



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 93 OF 1999

IN THE MATTER OF THE ESTATE OF M'IBUURI M'AMBU TU DECEASED

AGOSTINO MUTHUURI M'UBURI.....APPLICANT

VS

PETER KIRIMI M'IBUURI.....PROTESTER

RULING

By an application dated 10th July 2013 the applicant Agostino Muthuuri M'Iburi sought under Rules 4(1),45 and 63 of the Probate & Administration Rules and older 45 Rule 1 of the CPR 2010 that judgment herein dated 29th October 2010 be reviewed to make provision for the dependants of the late M'Muguna M'ibuuri (The former Administrator herein)

THAT Grant of Letters of Administration intestate of the estate of the deceased herein be issued to MuthuuriM'Iburi and the same be confirmed forthwith;

THAT the net intestate estate of the deceased comprising of Ntima/Igoki/1520 and 1709 be distributed equally as shown in.

The application was based on the ground that the distribution ordered in judgement dated 29th October, 2010 completely disinherited the family of the late M'Muguna M'Iburi who is the 1st owner and also the original petitioner/Administrator;

THAT the family of the late administrator comprises of his widow, 3 sons and one daughter all of whom have been disinherited;

Though the applicant Muthuuri M'Iburi replaced the late Administrator, he needs to be formally appointed as such and be issued with the grant in his name, a certificate of confirmation to enable him distribute the estate.

The application was also supported by affidavit of Agostino Muthuuri M'Ibuuri sworn on 10th July 2010. In opposing the application Peter Kirimi M'Iburi filed a Replying Affidavit and averred that the applicant had not taken out letters of Administration to the estate of the late M'Muguna M'Ibuuri to warrant being given any portion of the estate of M'Ibuuri M'Ambuthu.

THAT this matter was already determined and the former petitioner/Administrator now deceased testified that he was not interested in the estate herein as he lived on 15 acre farm in Timau where he died and was buried.

THAT the applicant is making another attempt through this application to get a bigger portion of the deceased father's land after failing in the judgement. He prayed that grant be issued in their joint names as the applicant will not administer the estate honestly or diligently given evidence adduced during hearing.

In the further affidavit of Mary Muguna ,Nathae Gatobu, Terah Kiogora Mugua, Aliel Gakii Kimaita and Martin Muturi Muguna they aver that they are interested in the inheritance of M'Muguna M'Ibuuri and have requested the current Administrator to have them considered and have M'Mugunas share registered in their joint names.

Applicants counsels M/S Mwenda Mwarania Akwalu and Co. Advocates filed submissions in support of the applications and said that M'Muguna M'Ibuuri was the original petitioner and when he died this cause had not been finalised and he was substituted by the applicant Agostino Muthuri M'Ibuuri but no formal letters of Administration were issued in the name of the applicant through matter was heard and a judgment dated 11th November 2010 delivered distributing the estate.

It was their view therefore that Letters of Administrator intestate be issued in the name of the applicant and certificate of confirmation and distribution also be issued to enable judgment of the court be executed. It was further submitted that thethe deceased M'Muguna M'Ibuuri was not provided a share of the estate in the judgment of the court is because there was no evidence adduced in respect of who were his beneficiaries.

That by the time the deceased died they had testified together with applicant and their case closed. It was urged that since the estate is yet to be distributed it is only just and fair that the deponents in further be allocated to take late petitioners share.

The court was urged to note that their dependency is not disputed in the Replying Affidavit and that the widow of beneficiary and grandchildren to the deceased are recognised dependant in law. It was urged that mode of distribution be rectified so as to make provisions for dependants of the late petitioner.

On their part Mwangi E.G. and Co Advocates for the Respondent/Protester submitted that this cause was determined by Hon Justice Mary Kasango by Judgment dated 29th October 2010, which distributed land parcel No. Ntima/Igoki/1520 and Ntima/Igoki/1709 to be shared equally between

Agostino Muthuri, Silas Mwenda M'Ibuuri, Peter Kirimi M'Ibuuri, Geoffrey Kaburu M'Ibuuri, David Miriti M'Ibuuri and Jediel Kaai M'Ibuuri and that Martha Naitore the 2nd wife of the deceased was to have a right to use both parcels No. Ntima/Igoki/1520 and 1709 for her lifetime.

It was submitted that applicant can't reopen this cause as it is determined. It was submitted that the family of the deceased M'Muguna M'Ibuuri have not made the application to be included in the estate or to review the judgment. That the affidavit dated 7th January 2010 is not an application nor is it an authority to the applicant to apply on their behalf.

It is an afterthought meant to counter paragraph 4 and 5 of the Respondents affidavit dated 1st July 2013. It was submitted that this court is functus officio having delivered judgment on 29th October 2013.

I have looked at the judgment of Justice Kasango dated 29th October 2010 and at page 13 line 7,8 and 9 the court said,

“There was no evidence adduced in respect of who are the beneficiaries of the estate of M'Muguna who would inherit his portion.”

Line 10

“The fact that Agostino substituted him does not amount to him inheriting M'Mugunas' portion.”

At page 17 at lines 2 and 3 it is again indicated,

“ As stated before M’Muguna died and no evidence was led in respect of his beneficiaries if any,”

The court in that judgment secured to say that the deceased M’Muguna was entitled to inherit from his father’s estate but had no surviving beneficiary to be considered for such inheritance and therefore the court could not distribute the estate bequeathing any portions to him.

On the other hand the Respondent Peter Kirimi M’Ibuuri claims that the late M’Muguna lived on 15 acres of land in Timau where he died and was buried was the alleged land in Timau a gift inter vivos out was land M’Muguna bought for himself? If it was land the late M’Muguna bought for himself, would ownership of such land exclude him from inheriting his father’s land? Judgment herein having been delivered on 11th November 2010 why did it take so long for the family of M’Muguna to come up and claim what they allege belonged to M’Muguna?

Where was the family of M’Muguna staying all the while if it is claimed by Agostino that they were disinherited by the distribution? Is it the family of M’Muguna who authorised Agostino to make application or Agostino is driven by ill motive to enrich and benefit himself?

These are issues that can’t be answered by way of affidavit evidence whose deponents have not been subjected to interrogation of their averments and therefore the applications for review of judgment dated 29th October 2010 can’t be allowed on such insufficient evidence.

As regards grant of Letters of Administration were granted to Agostino Muthuuri M’Ibuuri on 3rd October 2008 and the Deputy Registrar ought to have administratively extracted same and issued it. It is not a matter for the court, Certificate of Confirmation should also issue forthwith in accordance with the judgment of the court delivered on 11th November 2010. Costs of Suit to be borne by each party.

Ruling Signed, Delivered and Dated 2nd Day of August 2017.

HON. A.ONG’INJO

JUDGE

In the presence of:

C/A: Penina

Mr. Kariuki Advocate holding brief for Ms Mwangi for protester

Mr Ashaba Advocate holding brief for Mwenda Mwarania for applicant.

Copies of ruling to be supplied to parties at their own costs

HON. A.ONG’INJO

JUDGE