



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE NO. 350 of 2007

IN THE MATTER OF THE ESTATE OF JOSEPH MAGURU KANYUGUTI (DECEASED)

JULIA GICUKU KATHIL.....1ST APPLICANT

MARGARET RWAMBA MURIITHI.....2ND APPLICANT

VERSUS

ISAAC NJAGI NJERU.....1ST RESPONDENT

APHIJA IGOKI NJERU.....2ND RESPONDENT

RULING

A. Introduction

1. This ruling pertains to the Amended Summons dated 18/10/2016, which seeks amongst others enjoinder of the applicants in this succession cause, review or setting aside of orders issued on the 28/06/2008, dismissal of the application dated 24/04/2008 and revocation of the grant of the letters of administration issued in this succession cause.
2. The applicants state that they are beneficiaries of the deceased in conjunction with the respondents. The applicants state that the 2nd respondent vide an application dated 27/02/1997 managed to secure court orders, issued on the 11/04/2007, that were to the effect that the suit property Kyeni/Mufu/1964 be subdivided into three (3) portions consisting of 3.40 acres for each house of the deceased.
3. The applicants' further state that they were never parties to any application for confirmation of grant and neither were they aware of the proceedings that led to the subdivision of the suit property.
4. In rejoinder, the 2nd respondent filed a replying affidavit dated 13/2/2017 in which she stated that she was a daughter in-law to the 1st wife of the deceased and that she was bequeathed the share of the suit property of the eldest wife. It is her case that the 1st respondent is the biological brother to the applicants who kept them abreast of the proceedings in this succession cause and further that the applicants and the 1st respondent being children of the deceased 2nd wife were entitled to their share of the deceased's estate bequeathed to their mother.
5. The 2nd respondent further stated the issues being raised by the applicants were addressed by this court in previous applications dated 11/10/2012 and 3/12/2012 and as such the application before court is an attempt to evict the 2nd respondent from the suit land.

B. Applicant's Submissions

6. It is the applicants' submission that the deceased's property was distributed by a mere court order and not through the normal rigorous of probate proceedings and as such the said orders should be set aside. Further the applicants submit that they were never involved in any of the proceedings despite being beneficiaries of the deceased.
7. The applicants further submit that if the said order is not set aside, the applicants will be disinherited as the order did not include their names as beneficiaries. The applicants further submit that despite allegations of delay in bringing forth the current application the same is not merited as there is no time limitation in law on the same more so since there is uncontroverted evidence that the applicants were not involved in the proceedings.
8. The applicants placed reliance in the cases **Re Estate of Charles Ngotho Gachunga (deceased) [2015] eKLR** where the court held that Section 76 of the Law of Succession Act does not impose any time limitations within which an application for revocation of grant ought to

be filed as well as the Court of Appeal case of **Musa Nyaribari Gekone & 2 Others v Peter Miyianda & Anor [2015] eKLR** where the court held that summons for revocation of grant and rectification of register are an “action to recover land” for purposes of Section 7 of the Limitation of Actions Act.

9. In response to the allegation that he deceased died before the coming into effect of the Law of Succession Act, the applicants submit that under Section 2(2) of the Act, estates of persons dead before commencement of the Act are subject to the written laws and customs applying at the death of the deceased and as such it cannot be said that the current distribution was done in line with the Kiambu Customary Law as the 2nd respondent, a daughter of the deceased, could not inherit under it.

10. Further, the applicants submit that if Kiambu customary law was to be applied only the deceased’s son would inherit from him which would be unfair and contrary to section 3(2) of the Judicature Act which provides for application of customary law only as far as it is not repugnant to justice and morality as enunciated in the case of **Re Estate of G.K. (deceased) [2017] eKLR**.

11. The applicants further submit that it would be contrary to the rules of natural justice and fairness if this honourable court were to imply that the applicants were part of the proceedings herein through the 1st respondent as no evidence has been advanced to back up the same further that there’s no way the application can be said to be res-judicata yet the applicants were never parties to the previous applications.

C. 2nd Respondent’s Submissions

12. The 2nd respondent on her part submits that there is a similar application filed by the 1st respondent on the 11/10/2012 which was determined and dismissed and as such the current application is *res judicata*.

13. The 2nd respondent further submits that the orders which the applicants seek to set aside or have reviewed were made over eight (8) years ago and as such there has been unreasonable delay in filing the current application. It is further submitted that the applicants are both married and live with their husbands in their respective parcels whereas the respondent has been in occupation of the suit land since 1962.

14. The 2nd respondent further submits that the deceased died before the Law of Succession Act came into effect and as such the equal division of the suit land was proper.

D. Analysis & Determination

15. From the court record and specifically from the affidavit by the 2nd respondent dated 24/04/2008 in support of the application of the same date it is clear that the deceased’s estate was distributed by virtue of orders of the succession court Embu Principal Magistrate Succession Cause No. 42 of 1986 whereas the estate was divided equally between the three houses. Further it is not in disputed that the applicants are beneficiaries of the deceased being his children.

16. The issue for determination is whether this application is *res judicata* and whether the applicants are entitled to review.

17. I have perused the record and noted that the previous applications which sought similar orders in these proceedings were between the respondents on opposite sides. The applicants were not part of those proceedings and have come to litigate in court for the first time.

18. **Section 7 of the Civil Procedure Act** describes “*res judicata*” as “*a suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties....*”

19. I reach the conclusion that the application is not res judicata for it does not fall under the description under Section 7 of the Act.

20. The applicants assert that they were not involved in any proceedings leading up to the distribution of the deceased’s estate. The 2nd respondent does not dispute this but alleges that the 1st respondent who is the applicants’ brother held their brief in the proceedings. The 2nd respondent further argues that since the deceased died in 1980 before the commencement of the Law of succession Act which commencement date was 1/07/1981 which was after the death of the deceased, the Law of Succession Act is not applicable to his estate.

21. The 2nd respondent further submits that the orders which the applicants seek to set aside or to be reviewed were made over eight (8) years ago and as such there has been unreasonable delay in filing the current application. The 2nd respondent further submits that the deceased died before the Law of Succession Act came into effect and as such the equal division of the suit land was proper since it was based on Kiambu customary law.

22. The Law of Succession Act Section 2(2) provides that,

“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, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

23. It is important to note that the application of customary law is only applied so far as the same is not repugnant to justice. The Judicature Act (Cap 8 Laws of Kenya) Section 3 (2) provides,

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in

which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

24. Having restated the law, I wish to give a brief background of these proceedings which will shed light on the intricacies involved herein in this cause.

25. The case commenced in Embu Magistrate’s Court as Succession Cause No. 42 of 1986. The 1st respondent a son of deceased was the administrator having been so appointed on 22/06/2007. The 2nd respondent, a daughter in law of deceased whose husband was deceased filed a protest against confirmation of the grant.

26. Before the protest was heard and determined, the 2nd respondent filed an application under Section 71 of the Law of Succession Act seeking for several orders including confirmation of the grant. She claimed that the 1st respondent had failed to administer the estate according to the law.

27. The court ordered that the estate of the deceased be shared equally amongst his three houses as follows: -

- House of Mergery Ciamwathi Joseph – 3.40 acres
- House of Milliam Wamugo Joseph - 3.40 acres
- House represented by Alphija Igoki Njeru – 3.40 acres

28. The applicant then moved to the High Court accusing 1st respondent of being uncooperative and failing to administer the estate to give the beneficiaries their shares. She sought orders to have the share of the house of the first widow be curved out for her. Justice Wanjiru Karanja granted orders in favour of the 2nd respondent.

29. Bwonwonga, J. heard and dismissed the 1st respondent’s application dated 22/04/2016 to review the orders of W. Karanja, J. he had also sought to restrain the 2nd respondent from getting her share curved out of the estate. An application before the same judge by the 2nd respondent for removal of caution placed by the 1st respondent was allowed paving way for the 2nd respondent to get her share in the estate.

30. The application before me now has been brought by the applicants who are the sisters of the 1st respondent seeking to revoke the grant and to review the orders of the High Court issued on 28/06/2008 and to be enjoined as parties in this cause.

31. The applicants claim that they were not informed of these proceedings. The 2nd respondent argued that the two were represented by the 1st respondent who is their brother. It is not in dispute that the 1st respondent is the administrator of the estate and has always participated in these proceedings.

32. The deceased’s estate was shared equally between three houses of which the 1st respondent and the applicants belong to one. Each of the house got an equal share of 3.40 acres. If the applicants were to get a share of the estate since they are children of the deceased and beneficially entitled, their shares would come from the house of their mother and so would that of the 1st respondent.

33. The orders of the magistrate were made more than 10 years ago and have not been overturned. The High Court Judge W. Karanja, breathed life into the said orders when she ordered for partial confirmation of the grant that the share of the 2nd respondent be curved out of L.R. Kyeni/Mufu/1964 and that the Deputy Registrar signs the necessary documents.

32. However, the 1st respondent who has lost in his endeavours to deny the 2nd respondent the share of her mother in law’s house. He has been uncooperative and refused to execute the grant as the administrator. The applicants who are his sisters seem to be on a similar mission in that they are aware that no one appealed against the magistrate’s order to share the estate equally between the houses.

35. The magistrate’s orders are still valid and it is pointless to seek to review the High Court’s order for curving out the share of the 2nd respondent because the main orders in Succession Cause No. 350 of 2007 remain valid.

36. The applicants though married are heirs of their father’s estate and the share of the house they belong to has been identified in the succession cause. The dispute in this cause was determined by the magistrate more than 10 years ago and each of the houses are free to take up their shares and distribute among themselves.

37. I have considered the grounds relied on for review and do make a few observations; -

- i. That the applicants have not been disinherited since the share of their house was identified and is in the name of their mother.***
- ii. That the grant was issued to the 1st respondent a son of the deceased who is equally entitled under Section 66 of the law of Succession Act just as the applicants and that no fraud on his part has been proved or concealment of facts material to the case.***
- iii. That the applicants have not made a case for review of the orders made by the High Court on 28/06/2008.***

iv. That the cause has been concluded and applicants have not shown sufficient grounds for being enjoined as parties herein.

38. It is therefore my finding that the application dated 18/10/2016 has no merit and it is hereby dismissed with no order as to costs.

39. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF SEPTEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mutegi for Andande for Applicant

1st Respondent

Both Applicants