



REPUBLIC OF KENYA

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

Succession Cause 534 of 2002

AND

KIAMBU SENIOR PRINCIPAL MAGISTRATE'S COURT

SUCCESSION CAUSE NO.324 OF 1999

IN THE MATTER OF THE ESTATE OF MARY NYAMBURA

MBURU ALIAS KIBURA KAREGA (DECEASED)

PETER KARIUKI KAREGA APPLICANT

VERSUS

PENINAH WANJIRU KAREGARESPONDENT

RULING

When this matter first came up for hearing before me on 19.07.04, Mr. Ngaramba of Ngaramba & Njoroge Advocates informed the court that he was appearing for the applicant. The respondent appeared in person.

Mr. Ngaramba then referred the court to application of 04.03.02 stated to be brought under section 76 (a), (b) and (c) of the Law of Succession Act (Cap. 160), rules 44 and 73 of the Probate and Administration Rules Form 107 and 14 thereto. There is in the High Court file an incomplete summons bearing the title herein plus High Court Nairobi date stamp of 04.03.02. Only the first page of the summons exists in the file. There is also what appears like a sub-file in which is included a summons whose first page is identical with the incomplete summons in the main High Court file. This summons in the "sub-file" bears on its first page the rubber stamp of Kiambu Law Courts dated 06.03.02. The second page of the summons in the "sub-file" gives its date as 04.03.02 and the applicant as Peter Kariuki Karega. I shall give applicant the benefit of doubt and assume that the second page of summons in the "sub-file" with Kiambu Law Courts stamp is the missing page of the one-page summons in the main High Court file.

Even after doing the foregoing merger, there is still a problem with the application in that there is in the main High Court file an affidavit sworn by one Mwathi Karega on 29.11.04 and filed on 05.01.05 deposing that Peter Kariuki Karega the applicant herein is deceased. There is annexed to Mwathi's affidavit a Permit for Burial showing that Peter Kariuki died on 07.12.03. The fact of Peter Kariuki Karega's death was not referred to by advocate Ngaramba in his address to this court. At paragraphs 3 and 4 of his affidavit, Mwathi deposes as follows:

“3. THAT, this matter was filed by Peter Kariuki Karega on his own behalf and on behalf of Mwathi Karega (myself), John Ndundu, Moni Karega and Kibura as indicated in search and the title. Annexed MK 2 & 3.

4. THAT, I wish to proceed with this matter on my behalf and on behalf of Peter Kariuki’s family, John Ndundu, Moni Karega and Kibura Karega.”

When this matter subsequently came up before me on 25.10.05, the respondent appeared in person as she had done before. There was no appearance for the applicant. One Mwathi Karega who had accompanied respondent to court said he had authority from court to participate in this case. He said the authority was with one Mr Njihia Moni who was not in court. No such authority was ever produced before this court.

The two-page summons bearing Kiambu Law Courts stamp in the “sub-file” alluded to above has annexed to it a supporting affidavit ascribed to Peter Kariuki Karega and sworn on 04.03.02. All Peter Kariuki Karega deposed in that affidavit is that he was one of the proprietors of Land Parcel No. Lari/Kirenga/367 (suit land) registered jointly with Mwathi Karega, Kibura Karega, John Ndunda and Moni Karega. Nowhere in the summons and in the supporting affidavit did Peter Kariuki Karega purport to have filed the summons dated 04.03.02 on behalf of anyone else. In these circumstance, I am of the view that it was incumbent upon Mwathi Karega, if he wished to take over and prosecute Peter Kariuki Karega’s aforesaid summons, to have applied for and obtained an order to substitute him for or in place of Peter Kariuki Karega. As Mwathi Karega did not so apply and obtain the requisite order, I hold that he has no *locus standi* to prosecute Kariuki Karega’s aforesaid summons or application.

There is also in the main High Court file a summons dated 08.02.05 and filed on 01.03.05 by Mwathi Karega for revocation or annulment of the same grant issued to Peninah Wanjiru Karega by the Kiambu court subject matter of Peter Kariuki Karega’s application dated 04.03.02. In his address to this court, advocate Ngaramba never referred to Mwathi’s summons at all. Documents in the Kiambu court file show that the grant was issued on 31.01.2000 and documents in the High Court file show that it was confirmed on 06.12.2000. Mwathi Karega’s summons dated 08.02.05 also seeks revocation of Kiambu court order given on 17.10.01 ordering the Land Registrar to issue title deed to Peninah Wanjiru Karega of her share of land parcel No.Lari/Kirenga/367 as per confirmation of grant dated 06.12.2000. Since there is no evidence before me that Mwathi Karega applied for and obtained a court order to be substituted for or in place of Peter Kariuki Karega in applying for the subject revocations, I hold that Mwathi Karega’s summons dated 08.02.05 is incompetent and that the same must be and is hereby struck out.

I am also constrained to record here that upon perusing the file after the hearing of 19.07.04, I could not find two documents alluded to by advocate Ngaramba when he addressed this court on behalf of applicant on 19.07.04. The two missing documents are:-

- a) Affidavit dated 09.07.70 ascribed by advocate Ngaramba to Mwathi Karega; and
- b) Certificate of Succession dated 25.10.83 stated by advocate Ngaramba to have been issued by Limuru Magistrate’s Court in succession cause No. 41 of 1970 relating to the estate of Karega Ithondeka (deceased) from whom the land subject matter of the dispute herein appears to have come.

This court fixed this matter for mention on 19.10.04 and 02.11.04 with directions for advocate Ngaramba or a representative from his law firm to appear at the mentions and give clarification on the whereabouts of the two documents. Neither advocate Ngaramba nor anyone else from his law firm appeared at the mentions. Mwathi Karega said he had visited the offices of Ngaramba & Njoroge Advocates after this court session of 22.09.04 when the law firm sent nobody to appear at the session and found advocate Ngaramba absent. Mwathi Karega informed this court that he informed advocate Ngaramba’s colleague, Mr Mburu of the two documents required by court and that this matter would be mentioned on 19.10.04 and that advocate Mburu said he would attend court. Advocate Mburu did not, however, attend court and never sent any explanation. The court fixed this matter for mention on 02.11.04 with directions for either advocate Ngaramba or advocate Mburu to appear but neither did. This is unprofessional conduct on the

part of advocate Ngaramba and advocate Mburu and the said conduct is hereby deprecated.

The end result is that Mwathi Karega's application to prosecute Peter Kariuki Karega's summons dated 04.03.02 is declared incompetent and the same is hereby struck out.

Applicant Mwathi Karega and the respondent shall bear their own respective costs of these proceedings.

Orders accordingly.

Delivered at Nairobi this 6th day of March, 2006.

B.P. KUBO

JUDGE