



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO.189 OF 1999

IN THE MATTER OF THE ESTATE OF GACHII WAMBUGU (DECEASED)

SIMON THOGO KARIUKI.....APPLICANT

VERSUS

PATICK MATHENGE GACHII & 3 OTHERS.....RESPONDENTS

R U L I N G

Before me is the Summons General dated 7th March 2018 and filed on 8th March 2018. It is brought by Simon Thogo Kariuki under Rules 49, 63 and 73 of the P&A Rules, with respect to the Estate of Joseph Kariuki Wambugu.

The summons is supported by the affidavit of the applicant sworn on 7th March 2018.

According to the applicant his deceased father Joseph Kariuki Wambugu who died on 14th June 1982 was a brother to Gachii Wambugu. That his father was a beneficiary of the estate of Gacii Wambugu, and died while this cause was pending. That he the applicant was the personal representative of his father as evidenced by the Limited Grant of Letters of Administration ad litem issued on 16th December 2016 in Succession Cause No.95 of 2016.

According to Patrick Mathenge Gachie's (one of the administrators of the estate of Gacii Wambugu) affidavit in reply sworn on 14th March 2018 the applicant's father died before the Succession cause was filed, and was never a party to the same and therefore the application seeking to substitute him is in conceived.

That the applicant had filed a summons for Revocation of Grant which was still pending and which he ought to have prosecuted instead of filing this summons.

Arguing the application on behalf of the applicant, Mr. Kinuthia submitted that the estate of Gacii Wambugu actually comprised of property that he held in trust on his and his two brothers' behalf, one of whom was the applicant's father. That the applicant's family was denied its inheritance because it was not represented in this cause. That the respondents would not suffer any prejudice if the applicant was allowed to substitute his father in these proceedings to enable the applicant pursue the summons for revocation of grant.

The application was strongly opposed by the respondents through their counsel Mr. Kebuka Wachira. He submitted that Gacii Wambugu's estate was made up of 2 properties- 530 and 1247 which he was given by his father and there was no trust for any of his brothers. That the mother of the applicant Martha Njeri Kariuki participated in the proceedings together with the other two brothers of the deceased and after hearing all the parties, the court found that there was no trust. That the applicant's father died before the filing of the cause. He was never a party and therefore cannot be substituted. That the applicant was better off pursuing his summons for revocation of grant as his current application has no basis. He urged the court to dismiss the same.

In a rejoinder counsel for the applicant submitted that Mr. Kebuka Wachira was giving evidence from the bar when he submitted that the court had already determined there was no trust.

I have carefully considered the application, affidavits, submissions and the record. The only issue for determination is whether the applicant should substitute his deceased father in these proceedings. It is not in dispute that by the time this cause was first filed in as Nyeri RM Succession Cause No.190 of 1990 which later became High Court Succession Cause No.189 of 1999, the applicant's father was already deceased having passed on in 1982. The applicants mother participated in the proceedings in the lower court and when the protest that was filed by the other two brothers of the deceased on the basis that the deceased Gacii Wambugu held the two parcels of land in his name in trust for his two brothers-Makhandia J as he then was found that **"The trust having not been proved, there is no basis for the protests – accordingly they are dismissed"**. This was on 25th January 2010.

His ruling stands unchallenged to date and hence that issue is re judicata before this court.

Secondly the applicant's father was never a party to this cause. In 1990 he was already deceased for 8 years. His wife – the applicant's mother participated in the proceedings. Hence I agree with the respondent that the application is misconceived for seeking to substitute a person who was never a party in the first place.

It is therefore not correct to say that the applicant will be denied his place at the seat of justice if this application is not allowed. As the legal representative of his father's estate he is at liberty to pursue its interest through other legally available means.

This application however is misconceived and has no merit. It is dismissed.

Each party to bear its own costs.

Dated, delivered and signed at Nyeri this 28th day of September 2018.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant - Albert

Ms. Wangari for Mr. Gori for Applicant

Ms. Macharia holding brief for K. Wachira for Respondents