



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 345 OF 2003

IN THE MATTER OF THE ESTATE OF SOLOMON MWAKA NKUMARI

(DECEASED)

GERALD MUNGATIAPETITIONER

VERSUS

DOMINIC MUTUA NKUMARI.....OBJECTOR

J U D G M E N T

1. **Solomon Mwaka Nkumari**, the deceased in this cause, died on 2nd July, 1972. On 3rd November, 2003, **Celina Kaigongi**, the mother to the petitioner herein, petitioned for grant of letters of administration. However, she died on 7th August, 2005. **Gerald Mungatia**, the applicant, was then substituted as petitioner in her place on 15th January, 2007.

2. In the meantime, the objector had lodged an objection on 31st March, 2004. That objection was heard before me on 6th March, 2017 and 12th February, 2018, respectively. Although the applicant and his advocate were aware of the hearing dates, on both occasions, they failed to appear and the matter proceeded in their absence.

3. By a judgment delivered on 26th September, 2018, this court revoked the grant issued to the applicant on 16th January, 2007 and appointed the objector and **John Mutiga** as joint administrators of the estate of the deceased. Further, the court distributed the estate of the deceased as follows:-

L.R. NO. ABOTHUGUCHI/L. KAONGO/154 (6.8 HA)

a) John Mutiga - 4.8 Ha

b) Dominic Mutua Nkumari - 2.0 Ha

4. On 28th November, 2018, the petitioner filed a summons for the revocation of the grant. The grounds upon which the application was grounded were that; the grant was obtained by means of untrue allegations of fact and misrepresentation; that he was a beneficiary of the estate as his father died while his mother was pregnant of him and that his 5 siblings who were born after him were the deceased's children under the Ameru customs.

5. In his affidavit in support, the applicant acknowledged that the deceased was married to another wife i.e. **Njema Nkairo** who bore one daughter **Catherine Mpinda**. **Catherine Mpinda** then bore **John Mutiga** one of the administrators appointed by the court. He further alleged that the introduction letter from the chief that commenced these proceedings was not a forgery, but that the Chief had sought to coerce a benefit from the estate. Lastly, he stated that he and his siblings reside in the property of the deceased and some of his siblings have been buried thereon.

6. The respondent opposed the application. He contended that the application was an abuse of the court process for two reasons; firstly, that the advocate who drew and filed the application was not properly on record and secondly, that the application was but an appeal against the judgment of this court of 28th September, 2018.

7. The parties filed their respective submissions which this court has carefully considered.

8. The first issue is whether the application is properly before court. It is not in dispute that the applicant was hitherto represented by the firm of **L. Kimathi Kiara & Company Advocates**. The present application has been filed by the firm of **F. K. Gitonga & Company Advocates**.

I have perused the record. There is no Notice of Change of Advocate filed in court before the said application was filed.

9. **Rule 63 of the Probate and Administration Rules** specifies the Orders in the **Civil Procedure Rules** that are imported to the Law of succession Act. **Order 9** is not one of the Orders of the **Civil Procedure Rules** that apply in succession matters. (See **Jackson M. Miyogo v Simeon Mose Omiti [2016] Eklr**). In this regard, that objection is rejected.

11. The next issue is whether the application is an appeal against the judgment of 28th September, 2018. The grant on record was issued after a full trial. It was after the court had heard the objector's objection in full that it delivered the judgment being complained of. The applicant was a party to the proceedings in his own right. The application is challenging the outcome and findings made in that judgment.

12. To the extent that the findings in that judgment were made after a full trial, I do not think that those issues can be re-litigated before this court. This court is *functus officio* as far as those issues are concerned.

13. To my mind, the door open to the applicant was either to apply to set aside the proceedings that led to the judgment he is challenging or to appeal to the Court of Appeal. Attempting to determine the present application, this court will be sitting on appeal on an own judgment. That will be highly irregular if not unlawful.

14. Accordingly, I find the application to have no merit and dismiss the same with costs.

DATED and **DELIVERED** at Meru this 23rd day of May, 2019.

A. MABEYA

JUDGE