

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Succession 232 of 2008

IN THE MATTER OF THE ESTATE OF NAHASHON KABURU MUNDUI (DECEASED)

AND

MARY WANGARI MUKABURU.....APPLICANT

VERSUS

WANDETO KINYARI.....RESPONDENT

R U L I N G

By an application dated 14th May, 2008 expressed to be brought under *Rule 49 and 73* of the Probate and Administration Rules, **Mary Wangari Mukaburu**, hereinafter referred to as “*the applicant*” sought the rectification of the certificate of confirmation of grant of letters of administration issued to her on 29th March, 1990 so as to include plot number 27 Kiamariga. She also prayed that the costs of the application be provided for.

The application was supported by an affidavit sworn by the applicant. In the main she deponed that the deceased co-owned plot number 27 Kiamariga market hereinafter referred to as “*the suit premises*” with one **Ephantus Kinyari** and **Solomon Kahia**. That the two co-owners have also since passed on. However the suit premises were being wasted by their beneficiaries who have refused to take out letters of administration namely **Wandeto Kinyari** and **Muriuki Weru**. They are the beneficiaries of the estates of **Ephantus Kinyari** and **Solomon Weru Kahia** respectively. That when she petitioned for the grant of letters of administration for the estate of her deceased husband, she inadvertently failed to include the said suit premises in the list of assets of her deceased’s husband.

In her oral submissions in support of the application, **Mr. Kariuki**, learned counsel for the applicant stated that the two beneficiaries aforesaid, hereinafter referred to as “*the respondents*” had persistently failed to take out letters of administration to enable the suit premises to be apportioned to the beneficiaries of the estate of the three deceased co-owners. That the applicant was merely seeking that portion of the plot that rightly belongs to the estate of her deceased husband to be made available for distribution to the beneficiaries of the said estate.

The application was opposed. In a replying affidavit sworn by **Wandeto Kinari**, the respondents deponed in pertinent paragraphs that the applicant’s deceased husband had long before his death abandoned and ceded his interest in the suit premises to the family of the former joint owners and that the applicant had knowledge of that fact. That the deponents had been exclusively in effective occupation and use of the suit premises and have been paying all the liabilities, rates and rent due to the county council since 1974.

In his oral submissions in opposition to the application, **Mr. Mwangi**, learned counsel for the respondents stated that the omission by the applicant to include the deceased’s interest in the suit premises as part of the estate of the deceased in her application for grant of letters of administration was not an oversight or inadvertence. It was borne out of her realization that the deceased had as long ago as 1954 ceded his interest in the suit premises to his co-owners. That the applicant was coming to court 18 years later to ask for the inclusion of the property as part of the estate of the deceased. The delay is inordinate and has not been explained. Accordingly the application had not been made in good faith.

I have carefully considered the application, the respective supporting and replying affidavits and the annexures thereto, the respective oral submissions and the law. It is common ground that the suit premises are still registered in the joint names of **Ephantus Kinyari**, **Nahashon Mukaburu** (deceased husband of the applicant) and **Solomon Weru Kahia**. This is as per the official search certificate issued to the applicant by the county council of Nyeri. With this evidence, it is the contention of the applicant that a 1/3 of the suit premises belongs to the estate of her deceased husband and should be made available to her for distribution. The respondents do not dispute the fact that the suit premises were initially owned by the three aforesaid co-owners. However their contention is that the applicant’s deceased husband had ceded his interest in the suit premises to the other two co-owners. However the respondents have not provided any evidence to back up their claim. If indeed what they allege is true, how come they have never deemed it necessary to make the necessary changes in the records kept by the county council of Nyeri, to reflect the reality on the ground. In support of their contention, the respondents have exhibited a bundle of receipts and demands for payment of rates by the county

council of Nyeri. To my mind those payments perse do not change the reality on the ground, which is that the suit premises are still registered in the names of the initial joint owners who are all but deceased. In any event those receipts have been issued in the names of the three initial co-owners. Between the word of mouth and documentary evidence, I would rather belief documentary evidence. I do not therefore believe the statement by the respondents that the applicant's deceased husband ceded his interest in the suit premises to the other two co-owners way back in 1954. Where is the evidence? Could the deceased have ceded his interest in the suit premises without evidence, documentary or otherwise? I do not think so. If he had done so at least there would have been some witnesses who could have sworn an affidavit or testified to that effect.

The applicant has stated that her failure to include the suit premises as part of her deceased's husband's estate in her application for confirmation of grant was due to inadvertence. Nothing has been brought to the fore by the respondents to dissuade me from believing what the applicant has deponed to as aforesaid. The respondents contend that the applicant's failure was neither an oversight nor inadvertence but was as a result of the realization that as long ago as in 1954, her deceased husband had ceded in his interest in the suit premises. Where is the evidence? I do not see any. The respondents have not tendered any evidence as to the applicant's perceived knowledge of her husband's cessation of interest in the suit premises as claimed.

The respondents have contended that by the applicant coming to court 18 years later is an indication that she must have been aware that the estate of the deceased had no interest in the suit premises. My take on this is that, the applicant has emphatically stated that her failure to include the suit premises in the assets of the deceased was due to inadvertence. In any case I am not aware of provision in the Law of Succession Act and indeed any other law that bars an applicant from making the instant application. It matters not that the delay is inordinate and is not explained. There is no period of limitation in succession matters whether under the Law of Succession Act or the Limitation of Actions Act. Much as the application has come 18 years late, the applicant is under no duty to explain the delay nor can bad faith be imputed into such delay.

In a nutshell, there has been no prove that the applicant's deceased husband had ceded his interest in the suit premises to the respondents. Accordingly, the applicant's deceased husband's estate is entitled to a portion of the suit premises for distribution amongst its beneficiaries. That being my view of the matter I would allow the application dated 14th may, 2008 with no order as to costs.

Dated and delivered at Nyeri this 20th day of November, 2008.

M.S.A. MAKHANDIA

JUDGE