



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 2825 OF 1999
IN THE MATTER OF THE ESTATE OF KAMUKII MWETHI (DECEASED)

RULING

1. The deceased herein, Kamukii Mwethi, died in May 1968.
2. Two succession causes were mounted in respect of his estate. The first in time was this cause, **HCSC No. 2825 of 1999**, filed on 10th December 1999. The second in time was a cause filed at the Kiambu Magistrates' Courts, being **Kiambu SPMCSC No. 352 of 1999**. The High Court cause was filed by the sons of the deceased, who listed the three of themselves as the sole survivors of the deceased. The lower court cause was by a daughter of the deceased and it listed all the sons and daughters of the deceased as survivors.
3. It was ordered on 23rd October 2000 that the Kiambu Law Court cause be availed to the High Court for consolidation with **HCSC No. 2825 of 1999** for final disposal. At the time of consolidation grants of representation had not been made in both causes.
4. The petitioner in **Kiambu SPMCSC No. 352 of 1999**, Grace Wanjiru Guitati, was required to and filed an objection to grant being made on the basis of the petition by the petitioners in **HCSC No. 2825 of 1999**. She asserted that as a daughter of the deceased she was a survivor of the deceased and was entitled to a share in the estate.
5. The objection by Grace Wanjiru Guitati was heard by Rawal J. The objection was dismissed on 29th November 2002 on the finding that as the deceased died before the Law of Succession Act, Cap 160, Laws of Kenya, came into force, the applicable law to the distribution to the intestate estate of the deceased was Kikuyu Customary Law under which the objector, as a married daughter, was not entitled to a share in the estate.
6. The dismissal of the objection on 29th November 2002 paved way for the making of the grant of letters of administration intestate in terms of the petition filed herein on 10th December 1999. The grant was made on 2nd December 2002.
7. On 5th December 2002 an application was lodged at this registry for revocation of the said grant, on various technical grounds, such as non-disclosure of survivors and want of consents of the survivors. The summons for revocation was brought at the instance of Grace Wambui Mwaura, a daughter in law of the deceased, on account of her being a widow of a dead son of the deceased. The summons was heard by Kubo J., who, on 22nd October 2004, found that the process of obtaining the grant was defective and proceeded to revoke the grant. It was specifically found that Grace Wambui Mwaura was entitled to a share in the estate that ought to have gone to her dead

husband.

8. Following the said revocation, Grace Wanjiru Guitati filed an objection to making a grant, dated 18th July 2006, objecting to the making of a grant of letters of administration intestate to Stephen Mburu Kinyanjui and Evans Kariuki. Her grounds were that as a daughter of the deceased she was entitled to a share in the estate and should have been treated as a survivor.
9. The application I am tasked with determining is dated 1st July 2010. It seeks that the objection dated 18th July 2006 be struck out and expunged from the record. It is argued that Rawal J. had dealt with a similar objection by Grace Wanjiru Guitati and dismissed it on 29th November 2002. It is averred that the matter is now *res judicata*.
10. The objector, Grace Wanjiru Guitati, swore an affidavit in reply to the said summons on 27th July 2010. She argues that the objection was filed in pursuance of a consent order recorded in court on 13th February 2008. It is averred that the determination by Rawal J. of 29th November 2002 was no longer of consequence as it related to a grant that has since been revoked. It is further stated that Kubo J. had in any event ruled that daughters can inherit in certain circumstances.
11. It was directed on 7th October 2014, that the summons of 1st July 2010 would be disposed of by way of written submissions. Both sides have in pursuance of the orders of 7th October 2014 filed their respective submissions, which I have perused and noted the arguments advanced therein.
12. The only issue for me to determine is whether the objection dated 18th July 2006 should be allowed to stand in view of the ruling by Rawal J. of 29th November 2002 on a similar objection by the same party on the same point of law.
13. It is not disputed that the point of law at the core of the determination by Rawal J. is the same one that is the subject of the objection of 18th July 2006. However, the objector now argues that circumstances have changed. The grant the subject of the earlier proceedings has been revoked and therefore the issue has been reopened. There is also the argument that Kubo J. in his ruling, should have been a judgment, of 22nd October 2004 made certain remarks about the rights of daughters that would justify the objector raising the issue afresh. The further affidavit sworn on 21st October 2014 by Njoroge Guitati introduced the issue of the new Constitution and its provisions on the inheritance rights of daughters. There is also the claim that the second objection was filed on the strength of a consent order recorded in court by the parties.
14. The decision by Rawal J. of 29th November 2002 was not appealed against and therefore it has not been reversed by a higher court. Neither has it even been reviewed for no review application was filed against it. The decision by Kubo J. of 22nd October 2004 acknowledged and affirmed it. I do not find anything in the judgment of Kubo J. which can be construed as a review of the determination of Rawal J. of 29th November 2002. The said decision is intact and valid so far as it relates to the inheritance rights of Grace Wanjiru Guitati as a daughter of the deceased.
15. The grant that was made following the orders of 29th November 2002 was revoked on 22nd October 2004. The said revocation however did not affect the determination of 29th November 2002 so far as it related to Grace Wanjiru Guitati for what was before Kubo J. did not turn on the rights of Grace Wanjiru Guitati.
16. It is alleged that the objection of 18th July 2006 should be allowed to stand for it was filed pursuant to a consent order recorded before the Judge. Indeed, such a consent was recorded, but the mere fact that the parties, who did not include the applicant in respect of the instant application, recorded a consent before the court, does not justify inviting the court to make a determination on a matter of law that has already been decided on. So long as the decision by

Rawal J. of 29th November 2002 stands it would be imprudent to entertain pleadings that turn on the same point of law.

17. The fresh issues that Njoroge Guitati raises in his affidavit are not matters that can be addressed in an application of the nature before me. These can perhaps be dealt with in an application for review. What is before me is not a review application, and there would therefore be no justification for the court to entertain the new issues.

18. In the end, I hold that the objection dated 18th July 2006 is an abuse of the process of court as it seeks determination of points of law that have already been decided on by the court. The matters it raises are *res judicata*. I find merit in the application dated 1st July 2010 and I do hereby allow the same with costs to the applicant.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH DAY OF DECEMBER, 2015.

W. MUSYOKA

JUDGE