REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1974 OF 2008

IN THE MATTER OF THE ESTATE OF VERONICA NJOKI WAKAGOTO (DECEASED)

RULING

The deceased, to whose estate this cause relates, died on 5th November 2004. Representation to her estate was sought on 4th September 2007, by her son Peter Njoroge Mungai, at the Thika Chief Magistrate's court in Thika CMCSC No. 333 of 2007 and was granted on 25th February 2008. In the petition, the deceased was said to have been survived by her son Peter Njoroge Mungai, his daughter Mary Muthoni Wakagoto and a buyer called Felix Kinuthia. She was said to have died possessed of a piece of land known as Loc 5/Kagunduini/1354.

The current proceedings at the High Court were provoked by the events that occurred on 30th April 2008 when the grant was confirmed. The sole asset, Loc 5/Kagunduini/1354, devolved upon the buyer, Felix Kinuthia. A certificate of confirmation to that effect was issued on 26th May 2008. On 5th August 2007, the administrator, Peter Njoroge Mungai, moved the court for the removal of cautions that had been registered against the title Loc 5/Kagunduini/1354, ostensibly to facilitate transfer of the title to Felix Kinuthia. The caution in question had been entered in the register on 1st August 2008 at the instance of Jackson Mungai Njoki, a grandchild of the deceased.

Another application was filed in the same cause by the said buyer on 22nd October 2008 against Jackson Mungai Njoki, seeking removal of the caution and for grant of injunctive orders against him and other persons named in the application. It transpired from this application that Felix Kinuthia had acquired the subject property, Loc 5/Kagunduini/1354, from the administrator of the deceased, that is to say Peter Njoroge Mungai, on 11th September 2007. There is on record a sale agreement made on that date drawn by Karuga Wandai & Company Advocates of Thika. At the time the sale agreement was being executed, the said Peter Njoroge Mungai had not been granted representation to the estate of the deceased.

Jackson Mungai Njoki, the grandson of the deceased who had filed the caution the subject of the applications in the Thika cause dated 5th August 2007 and 22nd October 2008, moved this court on 21st August 2008 seeking revocation of the grant made on 25th February 2008 to Peter Njoroge Mungai. He advanced three grounds. One, that the administrator concealed from the court the fact that the applicant had been adopted by the deceased, and that the deceased had in an oral will bequeathed the said asset to him. Two, that there was an untrue allegation that the deceased had sold the only asset making up the

estate to Felix Kinuthia, yet the said sale took place after the deceased's death, and occurred before grant was made to Peter Njoroge Mungai. Finally, he argued that under Kikuyu customary law a grandson born in his grandmother's home and raised there from childhood to adulthood is entitled to be treated as a child of the grandmother.

The administrator, Peter Njoroge Mungai, has responded to the application. His affidavit in reply was sworn on 9th January 2009. In response to the matters raised by the applicant he states:-

1. That the deceased was survived by only two children, the administrator and Mary Muthoni Wakagoto, the mother of the applicant.

2. That the process of obtaining the grant was lawful as it was not attended by fraud as alleged by the applicant.

3. That the sale of Loc 5/Kagunduini/1354 to Felix Kinuthia was lawful and in keeping with the law.

4. That the applicant was never at any time adopted by the deceased and since his mother is alive he is not entitled to claim a share in his grand mother's estate.

5. That the deceased did not leave an oral will as alleged.

The law on revocation is *section 76* of the Law of Succession Act. The relevant portion of the provision states –

'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 a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently …'***

Both sides filed detailed written submissions, in which they articulated their respective positions.

The argument by the applicant is that the process of obtaining grant was defective. He alleges that the deceased did not die intestate, as she had left an oral will in which she bequeathed Loc 5/Kagunduini/1354 to him. The exact time when this happened is not indicated. There are on record two affidavits sworn by Hannah Wairimu Kang'ethe and Ezekiel Mwaura Kimundu. They allege that the deceased told them and pointed out to them, in the presence of the applicant, the portion of her land, that is to say Loc 5/Kagunduini/1354, that she bequeathed to the applicant. According to them, he was entitled to 1.25 acres of it while Peter Njoroge Mungai was entitled to the other half.

If the deceased had indeed died testate, proceedings leading up to the making of a grant of letters of administration intestate would be fatally defective. The question then is whether the deceased died testate. *Section 9(1)* of the Law of Succession Act governs oral wills. It provides: -

'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 the making of the will*** *…'*

It is alleged that the deceased made the utterances alleged in the presence or two witnesses who have sworn affidavits to that effect. This is an attempt, if the affidavits are to be believed, to bring the matter within *section 9(1) (a)* of the Act. I must state that the best evidence on such matters would be oral, where the witness would be subjected to cross-examination to test the evidence. *Section 9(1) (b)* of the Act has not been satisfied at all. An oral will would be valid only if the deceased dies within three months from the date of the making of the will. In this case the date when the will was made is not indicated. It is therefore difficult to tell whether death came within three months of the making of the will. There is therefore no proof that the deceased left a valid oral will. To that extent no defects have be established in the process of the making of the grant

The other argument by the applicant is that there was fraud and concealment of material information. He asserts that he had been adopted by the deceased after his mother abandoned him. Consequently, he ought to have been treated as a son of the deceased, yet the applicant did not disclose that, meaning that he concealed that material information from the court. The applicant and his witnesses, Hannah Wairimu Kang'ethe and Ezekiel Mwaura Kimundu, have deposed to these matters. I hasten once against to state that evidence of this nature is best given orally, as the witnesses would then be confronted in cross-examination. Otherwise, the court is left with two contradictory stories and at loss as to which of the two to believe. This is a case that should have been disposed of orally. Disposing of it by affidavits was a disservice to the applicant.

The applicant would like the court to treat him as a child that the deceased had taken him in as her own. The definition of children for purposes of succession is to be found in *section 3(2)* of the Law of Succession Act. It states –

*'**(2) references in this Act to 'child' or 'children' shall include a child conceived but not yet born (as long as the child is born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.'***

It is my humble view that the applicant cannot possibly be considered to be a child of the deceased under the provisions of *section 3(2)* of the Act. It would appear that the concept of taking in a child and accepting him as one's own or assuming parental responsibility over him only applies to a male person. Indeed, this is the construction given to this provision by the Court of Appeal in *Willingstone Muchigi Kimari vs. Margaret Njeri Mugo* Court of Appeal civil appeal number 168 of 1990. There therefore is no merit in the applicant's argument that the deceased adopted him as her child.

The other argument that is that there is a Kikuyu customary concept that a child born outside wedlock at its grandmother's home and is raised at that home to adulthood attains the same status as the children of the grandmother for the purposes of succession. If such a concept does exist, no evidence was led on it, and in any event such a custom can only be established through oral evidence or reliance on scholarly works of learned persons who have conducted research on it, is of no relevance in this matter.

These proceedings relate to the estate of a person who died on 5th November 2004. The law of succession which applies to this estate is not Kikuyu customary law, but the Law of Succession Act. The said Act came into force on 1st July 1981. *Section 2(1)* of the Law of Succession Act expressly ousts the

application of Kikuyu customary law to the estate of a Kikuyu dying after the 1st day of July 1981. The whole of *section 2* of the Law of Succession Act is relevant to the matters the subject of these proceedings. For avoidance of doubt I will set it out *in extenso*, it says –

'(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

2. *The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death …'*

I need not say more.

The deceased herein died intestate. The estate of a person who dies intestate in Kenya after 1st July 1981 is to be distributed in accordance with Part V of the Law of Succession Act. *Section 32* has exempted certain classes of property in certain areas from Part V of the Law of Succession Act. The law that applies to property so exempted from Part V is, by virtue of *section 33*, the law or custom applicable to the deceased's community or tribe. The only exemption made under *section 32* of the Act covered property in areas other than Murang'a where the deceased hailed from. This underlines the position that Kikuyu customary law is wholly irrelevant to succession to the estate of the deceased.

Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents. In this case, the applicant's mother survived the deceased. She is the one entitled under Part V to inherit her mother, the applicant's deceased grandmother. The applicant clearly has no claim under Part V so long as his mother survived the deceased.

It is also argued that the applicant is a dependant within the meaning of *section 29* of the Act. Reliance is placed on *section 29(b)* to the effect that the applicant is a grandchild that the deceased had taken into her family and maintained immediately prior to her death. *Section 29* of the Law of Succession Act cannot come to the aid of the applicant for the purposes of the application before me. *Section 29* falls in Part III of the Law of Succession Act, which deals with reasonable provision for dependants who have not been adequately provided for either under the will of the deceased or on intestacy. The remedy available to such persons, who have not been provided for, is provided in *section 26*; they ought to file an application for reasonable provision. *Section 29* defines the persons who are entitled to file the application envisaged in section 26. The definition of dependant in *section 29* is only relevant to a person who has approached the court under *section 26.* The applicant has not come before me through *section 26* of the Law of Succession Act, and therefore *section 29* is wholly irrelevant to these proceedings.

From the foregoing it is my conclusion that the applicant was not a child of the deceased. There was therefore no basis for the applicant to list him as a survivor of the deceased, particularly as his own mother was alive as at the date the grant was sought and was properly listed as a survivor. If the applicant was indeed dependent on the deceased he would no doubt benefit from an application brought under section 26 of the Act in his capacity as a dependant of the deceased.

The other point advanced in support of the application is that Felix Kinuthia is wrongly listed as a survivor of the deceased. Two critical issues arise from the matter of Felix Kinuthia. The first is whether he can be said to have survived the deceased. The concept of survivorship with respect to succession is limited to heirs and beneficiaries. The instant cause is on intestacy, and therefore we should be focusing on heir-ship. Heirs are family members. A person who purchased property from the deceased during his lifetime is not an heir in intestacy and cannot be said to have survived the deceased. Felix Kinuthia was not an heir of the deceased neither can he described as his survivor. Listing him as a survivor amounted to a false statement and an untrue allegation.

The second issue touches on the alleged acquisition of the estate property by the said Felix Kinuthia. He has been accused by the applicant of intermeddling with the estate of the deceased. The material before me shows that the deceased died in 2004. The estate property was sold to Felix Kinuthia by the respondent on 11th September 2007. Representation to the estate was made to the respondent on 25th February 2008. Felix Kinuthia bought the property before a grant of representation was made to the respondent.

The law on intermeddling is *section 45* of the Law of Succession Act, which states –

'(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall –

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or both fine and imprisonment …'

The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.

In this matter the respondent sold property belonging to a dead person without authority as letters of administration had not yet been made to him. The fact of having petitioned for the letters did not clothe him with any authority. He and Felix Kinuthia intermeddled with the estate, and they no doubt committed an offence under *section 45(2) (a)* of the Act. It is unfortunate that the prosecutorial authorities in do not focus on offences of this kind as prosecutions are hardly ever mounted over them. This explains why property of dead persons is routinely intermeddled with.

As the respondent had no authority to sell the property in question, Felix Kinuthia acquired no interest in it at all as the seller had no title to it whatsoever. A buyer, such as Felix Kinuthia, is not in the same footing with a creditor, for the interest he alleges to have acquired in the estate was not acquired from the deceased during his lifetime or from a person authorized to sell the property. It should be noted that even where a grant of representation has been obtained, the grant-holder has no power to sell any immovable asset before confirmation of the grant. This is the law under *section 82*(b) (ii), which states –

*'**Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers … to sell or otherwise turn to account … all or any part of the assets vested in them, as they think best: provided that – no immovable property shall be sold before confirmation of the grant …'***

The sale to Felix Kinuthia of immovable property was done in contravention of the law. It amounted to criminal activity. Such transaction cannot be valid, and should not be upheld by the law.

Having taken into account all the matters hereabove I will make the following orders:

1. That given that Felix Kinuthia is not a survivor of the deceased, it was false to list him as a survivor, and therefore the process of obtaining the grant was faulty and I hereby revoke the said grant.

2. That I declare the sale of Loc 5/Kagunduini/1354 to Felix Kinuthia by Peter Njoroge Mungai was contrary to the law and therefore invalid and a nullity.

3. That as the said sale violated *section 45(2) (a)* of the Law of Succession Act and therefore brought it within the purview of criminal law, I hereby direct the Deputy Registrar to furnish to the Director of Public Prosecutions with a certified copy of this ruling so that the Director of Public Prosecutions can consider initiating criminal proceedings against Peter Njoroge Mungai and Felix Kinuthia.

4. That the survivors of the deceased shall apply afresh for appointment of administrators.

5. That the court file in respect of Thika SRMCSC No. 333 of 2007 shall be returned to the Thika Chief Magistrate's Court for further dealing.

6. That the applicant shall be entitled costs of this application.

DATED, SIGNED and DELIVERED at NAIROBI this 10th DAY OF October, 2013.

W. M. MUSYOKA

JUDGE