



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
MISC SUCC.APPL. NO. 38 OF 2009

IN THE MATTER OF THE ESTATE OF SOLOMON WAWERU THIRIKWA (DECEASED)

AND

IN THE MATTER OF SUCC. CAUSE NO. 61 OF 2004 AT RUNYENJES RESIDENT
MAGISTRATE'S COURT

IRERI MBOGORI.....APPELLANTS

VERSUS

HARRISON NJIRU SOLOMON.....RESPONDENT

R U L I N G

The Applicant herein one Ireri Mbogori filed this summons for revocation of the grant issued in Runyenjes succession cause No. 61 of 04 by the Resident Magistrate Runyenjes. He has raised 4 grounds on the face of his summons as hereunder.

- a) *That the proceedings to obtain the said grant before the subordinate court – were defective in substance.*
- b) *That the grant was obtained secretly and fraudulently and by concealing to the court the interests of the Applicant in the said Estate.*
- c) *That the court to which these proceeding were filed had no jurisdiction to determine the matter under the provisions of section 48 of Cap 160 – in view of the enormity of the value of the subject matter of this suit – namely, the estate of the deceased.*
- d) *That the grant was obtained by means of untrue allegation of fact essential in point of law – namely – the devaluation of the estate.*

He has expounded the above grounds in his supporting affidavit dated 5.5.09. In the body of his affidavit, he had deposed that the value of the land in question was approximately 4 million and further that the Kshs.300,000 indicated in the succession cause was still above the jurisdiction of that court,. He claims to be a nephew of the deceased and that he had an interest in the land and that there was a dispute over the same which had been determined by the clan in his favour. He wants to be appointed as a co-administrator with the Respondent herein.

In his replying affidavit, dated 14.7.09 the respondent has deposed that the Applicant herein has no *locus standi* in this matter and he has no *bona fide* interest in the estate of the deceased. He further states that plot No. KAGAARI/KANJA 339 which the Applicant claims to have an interest in was not the subject matter of the succession cause in question.

He denies any knowledge of the Applicant's interest in the matter saying that he even waited for 8 years since the death of the deceased in order to bring this claim.

The matter proceeded by way of Affidavit evidence and there were no submissions filed by counsel. I have considered carefully the grounds on the face of the Application along with the rival Affidavits. Firstly, I agree with the Respondent that the subject of succession case No. 61/04 was not plot No. 339 which the Applicant claims to have an interest in but plot Nos. 4090 and 3254. The copies of the register for the 2 parcels which are annexed to the Affidavit show that plot No. 339 was sub-divided way back in 1985. The Registers do not show any encumbrances. If indeed the Applicant had a claim over those parcels, why did he not raise it over 2 decades ago? It is further noted that other than his word of mouth that the land belonged to his father, there is no iota of evidence in support of that allegation. There is nothing either to support this claim that the clan had given him that land. It appears to me that the Applicant is just groping in the dark trying to create imaginary rights and interests over land whose description he does not even know.

Secondly if indeed the deceased herein was his uncle, he is too far removed from the family tree given that the deceased left a wife, several sons and daughters and even grandchildren. They were under no duty to explain to him or inform him that they were filing the succession cause. I have perused the original record from the Runyenjes court. It is clear that all the necessary procedures including the letter from the chief and the advertisements were complied with. Indeed the letter from the chief categorically states that there was no known dispute over the succession cause. There was therefore nothing clandestine about the succession cause.

Thirdly, as rightly stated by the Respondent, the Applicant herein lacks *locus standi* in this matter as he is a stranger to the estate. He has no basis therefore for challenging the jurisdiction of the court that handled the succession cause. It is clear from the annexures that the estate has already been distributed and other Title Deeds issued to the respective beneficiaries. If the applicant had a valid claim, he should not have sat on his rights for that long. Equity does not assist the indolent. There is no non-disclosure of any material facts proved; nor is there any evidence of intent to defraud. One cannot be defrauded of what they do not have. The Applicant has not established that he had any rights over the estate of the deceased.

In conclusion therefore, my finding is that none of the grounds advanced by the Applicant have been proved to enable me revoke the grant herein.

Consequently, this application fails. The same is dismissed with costs to the Respondent.

W. KARANJA
JUDGE.

SIGNED BY THE ABOVE BUT DATED AND DELIVERED AT EMBU THIS 17TH DAY OF MARCH, 2011.

M. WARSAME
JUDGE

In the presence of:- Mr. Ithiga for the Respondent and N/A for the Applicant in open court.