



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO 294 OF 1996
IN THE MATTER OF THE ESTATE OF MOHAMMED GATONGE (DECEASED)

GAUKU MOHAMED.....PETITIONER

Versus

GITONGA MOHAMED.....OBJECTOR

RULING

Stay of confirmation

[1] Before I go into the merits of this matter, let me settle one matter quickly. The application dated 17th June, 2014 made by the Petitioner to have confirmation proceedings herein stayed, has been overtaken by events in so far as it is founded on ‘*determination of Supreme Court App. No. 19 of 2014*’; the Supreme Court of Kenya dismissed the application before them on 18th March, 2015. Stay of confirmation proceedings is not, therefore, a matter for determination by this court. I will now determine the protest to confirmation by the petitioner.

Fluctuating legal journeys and fortunes

[2] This cause is characterized by numerous fluctuating legal fortunes. It has seen many applications as well as legal journeys. It has traversed the entire system of superior courts; this court; the Court of Appeal and eventually the Supreme Court, the highest Court of the land. The most contentious matters which have impelled the Petitioner to take all those legal journeys are two, namely:

- (1) That the Objector, who is the joint administrator in the estate is not a biological son of the deceased; and**
- (2) That the consent order recorded on 16th September 2002 before Kasanga Mulwa J that both parties to be joint administrators of the estate of the deceased was procured by fraud.**

The above two issues were also the major grounds of appeal and were determined by the Court of Appeal in Appeal No. 64 of 2008. The eminent judges of appeal upheld the consent order as had been recorded before Kasanga Mulwa J. They also held that the paternity of Gitonga Mohammed was conclusively

determined that he was indeed a son of the deceased; the reasons given were that, following the dismissal by the trial court of the Petitioner's claim to the contrary, the Petitioner did not prefer an appeal on the dismissal. See the decision of the Court of Appeal.

The Protest

[3] Now, it bears repeating that the protest herein is solely based on the two issues which the Court of Appeal determined. These issues are:

(1) That Gitonga Mohammed is a stranger to the estate to which these proceedings relate because he is not the biological son of the deceased; and

(2) That consent order that was recorded before Kasanga Mulwa J. on 16th September, 2002 was procured by fraud, collusion or perjury. That it should be set aside and the said Gitonga be compelled to substantiate his paternity by way of DNA or other formal evidence.

[4] Look at these filings by the Petitioner: the affidavit of protest filed on 3rd December, 2013, the affidavit filed on 17th November, 2015 as well as her submission filed on 27th November 2014: they all but only amplify the two grounds. I note that there are several other affidavits filed by the petitioner in this cause for different purposes and remedies, but all rotate around one axis; the above two issues. I have carefully considered all the arguments by the Petitioner and by Thangicia for Gitonga Mohamed: and I have meticulously perused the court file; and I take the following view of the matter. The two issues; on paternity of Gitonga Mohamed; and the consent recorded before Kasanga Mulwa J on 16th September, 2002; were conclusively determined by the Court of Appeal. The decision by the court (*Lenaola J*) on distribution of 17th October, 2002 was upheld. I note that the Petitioner had even applied for review of that decision before going on appeal over it but her request for review was denied. With absolute respect, this court (*Lenaola J.*) made a decision on the two issues and the decision was upheld by the Court of Appeal. There are no new facts that have been disclosed as to impel the court to revisit its decision even on the guise of review jurisdiction. In the circumstances, I am bound on the two issues. The petitioner is trying to re-litigating these issues again before me which I think is against public policy of the law; that, litigation must come to an end. I do not, therefore, think it is appropriate to discuss the prospects or otherwise of the two issues even if I was to employ very ingenious craft in evaluating the protest herein. The essential core of the protest has been decided upon; that is to say, that the court has conclusively determined the paternity of Gitonga Mohammed that he is indeed the son of the deceased, and the consent recorded before Kasanga Mulwa J on 16th September 2002 was proper. Accordingly, there is absolutely nothing which prevents or lawful justification to deny confirmation of the grant of representation issued herein to the joint administrators; and distribution of the estate of the deceased to be in accordance with the order of this court (*Lenaola J*) made on 17th October 2007. For avoidance of doubt, I will restate the order:

“...that Plot No. 6 Makutano Meru Municipality shall be inherited in equal shares by both Gauku Mohammed and Gitonga Mohamed”.

The upshot

[5] The upshot is that, the application dated 30th October 2007 is allowed. The grant of representation to the estate of the deceased is confirmed. Accordingly, distribution of the estate of the deceased shall be in terms of paragraph 5 of the affidavit in support and more specifically the order by this court made on 17th October 2007. It is so ordered.

Dated, Signed and Delivered in open court at Meru this 19th day of January, 2016.

F. GIKONYO

JUDGE

In the presence of:

Thagicia for 2nd administrator

1st administrator

2nd administrator

Mwenda/Mark – C/c