



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 1131 of 1992

IN THE MATTER OF THE ESTATE OF NJUGUNA KARANJA – DECEASED

RULING

A beneficiary has filed a Notice of Motion (*sic*) dated 9th January, 2004 under section 47 and 76 of the Law of Succession Act (Cap.160) and Rules 63 (1) and 73 of the Probate of Administration Rules. As per provisions of Rule 63(1) of the said Rules, the summons is also filed under order XLIV Rule 1 and 2 of the Civil Procedure Rules.

It seeks prayers:

- (a) That this Honourable court be pleased to stay execution of the grant confirmed on the 4th day of June, 1999 and all consequential order thereof, if any.**
- (b) That this Honourable court be pleased to review and set aside its orders given on 12th day of November, 2003 dismissing the application for revocation dated the 27th day of March, 2000.**
- (c) That this Honourable court be pleased to order that this Succession Cause be heard De novo.**

I must first of all deal with the issue raised by Mr. Chege, the learned counsel for the Executor, Respondent, to the effect that this court has no jurisdiction to stay execution of the confirmed grant of Probate. As per Rule 63(1) of the Probate and Administration Rules, the provisions of the execution or appeal made under Civil Procedure Rules are not applicable to the proceedings under the Law of Succession Act (Cap 160) (hereinafter referred to as the Act)

I may agree to a certain extent with the aforesaid submissions but must add that the court may, and should in appropriate cases, invoke its inherent powers under Rule 73 of the said Rules, while considering the summons for revocation.

In this case, Certificate of confirmation was issued on 4th June, 1999 and the summons for revocation dated 27th March, 2000 also was dismissed vide a ruling of the court dated 12th November, 2003. The court is, however, not informed as to the position of the distribution of the estate. In absence of this crucial fact, I must reject prayer no.(a) in the summons and I do hereby hold so.

I move now to the prayer seeking review and/or to set aside the order dismissing the summons for revocation filed by the Applicant. I have mentioned hereinbefore that the order was made vide a ruling dated 12th November, 2003.

I have carefully perused the said ruling which was made on the sole issue of validity of the will made by the deceased. The revocation was sought for on the sole ground that the deceased was of unsound mind when he made the will.

The Applicant has prayed for the review of the aforesaid order of dismissal on the ground that new facts have been discovered.

These new facts are that the will does not include some properties owned by the deceased and that the properties given to the Applicant are not in existence.

So far as properties known as Loc.5/Kagunduini/1794 and 1795 are concerned, the explanation is duly given in the Replying affidavit sworn by Humphrey (Gibbs Harris) Mwai Waithaka sworn on 21st April, 2004.

He has averred that the aforesaid two properties are the result of sub-divisions of original property of Loc.5/Kagunduini/758 and that this fact is admitted by the Applicant in his affidavit sworn on the 27th March, 2000. This being so, it is not a new or important matter which was not within his knowledge.

As regards other properties alleged to be owned by the deceased and not included in the will as well as the properties alleged not to be in existence, in my view, the said facts are not reasons to invalidate the will and which facts, in any event, would have no bearing on the Ruling under attack. The applicant has not shown any relevance to the alleged facts and the decision on hand sought to be reviewed. Moreover, the executor is definitely incapable to respond to those facts.

I further note that a letter from the Registrar of Companies (Ann.GKNVI) annexed to the further affidavit of the Applicant sworn on 2nd March, 2004 is first of all obtained after the application was filed and does not give the name or designation of the signatory. I shall thus not find it as a credible evidence.

The Ruling was made without any error apparent on the face thereof and the Applicant has failed to show discovery of relevant facts affecting the validity of the will on the issue raised by him during hearing of his application for revocation.

The applicant may file an application for a fresh grant for intestate estate, if he deemed fit to do so.

But I must reject his attempt to enter the arena from the back door which has been closed to him.

The application dated 9th January, 2004 is thus dismissed with costs.

Dated and Signed at Nairobi this 22nd day of October, 2008.

K.H. RAWAL

JUDGE

22.10.08