



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
SUCCESSION CAUSE 699 OF 2003

IN THE MATTER OF THE ESTATE OF KIONGO GIKUHI – DECEASED

RULING

1. By a Summons for Revocation or Annulment of Grant dated 25th March 2003, the applicant herein Naomi Wanjiru Kiongo sought to have the Grant issued to the respondent by the Senior Resident Magistrate, Kiambu on 28th February 2001 revoked on the grounds, inter alia that the same was fraudulently obtained by the respondent who was not a dependant of the deceased and had, in the petition, failed to name the applicant's children who are the true heirs.

2 The applicant also cited, as a ground, that the allegation by the respondent that the land parcel No. **KIAMBAA/WAGUTHI/865**, which was the subject matter of the Kiambu Succession Cause, was held by the applicant's deceased husband in trust for the respondent and another brother (David Kimani Gikuhi) was untrue. Further the applicant complains that the Kiambu court proceeded on a false representation to the effect that the applicant had signed the consent to the petition for Letters of Grant of administration intestate when she had not. From the scanty information available from the record and submissions filed, it is apparent that the grant issued by the subordinate court was revoked by consent on 6th December 2004.

3. It is not clear why this matter has remained pending for almost 10 years or what transpired between 18th June 2003 and 27th April 2006. Nothing at all appears to have been recorded during this period. There is a possibility that part of the record is missing since, when the matter came before Rawal J. (as she then was) on 23rd May 2006, there were now two pending applications for Confirmation of Grant, dated 3rd August 2005 and 9th November 2005 respectively.

4. The application dated 3rd August 2005 was filed by the respondent while the one of 9th November 2005 was filed by the applicant. They both seek to confirm a Grant said to have been issued to the applicant and the respondent on 6th December 2004. The two copies of the said Grant which are in the

original are neither signed nor sealed. There is nothing on the record to show when and how the said grant of 6th December 2004 was obtained since the record bears no record of a petition in that regard.

5. Having taken the view that the only issue for determination was whether or not the deceased Kiongo Gikuhi held the land parcel No. **KIAMBAA/WAGUTHI/865** in trust for the respondent, Justice Rawal directed that the matter proceeds by way of written submissions followed by oral highlights, based on the affidavits on record as at 6th November 2006. This was notwithstanding that the Hon. Lady Justice Koome (now JA) had, on 16th November 2005 directed that the issue of a trust be determined through viva voce evidence.

6. However, Justice Rawal declined to give directions on the hearing of oral highlights ordered by herself when the matter was listed for mention before her on 5th May 2009. Subsequent hearing dates appear to have been taken without the matter being cause listed until 5th March 2012 when it was listed before me. Endorsements as to the taking of dates suggest that there is a protest to be heard but that too is not clear from the record.

7. I have considered the submissions filed herein and perused both the subordinate court's file and the record herein. In the absence of material to prove that the grant sought to be confirmed under the two applications cited hereinabove, was properly obtained, I am unable to make any determination on the summons dated 3rd August 2005 and 9th November 2005, particularly since the copies on the record appear to be mere drafts.

8. With due respect to both Lady Justices Koome and Rawal (JJA) the determination of the existence or non existence of a trust in the case of the suit property herein does not fall within this court's mandate under Section 71 of the Succession Act under which the two applications for Confirmation of Grant were filed. The applicant, who appears to be claiming the subject land as an heir ought to have taken out an Originating Summons under **Order XXXVI of the Civil Procedure Rules (2009 Revised Ed)**. Only after obtaining a declaration to that effect would he then have been entitled to claim a beneficiaries interest in the land herein, which, from the title documentation filed is clearly shown to have been owned absolutely by the deceased.

9. In the absence of an order declaring a trust in favour of the respondent herein, the only persons be legally entitled to inherit the said land are the deceased's widow and her children, in accordance with **Section 35 of Law of Succession Act**. The parcel of land, having been registered in the deceased's name absolutely could not have formed part of his father's estate as to devolve upon his siblings as claimed by the respondents.

10. In view of the above, even as I am unable to make any orders as relate to the Confirmation of the Grant, I am of the considered view that this ruling will guide the parties in the correct direction, now that the Grant issued by the subordinate court on 28th February 2001 has since been revoked.

DATED, SIGNED and DELIVERED at NAIROBI this 29th DAY OF June, 2012.

M.G. MUGO

JUDGE

In the presence of :

Mr. Isindu for the applicant.

Mrs. Manegeni holding brief for Ms. Githaiga for the respondent.