



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 318 OF 2010

In the matter of the Estate of MBOGO KAUMA (Deceased)

DUNCAN WAIN KAUMA)

GEORGE MWANIKI KAUMA).....APPLICANTS/PROTESTORS

VERSUS

IRENE LENAS KINA MULUNGA.....1ST CO-ADMINISTRATOR/RESPONDENT

AND

JOHN IRERI NJOROGE.....2ND CO- ADMINISTRATOR

R U L I N G

The applicants/protesters Duncan Wain Kauma and George Mwaniki Kauma in their application dated 27/11/2014 seeks for review of the orders of this court made on 27/10/2014. The grounds in support as set out on the face of the application and in the replying affidavit.

The facts leading to this application are that the respondent in her application dated 7/7/2014 sought to substitute the administrator in this case Roseline Kathanje Mbogo who was her mother and also the mother of the applicants herein. The applicants filed a replying affidavit to the application sworn on 24/10/2014 by Duncan Wain Kauma opposing the application. When the application came for hearing on 24/10/2014, the applicants were represented by one Francis Kinyanjui holding brief for their counsel Kenneth Githinji advocate.

Mr. Kinyanjui told the court that the applicant had filed a replying affidavit against the application but the position was that the application was not opposed. The court granted the orders sought in the application as prayed. The applicants were dissatisfied with the way the counsel handled the instructions given to them by their advocate on record and have now filed this application.

The grounds are that the counsel did not understand the instructions given to him and the correct position is that the applicants were still opposed to the application. It is their contention that their replying affidavits contain very weighty issues which they want the court to consider. The respondent herein is their younger sister whom they describe as unreliable and feel unsafe with her as the sole administrator in the estate. They expressed the fear that the respondent is incapable of administering the estate of the deceased in a fair and just manner. In their replying affidavits to the application for substitution, the applicants sought to be included as co-administrators in the estate.

The application was opposed by the respondent in the replying affidavit sworn by her counsel Mr. Njeru Ithiga. He deponed that the applicants are using delaying tactics to drag this succession cause. She argued that the applicants have not made any steps to apply for letters of administration ad litem as she did to enable them be appointed administrators of the estate. He explained that when he appeared in court to prosecute the application on behalf of the respondent, Mr. Kinyanjui addressed the court saying he had advised the applicants not to file the replying affidavits which they did against his advise. He then told the court that the application was not opposed. The court then granted the application. The applicants were present in court and did not rise to correct their advocate if what he said was not true. The applicants have filed protests against confirmation and it is prudent to fast track the matter for hearing.

This application for review is brought under a certificate of urgency. The law applicable in review in succession causes is Order 45 of the Civil Procedure Rules on the authority derived from Rule 63(1) of the Probate and Administration Rules which provides

Rule 63(1)

Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.

The applicant is required under Order 45 to prove the following:-

- (a) Discovery of new and important matter or evidence which after the exercise of due diligence was not within the time when the decree was passed or the order was made;*
- (b) Mistake or error apparent on the face of the record;*
- c. Or for any sufficient reason;*
- (d) The application must be made without undue delay.*

Having perused the affidavits of both parties, I am satisfied that this application was filed without delay. It was filed three days after the relevant orders were made by this court. The applicants have not shown any discovery of any new facts which were not in their knowledge at the time the application was heard. I wish to correct the erroneous position held by the applicants that the counsel holding brief for Kenneth Githinji advocates for the applicants did not address the court. The matter is still fresh in my mind having happened only a few days before I set my eyes on this application under certificate of urgency.

The correct position is as stated by Mr. Ithiga for the respondent that Mr. Kinyanjui addressed the court and said there was a new development after rejection of his advice not to oppose the application. He told court that the application was now not opposed despite the existence of the replying affidavit. This explains why the court did not bother to consider the contents of the affidavit and proceeded to grant the prayers. I am surprised to learn that the applicants were in court. They should have talked to their counsel to correct the position as stated or addressed the court. The filing of this application must have been as a result of an after thought.

However, since the counsel did not apply to withdraw the replying affidavits, the court will give the applicants the benefit of the doubt in regarding this as an error apparent on the face of the record. This way, the application qualifies for review of the orders.

I hereby allow the application and set aside the orders. I now proceed to consider the replying affidavits of the applicants in opposition of the respondents application dated 7th July 2014.

The applicants have filed a protest in this case against the applicant's affidavit for confirmation of grant. I

agree with the respondents counsel that this is the summons which the applicants must expedite by taking directions and having it heard so that the court may determine the cause once and for all. It is in pursuit of their interest in this matter that they are opposed to the respondent being the sole administrator in the estate . It must not be overlooked that the respondent was pro-active in that she applied for grant of administration ad litem a few months after the administrator died. The applicants slept on their rights despite the fact that they had interest in this case.

The deceased petitioner Roseline Kathanje Njagi is a co-administrator with the objector one Catherine Merky Warue Mbogo by authority of the ruling of Ongudi, Judge delivered on 19th February, 2013. The applicant feel that they can only protect their interests if they are appointed co-administrators with the respondent and the surviving co-administrator. I find nothing wrong with the proposal which if allowed will ensure the interests of the applicants are protected alongside with those of the respondent and Catherine Mecky Warue Mbogo. I therefore allow the application of the respondent Irene Lenas Kina Mulunga only partly by ordering as follows:-

That the estate of the deceased will be administered jointly by the following:-

1. *Catherine Mecky Warue Mbogo*
2. *Duncan Wain Kauma*
3. *George Mwaniki Kauma*

Each party to bear their own costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF JANUARY, 2015.

F. MUCHEMI

J U D G E

In the presence of:-

Ms. Muriuki for Ithiga for petitioner

Mr. Omenya for Ken Githinji for protesters

F. MUCHEMI

J U D G E