



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2299 OF 2012

IN THE MATTER OF THE ESTATE OF SALOME MUKAMI KARIUKI (DECEASED)

RULING

1. The application for determination is dated 26th March 2015. It seeks the review or setting aside of orders that were made by the court on 16th May 2013, and a declaration that the deceased was not the absolute owner of Muguga/Kanyariri/196. It is premised on the grounds set out on the face of the application, as well as the facts deposed to in the affidavit of the applicant, Job Waweru Kariuki, sworn on 26th March 2015.
2. It is averred that the deceased was the registered proprietor of Muguga/Kanyariri/196 in trust for defined beneficiaries and for that reason the property in question was not available for disposal by will by the deceased. It is stated that the subject property was the subject of proceedings in **HC Misc. No. 113 of 2012**, in which one Humphrey Kinyanjui was a party, yet the fact that the said property was held in trust was not brought to the attention of the court at the hearing of the application that culminated in the orders made on 26th March 2013.
3. The applicant avers that the said orders were made in the mistaken belief that the deceased was the absolute proprietor of Muguga/Kanyariri/196. He avers that he only came to be aware of the order of 26th March 2013. He avers that the order made in **HC Misc. No. 113 of 2012** was that the said property was held by the deceased in trust and the said trust dissolved upon her death, and that as the property had been held in trust it was not available for disposal by will of the trustee as if it formed part of her property.
4. Attached to the affidavit of the applicant are several documents. There is copy of the title deed in respect of Muguga/Kanyariri/196 which indicates that the deceased, Salome Mukami Kariuki, was registered on 28th May 1991 as trustee for the children of the marriage. There are also copies of the pleadings in **HC Misc. No. 113 of 2012**, the ruling of 16th May 2013, and of the correspondence exchanged between the parties and the court registry with regard to the matter.
5. The persons named in the application have replied to the same vide an affidavit sworn on 8th May 2015, by Humphrey Kinyanjui Kariuki, the executor of the will of the deceased and the first respondent to the application. He avers that the order of 16th May 2013 was to correct the erroneous reference in the will to LR No. 4885/16/7 instead of Muguga/Kanyariri/196 on the basis that LR No. 4885/16/7 did not belong to the deceased, but to their late father, and it was in fact Muguga/Kanyariri/196 that belonged to the deceased. It is his case that if the only issue was whether the deceased had capacity to will the property she held in trust, then there should be no basis for interfering with the order made clarifying the property she sought to will away. He states that in his view the matters addressed by the court in the

ruling of 16th May 2013 and in **HC Misc. No. 113 of 2012** were different. He argues that the will and the trust were not in conflict, and what the deceased sought to do in the will was to distribute the property to all the children. He pleads that the application should be dismissed so that the matter can progress to confirmation of the grant.

6. Attached to the affidavit of the first respondent are several documents. There is a copy of the will the subject of these proceedings. There are copies of certificates of title in respect of LR No. 4885/16/3, 5 and 6, and assorted documents relating to LR No. 4885/83, 85 and 86. There are also copies of affidavits that had been lodged in **HC Misc. No. 113 of 2012** in connection with Muguga/Kanyariri/196.

7. The said application was argued orally before me on 8th July 2015. Mr. Njuguna prosecuted the same for the applicant, while Mrs. Thongori urged the case for the respondents.

8. Mr. Njuguna submitted that the holding in **HC Misc. No. 113 of 2012** that the deceased, Salome Mukami Kariuki, had held Muguga/Kanyariri/196 as a trustee for her children and that the trust terminated at her death, meant that the said property was not available for disposal by the deceased by will. He stated that the existence of the proceedings in HC Misc. No. 113 of 2012 was not brought to the attention of the court when the application that culminated in the orders made on 16th May 2013 was prosecuted. He was of the position that the ruling of this court in this cause, of 16th May 2013, cannot stand together with the determination in **HC Misc. No. 113 of 2012**. He urged that the orders of 16th May 2013 ought to be reviewed to align them to the finding that the deceased held the property in trust for the children. He was of the view that once the order was reviewed it followed that a declaration ought to be made that the deceased was not the absolute owner of Muguga/Kanyariri/196. He concluded that the trust created in favour of the children did not allocate shares, and therefore the property in question ought to be shared equally in line with the maxim that equality is equity.

9. Mrs. Thongori submitted that the deceased did not own the property mentioned in the will, to wit LR No. 4885/16/7, and that the application dated 10th September 2012 was meant to obtain a clarification as the deceased held a title deed in her name in respect of Muguga/Kanyariri/196. She pleaded that there was no intention to mislead the court. She argued that the said application was not served as service was not necessary at that stage. She asserted that the deceased was entitled to will away Muguga/Kanyariri/196 for it had been granted to her following divorce proceedings in **HCDC No. 76 of 1980**, to hold the same for her children with reversion to the children upon her death. It was her case that she could during her lifetime will it away to the children, arguing that it was matrimonial property over which she had discretion to subdivide it during lifetime.

10. Mr. Njuguna, in his rejoinder, asserted that there was only one issue for the court to determine, whether a trustee holding property for named beneficiaries could distribute the trust property by will. He submitted that such trustee had no power to do so for such person could only dispose of what she owned absolutely. He stated that there was no advancement of the property to the deceased. He concluded by saying that **HC Misc. No. 113 of 2012** ought to have been brought to the attention of the court for if that had been done then the court would have come to a different conclusion.

11. Review of court orders is provided for in the Civil Procedure Act and the Rules made under it. The said review provisions have been imported into probate practice vide Rule 63 of the Probate and Administration Rules. Review would be sought for an error apparent on the face of the record, for discovery of an important matter of evidence that was not available at the time the case was being heard, and for any other sufficient reason.

12. The order sought to be reviewed was intended to correct what the applicant in the application dated 10th September 2012 said was an error in the will, for the will had purportedly disposed a property which the deceased did not own. It was argued that the deceased sought to dispose of property that she owned or was registered in her name. It was said that the only property registered in her name was Muguga/Kanyariri/196 and copy of a title deed for that property was placed before the court.

13. It is common ground that the deceased did not own the property described in her will as LR No. 4885/16/7. I have noted that the applicant in the instant application has not placed before me any material indicating that the deceased did indeed own property of such description as at the date of the making of the subject will. No such property could possibly pass by her will, for the said property was alleged to have had been registered in the name of her late former husband.

14. She did have, at the material time, property registered in her name, described as Muguga/Kanyariri/196. Whether she could validly dispose of the said property by will was not an issue for determination at the time of the application dated 10th September 2012. The argument then was that the property was registered in her name, and it was the only property that she could possibly believe was within her power to dispose of by will. Whether she could actually dispose of it by will was not an issue that could be addressed at that point, for representation had not yet been granted. It could only arise at the confirmation of the grant or upon application being made, like in the instant case, inviting the court to make a determination on the point of law.

15. It would be worth noting that a will cannot be invalidated merely on the basis that it disposes of property that does not exist or which the testator could not possibly dispose of by will. Whether the property exists or is available for distribution or the testator did not have capacity to will it away, are questions that can only be validly answered at the stage of confirmation of the grant and the distribution of the estate. The mere fact that a property is mentioned in a will does not mean that the court is bound to have it distributed. It has to be determined at confirmation whether the same is in fact available and can be dealt with in the manner proposed by the personal representative.

16. Is there an error apparent on the face of the record? I do not think so for the reasons that I have stated in paragraphs 13 and 14 above. Neither has it been demonstrated that there was important evidential material discovered after the making of the order which was not available at the time the said order was made. The title deed in question was exhibited to the application dated 10th September 2012 and it had been clearly indicated in it that the deceased was registered as a trustee for the children of the marriage. No other sufficient reason has been advanced. That being the case there is no basis upon which I can review the order made on 16th May 2013 or set it aside.

17. The applicant has invited me to make a declaration that the deceased was not an absolute owner of the property in question for she held the same in trust for others; consequently the said property was not capable of distribution by will.

18. The face of the title deed in respect of Muguga/Kanyariri/196 records the deceased, Salome Mukami Kariuki, as the absolute proprietor of the said property. However, in the proprietorship section she is described as ‘trustee for the children of the marriage.’ This then means that whereas she is named in the title deed as proprietor of the property, her proprietorship is not absolute. It is limited, for she did not hold the property as hers for keeping, but rather on behalf of others. She could not deal with the property as if it belonged to her, for her dealings with it had to be subject to the trust.

19. The property available for disposal by will is defined in section 3(1) of the Law of Succession Act, which states as follows –

“free property,” in relation to a deceased person, means the property of which that person was legally competent freely to dispose of during his lifetime, and in respect of which his estate has not terminated by his death.’

20. A testator can only therefore freely dispose of such property as belongs to them absolutely or property that they have absolute control over. Property held in trust does not belong absolutely to the trustee; although in law he is the legal owner thereof. He deals with such property subject to the trust. He holds the same for the benefit of others, and he cannot legally deal with it in a manner adverse to the interests of the beneficiaries. The property does not belong to him, so he cannot sell it or gift it in any manner to anybody. He can only deal with it in ways that advance the interests of the beneficiaries.

21. Property held in trust for others, does not belong to the trustee, therefore the same is not free property, and it cannot be disposed of by will. Muguga/Kanyariri/196 was not registered in the name of the deceased as the absolute owner thereof, for she was a mere trustee, holding the same for others. She held interest in the property that she could not dispose of by will, and whatever interest she held in it terminated upon her death. Consequently, I am persuaded that I can make the declaration sought by the applicant in the instant application.

22. If the said asset was not available for willing away by the deceased and the interest she held in it terminated upon her death, it follows that the same is not available for disposal in succession proceedings, whether testate or intestate. The property was subject to trust. The said trust terminated upon the death of the trustee, meaning therefore that the property thereafter reverted to the children of the marriage. The exact entitlements of the children are not indicated in the title deed and it should therefore be presumed in equity that the property is to be shared equally amongst all the children of the marriage, who are the beneficiaries of the trust.

23. In the end, am persuaded to make the following orders:-

(a) That prayer 1 of the application dated 26th March 2015 is hereby dismissed;

(b) That prayer 2 of the application dated 26th March 2015 is hereby granted;

(c) That Muguga/Kanyariri/196 to be shared equally amongst the children of the marriage between the deceased and her late former husband without recourse to succession proceedings; and

(d) That the applicant is entitled to the costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 12TH DAY OF FEBRUARY, 2016.

W MUSYOKA

JUDGE