



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

SUCCESSION CAUSE NO.15 OF 2012

IN THE MATTER OF THE ESTATE OF THE ZAKARIA GACHOGU KIIRU DECEASED

ZAKARIA KIIRU alias JAMLECK GACHOGU NGIABU.....APPLICANT

VERSUS

PETER KARUNG'A GACHOGU.....RESPONDENT

RULING

1. This matter relates to the estate of ZACHARIA GACHOGU KIIRU (deceased). A grant of Letters of Administration was issued to PETER KARUNG'A GACHOGU was confirmed on 8.5.2012. The estate of the deceased was ordered to be distributed as follows;

PLOT NO.250/21 KERUGOYA

PERIS WANJIKU GACHANGA **To be shared equally**

JOHN KARIUKI GACHOGU

PETER KARUNG'A GACHOGU

ELIZABETH NINI NGIABI

PLOT NO.22 KERUGOYA

PETER KARUNG'A GACHOGU - Whole share

2. What is now pending before this court is a summons for revocation of grant filed by ZAKARIA KIIRU alias JAMLECK GACHOGU NGAMBI **under Section 76 (a) (b) (c) (d) (iii) of the Law of Succession Act** (to be referred to as the Act) and **Rule 44 of the Probate and Administration Rules**. The application is based on the grounds that the applicant is a grandson of the deceased. That the respondent listed Plot No.250/21 Kerugoya which he co-owns with others as property of the deceased. He contends that the property does not form part of the estate of the deceased. He prays that the grant be revoked or annulled to exclude the property.

3. The applicant filed a further affidavit and submits that the application which was dated 19.4.2012 seeking to include Plot NO.250/21 was not served on him or ELIZABETH NINI NGIABI.

4. The respondent PETER KARUNG'A GACHOGU opposed the application and filed a replying affidavit. He depones that the applicant is a grandson of the deceased and lacks the locus standito lay any claim to his estate. He further asserts that Plot NO.250/21 is in the name of ZACHARIA GACHOGU KIIRU. That the name of the applicant is JAMLECK GACHOGU NGIABI ID/No.1210818. That it is the deceased who was allocated plot No.250/21 on 21.2.1968 as per the Letter of allotment annexure PKG 1 and the name of the applicant does not appear anywhere on the records of Plot No.250/21.

5. The respondent depones that the applicant has no proprietorship interest in the aforesaid plot and has not produced any documents declaring him its owner. That the applicant has not annexed any documents to prove that he is also known as ZACHARIA KIIRU.

6. The respondent further depones that the applicant is the son of his brother STANLEY NGIABI GACHOGU who is deceased and his wife is ELIZABETH NINI NGIABI who was served with notices relating to this cause and she never objected to the grant being issued. He prays

that the application be dismissed.

7. The application proceeded by way of oral evidence. Parties adduced evidence. In his evidence the applicant testified that the deceased left Plot No.250/21 Kerugoya and is the one he is claiming. That the plot is owned by a group of men and is the one he is claiming. He testified that he is claiming the share of ZACHARIA KIIRU. He further testified that ELIZABETH NINI took over on behalf of STANLEY. That the share of ZACHARIA KIIRU is his as he is the father of his father.

8. The respondent testified that the plot in dispute is registered in the name of the deceased ZACHARIA KIIRU applicant has no claim over it as he is a grandson of the deceased.

9. I have considered the application, the averments in the affidavits and the evidence tendered in court. The issue which arises in the application is revocation of grant. **Section 76 (a), (b), (c) (d) (iii) of the Act** provides;

“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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or”

10. A person seeking an order for revocation of grant must prove that;

- The proceedings were defective in substance.
- The grant was obtained fraudulently by the party- making a false statement or by the concealment from court of something material to the case.
- Making untrue allegation of facts essential in a point of law notwithstanding that the allegation was made in ignorance or inadvertently.

Other grounds are that the administrator has failed to apply for confirmation to proceed diligently and to produce an inventory or account of the administration within the prescribed time. That the grant has become inoperative through subsequent circumstances.

11. These are the grounds which a party wishing to have the grant annulled or revoked must prove. The party need not prove all the grounds, if one of the grounds is proved to the satisfaction of the court, the court will order that the grant be revoked. That is why under **Section 76 of the Act** the word or is used after each of the grounds.

12. It is trite law that a person who alleges bears the burden of proof. It is not a matter of a game wits, it must arise from the clear allegations made by the party as he who alleges must prove. This is measured by considering the person who would lose if he fails to prove the existence of facts giving him any legal right or liability. This is well articulated under the **Evidence Act (Cap.80) Laws of Kenya.Sections 107, 108 and 109** provides;

107 Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The provisions deal with legal burden of proof (Section 107) and evidential burden of proof, (Section 109). The evidential burden is also provided under section 112 of the Act which provides;

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

These observations were made by the court of appeal in ANNE WAMBUI NDERITU –VS- JOSEPH KIPRONO REPKOI & ANOTHER (2005) E.A 334 where it was stated;

“As a general proposition under Section 107 (1) of the Evidence Act Cap.80, the legal burden of proof lies upon the party who invokes the aid of the laws and subsequently asserts the affirmative of the issue. There is however the evidential burden of proving any particular fact which he desires the court to believe in its existence which is captured in section 109 and 112”.

13. In this case the applicant had the burden to prove the grounds for revocation of grant and that he is the owner of the disputed property.

14. The plaintiff failed to prove any of the grounds under Section 76 of the Act. He also failed to prove that the property in dispute belongs to him. The property as shown in his exhibits, annexure AK2 para.5 of his affidavit was a letter forwarding the grant. Annexure ZK 5 shows that the plot is registered in the names of;

ELIZABETH NINI NGIABI

ZAKARIA KIIRU

RICHARD WANJOHI GITONYI

TARCISIO GAKURU MBITI

The applicant produced his identity and in court with the name JAMLECK GACHOGU NGIABI. He did not produce any proof that he is the one called ZAKARIA KIIRU. The burden of proof never shifted that the applicant produced a letter of allotment showing that the plot was on 21.2.1968 allocated to MR. ZAKARIA KIIRU & company. The applicant never adduced proof that he is the one known as ZAKARIA KIIRU. The applicant is registered as provided under Section 2 Registration of Persons Act Cap. Section 5 of the Act requires that a person gives his particulars for the purpose of being issued with an identify card. Among the particulars to be given is the name of the person in full. The identity card is then issued in the name of the registered person. It is presumed that the name on the identity card is the name of the applicant unless the contrary is proved.

The claim by the applicant is that the respondent listed the plot in dispute as part of the estate of the deceased when it was not. The applicant has failed to prove that, firstly that the plot is registered in his name and secondly that it does not form part of the estate of the deceased.

15. The respondent proved that the plot is registered in the name of the deceased, his brother STANLEY NGIABI (the applicants letter), RICHARD WANJOHI and TARCISIO GAKURU. The applicant’s mother ELIZABETH NINI NGIABI received an equal share of the plot.

16. The applicant did not discharge the burden of proof that the plot No.250/21 did not belong to the estate of the deceased.

17. The 2nd issue is the pleadings. It is trite that a party is bound by his pleadings. In DARE –V- PULHAM (1982) 148 C.L.R 658 at 664 the function of pleadings was described as follows;

“pleadings and particulars have a number of functions they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity of what he expects to meet. They define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial and they give the defendant an understanding of a plaintiffs claim in aid of the defendant’s rights to make a payment into court”

The pleadings form the basis of a claim by a party and they must therefore disclose the case by the claimant so that the defendant is aware of the claim before hand and gives him the opportunity to respond to that specific claim and is certain of what to expect in court. It is an issue of fair trial which gives the defendant an opportunity to be heard on the allegations in the pleadings. Article 50(1) of the Constitution provides;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

Where a party departs from his pleadings after pleadings are closed, it denies the defendant the right to be heard on matters raised during trial which were not pleaded. It also denies a party an opportunity to prepare his defence and he is caught by surprise by the ambush of the claimant departing from his pleadings.

18. The applicant departed from his pleadings and testified to completely different claim from what was pleaded. This can be demonstrated from the supporting affidavit where he depones at para-3- that he co-owns the property with others as property of the deceased. He impugnes the summons dated 19.4.2012 stating that he was not served with the application seeking to include his plot in the petition. Annexure ZK 3. This averment is in ignorance of Rule 26 (1) (2) of the Probate & Administration Rules which provides;

(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

The rule provides mandatorily that the person who is to be informed when filing for Letters of Administration is the person entitled in the same degree as or in priority to the applicant. The applicant is a grandson of the deceased and the respondent had no obligation to inform him as he does not rank in the same degree with the respondent or priority. The applicants' mother is alive and it is alleged that she was informed.

19. When the applicant testified he abandoned his averments in the pleadings and gave his name as JAMLECK GACHOGU NGIABI without an alias then stated that the share of ZAKARIA KIIRU is his as it belongs to his father. There was a complete departure from his pleading. It exposes the applicant as a person who is making a claim which is without basis. He stated he uses the name ZACHARIA KIIRU when coming to court a clear indication that this is not his name but uses it with ulterior motives. This cannot be entertained. He admitted that he is not registered by the registrar of persons by the name ZACHARIA KIIRU. The claim pleaded in the affidavit in support of the application were not proved.

20. Finally, I must address the issue of locus standi. ***Section 29 of the Act*** defines the meaning of dependants. It provides;

For the purposes of this Part, "dependant" means

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

The section gives the order of priority as follows;

- i) Wife/wives
- ii) Children
- iii) Parents
- iv) Grandparents ***Who the deceased had taken into***
- v) Grandchildren ***his family as his own.***
- vi) Stepchildren etc

The wife and children have the first priority without prove of dependancy. All the other category of dependants must prove that they were maintained by the deceased. The applicant does not rank in the order of priority and has not proved dependancy. He has admitted the deceased is survived by his children who are still alive. Indeed the applicant's mother who is a daughter-in-law of the deceased is still living. The applicant lacks the locus standi to bring the application. The applicant's mother who ranks in priority to the applicant was served on 3.5.2013 and she chose not to file any papers or to attend court. The application cannot be sustained as the applicant has no business with the estate of the deceased who is his grandfather. Those who were allocated the plot are members of the deceased's family and have not challenged the distribution safe for ELIZABETH NINI NGIABI who I find is not candid as she has not filed any application to challenge the grant but associates with her son who has no locus standi.

IN CONCLUSION

The applicant lacks locus standi to bring this application. He has not proved any of the grounds under ***Section 76 of the Act*** to warrant this court order a revocation of the grant. I order as follows;

- i) The application dated 19.9.2012 is without merit and is dismissed.

ii) I award costs of the application to the respondent.

Dated and delivered at KERUGOYA this 23rd day of January 2020.

L. W. GITARI

JUDGE