



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Succession Cause 138 of 1995

TABITHA TIRINDI M'IKIUGU
PETITIONER/RESPONDENT

AND

JEREMY NTIMI M'MBURIA
OBJECTOR/APPLICANT

RULING OF THE COURT

The application before court is the Notice of Motion dated 8.4.2003. The same is brought under Order 45 Rule 15 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act. By the application, the applicant prays for orders:-

1. That the honourable court be pleased to set aside the award dated 12th November 2002 and read in court on the 10th day of March 2003.
2. Costs be in the cause.

The application is premised on six grounds on the face thereof. As the grounds are brief in nature, I reproduce the same hereinbelow as follows:-

1. That the respondent misconducted herself and or deceived the arbitrators in deciding the matter.
2. That the respondent misconducted herself by bringing extraneous matters on record.
3. That the applicant was not given a chance to call his witnesses.
4. That the award was not signed by the elders.
5. That the respondent acted contrary to the terms of reference.
6. On further grounds to be adduced during the hearing.

The application is also supported by the affidavit sworn by the applicant Jeremy Ntimi M'Mburia on 8.4.2003. The applicant has deponed that the land in issue (hereinafter referred to as the suit land) being parcel number KIBIRICHIA/465 (the suit land) is an inheritance from his father and that the petitioner/respondent has no stake in it. He has also deponed that during the hearing of the reference, he was not given an opportunity to call his witnesses, while at the same time also saying that the respondent brought extraneous matters into the dispute. The applicant has also deponed that the award is bad in law because it contravenes the provisions of section 26 of the Law of Succession Act (the Act), Cap 160 Laws

of Kenya. Finally, the applicant states that apart from the fact that the award was not signed by the elders, the arbitration process itself was flawed in that the District Officer, who the court believes was the chairman, was openly shouting at the applicant.

Section 26 of the Act, whose provisions the applicant says have been contravened reads as follows:-

“26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”

I shall return to these provisions later on this ruling.

In his further supporting affidavit made and sworn on 12.5.2003, the applicant has deponed that the petitioner/respondent has another parcel of land at Katheri, which parcel also belonged to the deceased. Further, he has deponed that the 27 cows given to the respondent during the arbitration process brought her to the same level as the applicant and other sons of the deceased. He also avers that the arbitrators were wrong in ordering that he gives a share of the deceased’s land to the respondent. He has also deponed that the arbitrators refused to admit the evidence from a tape, and that for this reason and the many other reasons he has given, the arbitrators’ award was contrary to the rules of natural justice.

The application is very much opposed by a 12 paragraph replying affidavit. The respondent states that the grounds supporting the affidavit are not only frivolous and vexatious, but that they are also an abuse of the due process of the court. She has termed as untrue the applicant’s contention that he was denied an opportunity to call his witnesses, and states that each party was given an opportunity to state their case and to call witnesses with each side calling 3 witnesses. Further, she has contended that it is the applicant who deceived and misled the arbitrators.

According to the replying affidavit, the respondent who is a daughter in-law to the deceased, was, as much entitled to the deceased’s estate as the applicant was. She denied that her husband had been given any other portion of land as alleged by the applicant, although she admitted that her deceased husband was allocated land parcel Abothuguchi/Katheri/1230 measuring 6 acres by the clan. She has also deponed that the deceased sold his land at Nkiriri to one M’Mbutura M’Imaita before he was allocated the suit land. She urged the court to dismiss the application with costs to herself.

Perhaps before moving further with this ruling, a brief background into this application is necessary. Grant of letters of administration intestate was issued to the respondent on 6.12.1999. On the 16.8.2000, she filed the Summons for Confirmation of Grant of Letters of Administration intestate. At paragraph 6 of the supporting affidavit, she identified the deceased’s properties; namely the suit land which measures 25 acres. The proposal was that the suit land be divided into two equal shares between herself and the applicant. She was to hold the 12 ½ acres in trust for her five children, four sons and one daughter namely:-

- Veronica Mwarania M’Ikiugu (daughter unmarried)
- David Nkuru M’Ikiugu
- Moses Kirimi M’Ikiugu
- George Mwirigi M’Ikiugu
- James Mugambi M’Ikiugu

The applicant protested. He filed his affidavit of protest on 19.10.2000 disputing the sharing of the suit

land between himself and the respondent. His main contention (paragraph 4 of the affidavit) was that the deceased wanted the respondent to settle on land parcel No. Katheri/1230 and that he was to become the absolute owner of the suit land. He contended that giving a portion of the suit land to the respondent would thus disentitle him of his fair share in the same.

I note from the record that the applicant did not attach a copy of the title for land parcel No. Katheri/1230, which he alleges was allocated to the respondent by the deceased. The copy of the title deed he produced shows that the land was registered in the name of IKIUGU S/O ABURIA, the deceased herein.

On the 16.9.2002, the parties appeared before court and informed the judge (Mr. Mburugu for the respondent addressed the court) that they had reached agreement to refer the matter to arbitration. The matter was thus referred to arbitration by consent of both parties. The D.O. west Abothuguchi West Division was to chair the panel of arbitrators. Each party was to appoint two elders to sit with the D.O. The award was to be filed with the court before 18.11.2002. The D.O. was allowed a casting vote.

The award was duly filed in court as ordered. The elders' award was read on the 10.3.2003. There was no unanimous verdict on how the suit land was to be shared out. Using his casting vote the chairman decided that the suit land should be shared out equally between the objector and the respondent's husband.

The applicant has asked this court to set aside the award under the provisions of Rule 15 of Order 45 of the Civil Procedure Rules. The relevant rule provides as follows:-

“15 (1). The court may set aside an award on the following grounds only:-

(a) Corruption or misconduct of the arbitrator or umpire,

(b) That either party has fraudulently concealed any matter which he ought to have disclosed, or has willfully misled or deceived the arbitrator or umpire.

***2. Where an award is set aside under this rule, the court shall supercede the
the arbitration and shall proceed with the suit.***

The question for determination is whether the applicant has shown that the respondent fraudulently concealed any matter, which he ought to have disclosed, or has willfully misled or deceived the arbitrator or umpire.

Before delving into the issue, it is important to take note of the provisions of Rule 19 of Order 45 which provide as follows:-

“19. Applications under this Order other than under Rule 15 shall be made by summons and an application under Rule 15 shall be served on the arbitrator or umpire.” (Emphasis is mine).

After carefully considering all the pleadings and submissions, I would allow the application, set aside the elders award and supercede the arbitration. The main reason for reaching this decision is that the DO who heard the dispute was not the one to whom the reference was made. This fact is admitted by the respondent. Secondly, the respondent did not clearly bring out the issue of the parcel of land known as Katheri/1230, measuring six acres. Unless the court looks deeper into this issue, the same might result in contravention of the rules of natural justice.

There may also be an issue to be determined by this court touching on section 26 of the Act; namely whether the 6 acres were a gift by the deceased to the respondent's husband before the deceased died or whether that parcel was given to the deceased's husband by the clan. If the clan gave the land, under whose mandate did they give it?

In the result, the applicant's application dated 8.4.2003 is allowed. The award dated 12.11.2002 and read in court on 10.3.2003 is hereby set aside. The court will now proceed to determine the distribution of the deceased's estate.

As to costs, each party will bear its own costs.

Orders accordingly.

Dated and delivered at Meru this day of 2006.

RUTH N. SITATI

J U D G E