellants having got their shares were now trying to grab their deceased brother's share in the family land. She has further deponed that the matter of transferring plot 805 into her name was deliberated upon at length in several meetings before the chief and clan elders and that she was surprised that the appellant's had not disclosed this fact in their application for annulment of the grant. These allegations made by the respondent have not been formally denied by the appellants.

By a short ruling made on 30th July, 1997, Kuloba J. dismissed the appellants application for revocation of the grant. The ruling reads as follows:-

> ***"The affidavits in support of the application for revocation of grant do not disclose any fairness on the part of the applicants. They already got their share. They now want to take a share due to a third brother (deceased) held by the respondent (widow of the deceased brother). It will be inequitable to allow such a claim. The application is dismissed. No order as to costs.***"

By their memorandum of appeal the appellants say that the learned Judge acted capriciously and injudiciously taking irrelevant matters into account and without considering the relevant law applicable to the matter before him. It is also a ground of appeal that the learned Judge erred in law as he failed to give a concise statement of the case, the points for determination before him and his decision with reasons therefor as was required of him under O.XX r4 of the Civil Procedure Rules.

The learned Judge had uncontroverted affidavit evidence before him that plot 805 was the respondent's husband's share in the family land which was registered in the deceased's name as the respondent was a very sickly person at that time. It was so registered on the understanding that upon her death, the said plot would revert to the family of the third brother, the respondent's deceased husband. It was also stated by the respondent that the appellants had already got their shares and plots 803 and 804 were already registered in their respective names. They were now trying to grab plot as well, the respondent had deponed, which was the share of the respondents husband. The learned Judge preferred the evidence of the respondent over the evidence of the appellants and in our view he was quite justified in so doing. We cannot upset his finding of fact.

Mrs. Wairagu for the appellants submitted that the Learned Judge erred in law in not holding that the appellants had been deprived of their shares in the estate of the deceased. However it is obvious that although plot 805 was registered in the name of the deceased, in reality it belonged to the respondent's husband and his family. It was not a "free property" of the deceased as defined under S.3 of the Law of Succession Act (the Act) because it was not the property of which the deceased was legally competent freely to dispose during her life time and in respect of which her interest had not been terminated by her death. As such it could not form part of the estate of the deceased and could not be available for inheritance by the appellants. Again, under S.3 of the Act "estate means free property of a deceased person."

Mrs Wairagu has also argued that the ruling of the learned Judge was in breach of the mandatory provisions of O.XX r4 in as much as it did not contain a concise statement of the case, the points for determination, his decision thereon and the treasons for that decision. We do not agree with her. The ruling though short is clear enough. It does say that before him was an application for revocation of the grant. His decision was that it was unfair and inequitable to allow that application and his reasons were that the appellants had already got their share of the family land and they were now trying to take the share which belonged to their deceased brother. Anyway, the provisions of O.XX r4 are procedural. The deceased brother of the appellants was entitled to his share of the family land according to the Kikuyu custom. Under S.3(2) of the Judicature Act (Cap 8) in a case like the instant one, the court is enjoined to decide it according to substantial justice without undue regard to technicalities of procedure unless of

courrse their disregard could have caused miscarriage of justice. Here we are of the view that substantial justice has been done by the learned

The only ground relied upon by the appellants for revocation or annulment of grant was that the grant had been obtained fraudulently by making a false statement or by concealment of material facts. As the appellants were not entitled to any share in plot 805, the respondent had rightly stated in her application that she was the only surviving beneficiary of that land which was registered in the name of the deceased. There was no fraud nor concealment of any material facts. In the result, there is no merit in this appeal and the same is dismissed with costs to the respondent.

Dated and delivered this 20th day of March 1998.

J.E. GICHERU .....

JUDGE OF APPEAL

P.K. TUNOI .....

JUDGE OF APPEAL

G.S. PALL .....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR