



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 50 OF 1996

IN THE MATTER OF THE ESTATE OF ELIJAH M'MANYARA NTHAI (DECEASED)

FLORENCE KIRUMBA.....PETITIONER

VERSUS

EVANGELINE GACHERI GITOBU....1ST RESPONDENT/INTERESTED PARTY

CATHERINE GACHERI.....2ND RESPONDENT/INTERESTED PARTY

RULING

1. This matter relates to summons dated 6/03/2019 brought pursuant to **Rule 49 and 73 of the Probate and Administration Rules**. The applicant seeks that an order of temporary stay of execution do issue against the judgment, decree or order made on 16/10/2018 pending hearing and determination of the application.
2. That the court issues temporary injunction restricting the Respondents from entering LR No. Abothuguchi/Katheri/734 pending the hearing and determination of the application.
3. That the court orders review and or setting aside of the orders of 16/10/2018 and allow the matter to be heard a fresh on merit.
4. The application was supported by the grounds in the body on the Summons and the supporting and further supporting affidavit of Florence Kirumba and Dorence C. Soy both sworn on 6/03/2019.
5. It is contended that the applicant was never heard and should be given an opportunity to present her case. She was not aware of the mention on 16th October 2018 as her counsel handling her matter fell ill and was in and out of hospital in Nairobi and had failed to diarize the matter. This mistake of counsel should not be visited upon the applicant who is an innocent litigant.
6. It is affirmed that the petitioner, Naomi Karegi petitioned for letter of administration, and the applicant is the one who has the letters of administration as the legal representative of her estate as she is dead. That the respondents are total strangers to the estate of the deceased for since the matter commenced in 1996 they have never complained or appeared anywhere. The issues at hand such as paternity need to be determined by filing of pleadings which requires oral evidence and DNA test on the respondents.
7. This application was opposed by the 1st respondent through her replying affidavit sworn on 26th April 2019. She deponed that that application has been brought in bad faith as the applicant wants to delay the matter. That it is not true that the applicant was not granted the opportunity to present her case as there is no evidence on record that supports her assertions. That she is not a stranger to the estate as she is the daughter of the deceased through the first wife.
8. The application herein was canvassed by way of written submissions and the issue for determination is whether the applicant has satisfied the court that the orders made on 16th October 2018 should be revealed and/or set aside.
9. In this case the applicant seeks review based on two grounds. Firstly, that she was not aware of the date of the mention that led to the orders that she seeks to review and or setting aside. She stated that her advocate at that time was ill and frequently in hospital and did not make her aware of the date. According to the further supporting affidavit of Dorence C. Soy, advocate, she deponed that when she reported to the firm she found out that the applicant's advocate had left on medical grounds and was subsequently admitted in Nairobi for an operation and upon recovery she never returned to Meru. She unfortunately failed to diarize the matter. The mistake to fail to attend court on 16/10/2019 was not intentional. On the other hand, the respondents refuted these allegations.
10. The history of this matter is that Naomi Karegi M'Imanyara petitioned for letters of administration to the estate of her deceased husband Elijah M'Imanyara Nthai. M'Inoti Nthai the brother of the deceased objected to her being granted letters of administration. The objection

was heard by viva voce evidence and after long and elaborate hearing Justice Kasango delivered a judgment on 22nd October 2010 dismissing the objection and finding that L.R. No. Abothuguchi/Katheri/734 shall go to Naomi Karegi M'Imanyara absolutely. During the hearing of the objection, it was established and noted in the judgment that the petitioner Naomi Karegi was the one residing on the suit land and that she had 2 daughters one of whom was married whereas the applicant herein Florence Kirumba was staying with her together with her children on the suit land.

11. The objector was aggrieved by the determination of Justice Kasango and he appealed as shown in annexure FK1 Court of Appeal At Nyeri, Civil Appeal 154 of 2011. Upon consideration of the objectors appeal, the same was dismissed and Honourable Justice Kasango's judgment upheld that the objector had not succeeded in proving the deceased held the land in question in trust for him neither did he prove that the deceased had left an oral will bequeathing him half of the suit land. The Court of Appeal held that under S. 66 of the Law of Succession Act the surviving wife of the deceased and the children of the deceased had priority to be issued with letters of administration.

12. By an application dated 14th December 2017 Evangeline Gacheri Gitobu sought that grant that was made to Naomi Karegi be revoked for reasons that the petition had not been brought to her attention and that it was filed secretly. The application was filed at a time that the petitioner had already died and on 10th January 2018 the court indicated that there was need to substitute the administratrix. On 27th June 2018 the court issued fresh grants of letters of administration to Evangeline Gacheri Gatobu and Florence Kirumba jointly and directions were taken that summons for confirmation be filed. The Interested Party herein filed an affidavit proposing modes of distribution of the estate and 21st September 2018, the matter was brought up for hearing but the applicant had not filed her proposal. Another date was taken for mention on 16th October 2018.

13. On 16th October 2018, the applicant had not yet filed her mode of distribution as result of which the interested party mode of distribution was adopted as an order of the court.

14. Upon perusal of the records of the court it was realized that the cause herein had been adjudicated fully by a court of competent jurisdiction whose verdict was challenged at the court of appeal and the appeal was dismissed. It was therefore erroneous that Letters of Administration were issued to the interested party jointly with the Interested party when it had already been determined that the deceased was survived by 2 daughters and one wife. The objector and the interested party herein have never challenged the finding the court of appeal in Civil Appeal No. 154 of 2011 and this court cannot vary that finding unless with the consent of the parties.

15. The grant of Letters of Administration that was issued on 16th October 2018 is hereby revoked and Florence Kirumba is made the Administratrix of the estate of the deceased Elijah M'Imanyara Nthai. The estate shall be distributed between Florence Kirumba and Catherine Gacheri in equal shares. Each party to bear their own costs.

HON A.ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON 24TH OCTOBER 2019.

In the presence of:

CA:- Kinoti

Ms Soy advocate for the applicant.

Ms Rimita Advocate for the Interested Parties.

HON. A.ONG'INJO

JUDGE