



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 404 of 2008

IN THE MATTER OF THE ESTATE OF BENSON MURIU KAMONDE (DECEASED)

And

JOYCE WANGUI IRUNGU.....

.....APPLICANT

Versus

MWANGI KAMONDE)

BENSON KINYUA).....RESPONDENTS

R U L I N G

On 6th August, 2002, **Joyce Wangui Irungu**, hereinafter referred to as “the applicant” filed summons for Revocation and or annulment of the grant pursuant to *Section 76* of the Law of Succession Act and *Rule 44(2)* of the Probate and Administration Rules. The application was anchored on the grounds;

- (a) That the proceedings to obtain the grant were defective in substance.**
- (b) That the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case.**
- (c) That the grant was obtained by means of untrue allegations of fact essential in point of law to justify the grant notwithstanding that the allegations was made in ignorance or inadvertently.**
- (d) That the applicant who is a beneficiary of the estate of the deceased was left out of the proceedings to obtain the grant.**
- (e) That the 2nd respondent filed Karatina SRM SUCC CAUSE NO.73 of 2001 and letters of administration issued to the 1st respondent secretly and without the knowledge of the applicant.**
- (f) That the said grant has disinherited the applicant.**
- (g) That the value of the estate exceeds the jurisdiction of the Karatina Senior Resident Magistrate’s Court.**

The application was further supported by an affidavit sworn by the applicant. In the main she deponed that the deceased **Benson Muriu Kamonde** was her biological brother. That **Benson Kinyua**, the 2nd respondent who is a nephew of the deceased filed Karatina SRM succession cause number 73 of 2001 secretly without informing other beneficiaries. **Mwangi Kamonde** objected and cross-petitioned. However he also failed to inform the court that the applicant was one of the beneficiaries. Eventually on 21st July, 2003 the grant was confirmed and the estate of the deceased comprising land parcel **Kiine/Kibingoti/Nguguchi/1376** was shared equally between the two respondents. As far as she was concerned the applicant together with the respondents were the beneficiaries of the estate of the deceased as he was unmarried and he died without leaving behind any children. The value of the estate of the deceased at the time of obtaining the grant far exceeded the estimated value of Kshs.100,000/= given by the 1st respondent. Accordingly the SRM's court had no jurisdiction to entertain the proceedings.

That application was resisted by the 1st respondent. In an affidavit dated 15th December, 2008 he deponed in pertinent paragraphs that the applicant was his sister who has been married for over 30 years and is still married. When the 1st respondent discovered that the 2nd respondent had filed the succession cause No.73 of 2001 at Karatina, he notified the applicant who advanced him Ksh.1500/= to file the objection. Thereafter he kept her abreast of the progress in the matter in the company of one, **Peter Ngari**. All these times the applicant never indicated that she was interested in the estate. He was convinced that the application had been filed in bad faith and through pressure exerted by the 2nd respondent on the applicant after the 2nd respondent's appeal against the distribution was dismissed by this court on 30th June, 2008 and a warrant for his arrest issued on 15th July, 2008. That the collusion between the applicant and 2nd respondent is clearly demonstrated by a letter dated 25th September, 2008 in which he sought to stop the surveyor from subdividing the suit premises. Finally, he deponed that the applicant had never utilized any portion of the estate of the deceased and the same is utilized almost exclusively by the 2nd respondent.

Subsequent thereto, the applicant sought and was granted leave to file a further affidavit to counter what the 1st respondent had deponed to as aforesaid. In this further affidavit, the applicant where relevant deponed that though married, she was also still a beneficiary of the estate of the deceased. She denied having advanced the 1st respondent Ksh.1500/= nor that she was kept abreast of the developments in the cause. She conceded though having met the 1st respondent with another man by the name of **Ngari** whom she later learned was a purchaser of the suit premises. The two tried to persuade her to withdraw the application by giving her Ksh.500/=. He is also denied having been pressurized by the 2nd respondent to file the application.

On 22nd January, 2009, the cause was placed before me for directions. By then **Mr. Kahiga**, learned counsel was appearing for the applicant whereas **Mr. Kiama**, learned counsel was appearing for the 1st respondent. It should be noted that though the 2nd respondent was served with the application, he did not file any papers in opposition to the same nor did he appear for the hearing. As it turned out the contest was actually between the applicant and the 1st respondent. These parties agreed that the application be disposed off on the basis of the affidavits on record. Thereafter parties again agreed to file and exchange written submissions. This was done. I have carefully read and considered the written submissions.

Having considered the application, the various affidavits filed together with the annexures thereto and the written submissions, my take on this dispute is as follows; the deceased, it is common ground that when he passed on left no surviving spouse or children. Therefore under the provisions of section 39 (1) of the Law of Succession Act, the estate of the deceased ought to devolve to the deceased's brothers and sisters and any child of the deceased brothers and sisters. The deceased had two brothers namely the 1st respondent, the 2nd respondent's father and a sister, the applicant herein.

The applicant has sought to revoke the grant on the grounds set out on the face of the application. However, I do not think she has been able to bring out sufficient material to bear on the application. Her affidavits do not show how the proceedings to obtain the grant were defective in substance. Looking at

the proceedings before the karatina court, nowhere can anybody fault the process. The petition was properly filed, Gazetted and subsequent thereto the 1st respondent objected. The objection proceedings were heard and determined in the usual manner. Thereafter the protest was heard and “*judgment*” delivered on 21st July, 2004 by **J.N. Nyangah, SRM**. It ought to have been instituted a ruling and not judgment, as the learned Magistrate was entertaining an application for confirmation of grant and the protest filed in response thereto. Failure to involve the applicant in the petition does not amount to proceedings being defective in substance. In any event, who was to involve her? It should have been the 2nd respondent. The said 2nd respondent has not been a participant in these proceedings so far. The 1st respondent claims that the application is being prosecuted by the applicant in collusion with the 2nd respondent to frustrate his endeavours to bring this matter to final rest. Going by the record, it is not difficult to agree with the 1st respondent on the issue. The 2nd respondent had put up a spirited fight to lock out the 1st respondent from the estate of the deceased. He was not happy with the distribution. He appealed and the appeal was dismissed. Having waged such battle, why would he all of a sudden go quite when served with the application?

The applicant also seeks revocation of grant on the ground that the same was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case. In support of this allegation, it is the contention of the applicant that her name was not included in the petition as a beneficiary. However, there is evidence unchallenged that the applicants have for well over 30 years been married and stays at Kangema. All these time she has never utilized any portion of the estate of the deceased. It would appear, she was least interested in the estate. Had she shown keen interest in the affairs of the estate she would no doubt have come to know the existence of the succession cause in Karatina the same way that the 1st respondent did. It is hard to believe that a family would be involved in such gigantic fight in court and the applicant would not be aware of the same. It is simply incredible. I do not think that the applicant is being candid when she claims that she was unaware of the existence of the petition until sometimes in 2008. In any event the petition was Gazetted for those ones with an interest in the estate and who felt left could pursue such remedies as are available to them. It is assumed that every Kenyan reads the Kenya Gazette. If the applicant did not read the Kenya Gazette of 9th November, 2001, the blame squarely lies with her. She cannot blame the respondents or indeed the 1st respondent for this omission. It is also worthy noting that in the entire pleadings, the applicant has failed to disclose when she first learnt of the succession cause. This further casts doubt as to her credibility.

The applicant also maintained that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant. The applicant has not been able to demonstrate to my satisfaction any untrue allegation in the petition. The 2nd respondent described himself in the petition as a nephew of the deceased. That was correct. The applicant and the 1st respondent acknowledge that fact as well. In his objection proceedings as well as the protest proceedings in the Karatina court, the 1st applicant described himself as a brother of the deceased. That was also true. The mere fact that the name of the applicant did not feature in the petition, cross-petition and affidavit of protest does not mean that the grant was obtained by means of an untrue allegation of fact essential in point of law as to justify the revocation of grant notwithstanding that the allegations was made in ignorance or inadvertently.

Yes, the applicant may be a sister of the deceased. That perse does not turn her into a dependant of the estate. As a correctly submitted by **Mr. Kiama**, the mere fact that she is a sibling of the deceased does not automatically entitle her to a share of the deceased’s estate thereof. She must demonstrate how the estate benefits her which has not been done in the circumstances of this case.

On the issue of jurisdiction, **Mr. Kahiga** has submitted that the estate of the deceased comprised of land parcel **No.Kiine/Kibingoti/Nguguini/1376** measuring approximately 2 acres. The 2nd respondent gave the value thereof as Ksh.100,000/=. However it is a matter of common knowledge that land in Central Province is of high value and 2 acres of land in Kirinyaga District cannot be valued at Ksh.100,000/=. It is on that basis that the applicant wants this court to revoke the grant for want of jurisdiction by the Karatina SRM’s Court. Courts of law do not operate on the basis of assumptions and speculation. The applicant has not tabled anything in court to demonstrate that the estate of the deceased

is worth more than Ksh.100,000/= given by the 2nd respondent. In any event parties are bound by their pleadings. In this regard, the pleadings are clear. In the affidavit in support of the petition for letters of administration intestate the 2nd respondent stated that total estimated value of the estates assets was Ksh.100,000/=. There was nothing to suggest to the court that, that statement was incorrect. To date the applicant too has been unable to show that the said information is incorrect. He asks me to take judicial notice. However I am aware that there are certain areas of Central Province where land is not that highly priced. Accordingly, I refuse to take that route. I refuse to accept that Karatina court has no jurisdiction to entertain the cause.

For all the above reasons, I find no merit in this application which is accordingly dismissed with costs to the 1st respondent.

Dated and delivered at Nyeri this 17th September, 2009.

M.S.A. MAKHANDIA

JUDGE