



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 275 OF 2014.

IN THE MATTER OF THE ESTATE OF ERASTUS MURIUNGI NGARUTHI.....DECEASED

VERSUS

GERALD KINOTI NGARUTHI.....1ST APPLICANT

FRANCIS RIUNGU NGATURUTHI.....2ND APPLICANT

J U D G M E N T

1. The applicants GERALD KINOTI NGARUTHI and FRANCIS RIUNGU NGARUTHI through summons pursuant to Section 47 and 48 of the Law of Succession Act and Section 68 and 69 of the Land Registration Act seeks the following orders:-
 - i. *That this application be certified as extremely urgent and be heard ex-parte in the first instance.*
 - ii. *That an order of inhibition do issue restricting any dealings with land parcel Nos. NKUENE/U-MIKUMBUNE/1768 AND NKUENE/U-MIKUMBUNE/1769 pending interpartes hearing and determination of this application.*
 - iii. *That Chuka Principal Magistrate's court Succession No. 79 of 2011 be transferred to Meru High Court and be consolidated with this matter for further order.*
 - iv. *That the confirmed grant issued in Chuka SPMCC Succession Cause No. 79 of 2011 and dated 14/8/2012 be revoked and all s subsequent orders including the resultant title numbers NKUENE/U-MIKUMBUNE/1768 AND NKUENE/U-MIKUMBUNE/1769 be revoked.*
 - v. *That the orders be served upon the Land Registrar Meru Central for compliance.*
 - vi. *That costs of this application be borne by the petitioner/respondent.*
2. The application is based on the grounds on the face of the application inter alia; that the proceedings leading to the issuance of the grant were defective for want of both territorial and pecuniary jurisdiction by the Chuka Court; that grant was obtained secretly and through concealment of a material fact; that the applicants have a legal entitlement over the deceased's estate arising from the decree in Meru High Court Civil Case NO. 54 of 1986 and that the application is merited.
3. The applicant's application is supported by the affidavit of Gerald Kinoti Ngaruthi who has briefly deposed as follows; that he learned of SPMCC 70 of 20-11 on 28/5/2014 after discovery that land

parcel NKUENE/U-MIKUMBUNE/810 had been subdivided as per annexure “GKNI”. That the said land was subject of Meru HCCC 54 of 1986 where court awarded applicants 7 acres each, 2 ½ acres to their father and balance of 7 acres to the deceased herein; as per copy of the decree marked “GKN2”, that decree has not been executed due to court’s order of stay of execution issued on 23/1/2009 as per attached copy marked “GKN3”. That no appeal has been filed and discharge of the court’s order has been unfruitful as per attached “GKN4(a), & (b)”;

that the applicants have been waiting for petitioner to pursue her appeal at the Court of Appeal, that following confirmation of grant the petitioner subdivided L.R.NKUENE/U-MIKUMBUNE/810 into L.R. NKUENE/U-MIKUMBUNE/1786 and 1768 and 1769 and transferred the same to her two sons as per annexure “GKN4” 5(a) and (b)”;

that the deceased estate was only entitled to 7 acres out of NKUENE/U-MIKUMBUNE/810; that the petitioner deliberately concealed from court, with intention of defeating the High Court decree in HCCC No. 54 of 1996; that Nkuene/U-Mikumbune/810 measures 23 acres and its value is in excess of Kshs.23million, that Chuka Court did not out rightly have requisite pecuniary jurisdiction nor territorial jurisdiction as the land is situated in Imenti South District outside territorial jurisdiction of Chuka Court.

4. The petitioner in response filed grounds of objection dated 8th September, 2014 averring, that the title to the application is defective; that application for inhibition can only be made by a miscellaneous application under Civil Procedure Act by way of Notice of Motion; that transfer of a file from one court to another court can only be made by Misc. Civil application under Section 18 of the Civil Procedure Act; that revocation of grant under prayer 4 is defective as it cannot be issued under Section 76 of the Law of Succession Act; that Land Registrar cannot be served with orders obtained through defective and unprocedural manner; that all miscellaneous applications are procedurally under Order 50 of the Civil Procedure Rules and are by “motions” and not “summons” and that the application is totally incompetent.
5. Mr. M. Kariuki represented the applicants whereas Mr. Kioga appeared for the petitioner. That both counsel made oral submissions in support of the varying positions. I have very carefully considered the petition for grant of letters of administration intestate forms the applicant’s application, supportive affidavit and annexures thereto and the petitioners grounds of objection. I have further considered the submissions by respective Counsel in support of their different stands. The issues for determination in this cause can be summarized as follows:-
 - i. ***Whether the grant of letters of administration intestate were defective for want of both territorial and pecuniary jurisdiction by Chuka Law Courts?***
 - ii. ***Whether grant was obtained secretly and through concealment of material facts that the applicants have a legal entitlement over the deceased’s estate arising from the decree in Meru Court Civil Case No. 54 of 1986?***
 - iii. ***Whether the applicants application is fatally defective, incompetent and whether orders can be granted in view of the application being defective or incompetent?***

A. Whether the grant of letters of administration intestate were defective for want of both territorial and pecuniary jurisdiction by Chuka Law Courts?

6. The petitioner’s petition was filed at Chuka Principal Magistrate’s Court as Succession Cause no. 79 of 2011. Form P&A 5 under paragraph 6 indicates the value of the deceased’s estate to be Kshs.300,000/-. The deceased asset is shown to be a parcel of land situated at Nkuene/U-Mikumbune/810.
7. Section 48 of the Law of Succession Act limits jurisdiction of the Resident Magistrate to entertain any application under the Law of Succession Act and pronounce such decree and make orders therein in respect of any estate whose gross value does not exceed Kshs.100,000/-. **Section 48 of the Law of Succession Act** provides:-

48. (1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section

76 and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:

8. Further to Section 48, Section 49 of the Law of Succession Act provides”

“49. The Resident Magistrate within whose area a deceased person had his last known place of residence shall, if the gross value of the estate of the deceased does not exceed one hundred thousand shillings, have in respect of that estate the jurisdiction conferred by section 48:

Provided that.....”

9. The petitioner in her Form P&A 5 gave the value of the deceased estate at Kshs.300,000/- whereas the applicants gave the value at kshs.23,000,000/-The petitioner did not controvert the applicants contention by way of affidavit or otherwise. That at any rate the value given by the applicants and petitioner are both beyond the jurisdiction of the Magistrate’s court in a Succession Cause. The court therefore lacked pecuniary jurisdiction to entertain the succession cause filed before it.

10.The applicants deponed that the deceased asset is situated at South Imenti District outside the territorial jurisdiction of Chuka Law Courts and that the court lacked territorial jurisdiction. The petitioner did not controvert the contents of the applicants affidavit. I therefore find that the Magistrate at Chuka did not have territorial jurisdiction as the deceased last known place of residence was outside his territorial jurisdiction.

11.In view of the foregoing I am of the view that the Chuka Law Courts lacked both territorial and pecuniary jurisdiction to grant letters of administration intestate and the grant by Chuka Law Court was therefore defective for want of both territorial and pecuniary jurisdiction.

B. WHETHER GRANT WAS OBTAINED SECRETLY AND THROUGH CONCEALMENT OF MATERIAL FACTS THAT THE APPLICANTS HAVE A LEGAL ENTITLEMENT OVER THE DECEASED’S ESTATE ARISING FROM THE DECREE IN MERU HIGH COURT CIVIL CASE NO. 54 OF 1986?

12.The petitioner in Form P&A 5 under paragraph 6 on liabilities indicated liabilities as nil. The applicants in their affidavit have demonstrated that by virtue of HCCC No. 54 of 1986 they are entitled to 7 acres each from the deceased parcel NO. NKUENE/U-MIKUMBUNE/810. The petitioner did not controvert the contents of the applicants affidavit that she obtained the grant secretly and through concealment of a material facts that the applicants have a legal entitlement over the deceased’s estate arising out of the decree in Meru HCCC NO. 54 of 1986. I have very carefully perused the annexures attached to the applicants affidavit and I am satisfied that the applicants have legal entitlement over the deceased estate by virtue of a decree in the HCCC No. 54 of 1986 and that the grant at Chuka Law was obtained secretly and through concealment of material facts from which a grant whether confirmed or not can be revoked.

(C) WHETHER THE APPLICANTS APPLICATION IS FATALLY DEFECTIVE AND INCOMPETENT AND WHETHER ORDERS CAN BE GRANTED IN VIEW OF THE APPLICATION BEING DEFECTIVE OR INCOMPETENT?

13.The petitioner in her grounds of objection avers that the applicants application is defective. The petitioner argued that the title to the application is defective as it is neither grounded on the Law of Succession nor on ordinary provisions of the Civil Procedure Act. That there is no applicant nor respondent neither a petitioner nor an objector. She urged that due to the application being defective the court would be able to entertain the same.

14.I have carefully persuaded the application before this court and it is evidently clear that the same

is grounded on the provisions of the Law of Succession Act. The application is brought pursuant to Section 47 and 48 of the Law of Succession Act. Section 47 of the Law of Succession Act states that the High court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient. There are applicants and a respondent/petitioner. The parties are properly described and there is no confusion as to the nature of the claim and who the parties are contrary to the respondent's arguments. I therefore find no merits on the petitioner's/respondents ground No. 1 of the objection.

15. The petitioner/respondent under ground No. 2 contended that inhibition orders can only be sought made by a miscellaneous application under the provisions of Civil Procedure Act and by way of Notice of Motion and as such the same cannot be obtained through an application under the provisions of the Law of Succession Act.

16. The provisions of the Civil Procedure Act and Civil Procedure Rules which are applicable in the Succession Causes are well spelt out under Rule 63(1) of the Probate and Administration Rules. The said Rule provides:-

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.

17. That further in an application for revocation of a grant an application for revocation or annulment is supposed to be filed at the High Court by way of summons and not by way of Notice of Motion. Rule 44(1), (2), (a) and (b) of the Probate and Administration Rules provides:-

44. (1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.

(2) There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him-

(a) whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and

(b) the extent to which the estate of the deceased has been or is believed to have been administered or to remain unadministered, together with any other material information.

18. Where the grant sought to be revoked or annulled was issued by a Magistrate the application in my view should be filed to the High Court registry situated nearest the Magistrate's Court registry and by way of miscellaneous application. The application cannot in my view be registered as Succession Cause nor in my view be filed by way of Notice of Motion as that procedure is only provided for in Civil Procedure Act and/or Rules and the relevant Order 51 in the Civil Procedure Rules is not one of the provisions of the Civil Procedure Rules applicable in Succession Cause under Rule 63 of the Probate and Administration Rules.

19. Further under Rule 49 of the Probate and Administrative Rules it provides where no provision is made elsewhere in the rules a person desiring to make an application to the court relating to the deceased estate, the person shall file a summons supported by affidavit. There is no mention of notice of motion in the said Rule which provides:-

“A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.”

20. In view of the above I am of the view that the proper procedure to seek revocation or annulment of Resident Magistrate decision against confirmation of a grant is by filing a miscellaneous application by way of summons as provided by the law of Succession Act to the nearest High Court registry applying the provisions of the Law of Succession Act but not to file a Notice of Motion applying the Civil Procedure Act as the provisions of the Civil Procedure Act do not apply to Succession matters save those specifically stated under Rule 63 of the Probate and Administration Rules. I find no merits in petitioner's ground No. 2 of the objection.

21. The petitioner contend that a transfer of a file from one court to another can only be made by miscellaneous civil application under Section 18 of the Civil Procedure Act but not through a Succession Application. The petitioner relied on Section 18 of the Civil Procedure Act, however, Section 18 of the Civil Procedure Act is not one of the Civil Procedure Rules or Provision that is provided for application in Succession Causes under Rule 63 of the Probate and Administration Rules.

22. Section 76 of the Law of Succession Act provides:-

“76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-“

23. The court under Section 76 of the Succession Act can revoke or annul a grant of representation, whether confirmed or not either on an application by any party or its own motion. In my view Section 18 of Civil Procedure Act do not apply in transfer of Succession matters nor should there be an application for court to revoke or annul a grant but court can act somoto. I find no merit in the petitioner's ground No. 3.

24. The petitioner under ground No. 4 contend that the applicants application is defective as the application is not based under Section 76 of the Law of Succession Act. That the Procedure adopted in this application is defective, incompetent and is based on inapplicable provisions of the law. That Sections 47 and 48 are only jurisdictional provisions which have no application on revocation of a grant. The petitioner therefore contend the application is therefore defective in both procedure and substance.

25. It is correct that the application has not cited Section 76 of the Law of Succession Act. However, there is no doubt from the body of the application the prayers sought are for revocation and/or annulment of the grant. The application is clear on what is being sought and the fact that the applicants have not cited Section 76 of the Law of Succession Act in my view do not make the application defective. In view of doing substantive justice to all parties the rule or Section of Law relied upon by an applicant ought to be cited but no application should be struck out or be refused or dismissed merely by reason of a failure to cite the Section or Rule relied upon so long as it can be easily ascertained from the pleadings the nature of the claim and that the provision of law relied upon.

26. Section 47 of the Law of Succession Act enjoins the High Court to entertain any application and determine any dispute under the Law of Succession Act and pronounce such decrees and make such orders therein as may be expedient.

27. Further under Rule 73 of the Probate and Administration Rules it is provided:-

“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

28. Under **Article 159 (2),(d) of the Constitution of Kenya, 2010** the court is enjoined to administer justice without undue regard to procedural technicalities.

29. In view of the foregoing I find no merits in petitioner's objection No. 4 and that the same is dismissed.

30. The petitioner's grounds of objections Nos 5,6 and 7 are that the land Registrar cannot be served with orders obtained through a defective and unprocedural manner; - that all miscellaneous applications are procedurally under Order 50 of Civil Procedure Rule and are by "motions" and not by "summons". That the application is totally incompetent, defective and absolute abuse of the court process and as such the application ought to be dismissed with costs to the respondents.

31. I have in dealing with the petitioner's other grounds of objection which are similar to the last three dealt with same issues as raised under grounds numbers 5, 6 and 7. I have in my finding found the application is not defective and procedure adopted is correct. That in Succession causes matters Order 50 of Civil Procedure is not applicable nor are application supposed to be brought up by way of "Notice of Motion" as contended by the petitioner but by way of "summons" as provided for under the Probate and Administration Rules. In view of the foregoing I find the petitioners grounds of objection Nos 5, 6, and 7 not merited and the same are dismissed.

32. The upshot is that the applicant's application dated 3rd June, 2014 is merited. The petitioners ground of objection are not meritorious. I therefore find as follows:-

- i. ***That the proceedings leading to issuance of grant in Chuka SPMSC Succession Cause No. 79 of 2011 were defective for want of both territorial and pecuniary jurisdiction.***
- ii. ***That grant in Chuka SPMSC No. 79 of 2011 was obtained secretly and through concealment of a material fact that the applicants have a legal entitlement over the deceased's estate by virtue of Meru HCCC NO. 54 of 1986.***

33. I therefore order as follows:-

- i. ***That the confirmed grant issued in Chuka SPMSC 79 of 2011 dated 14th August, 2012 and temporary grant dated 19th July, 2011 be and are hereby revoked and all subsequent orders including the resultant title numbers Nkuene/U-Mikumbune/1768, and Nkuene/1769 are cancelled and titles ordered to revert back into the name of the deceased.***
- ii. ***That fresh temporary grant do issue forthwith to the petitioner jointly with the applicants.***
- iii. ***The appointed petitioners are in view of the age of the matter at liberty to apply for confirmation of the grant without waiting for expiry of 6 months from the date of this ruling.***
- iv. ***The applicants are awarded costs of this application.***

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF APRIL, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:-

1. Mr. Igweta h/b for Mr. M. Kariuki for applicants
2. Mr. Kiamenyi h/b for Mr. M. M. Kioga for the petitioner
3. Applicants - present
3. C/clerk Penina/Mwenda

J. A. MAKAU

JUDGE