Kamiri & another v Kamiri (Civil Appeal 38 of 2003)
[2005] KEHC 2759 (KLR) (Civ) (21 January 2005) (Judgment)

Peter Muchiri Kamiri & another v David Kabugo Kamiri [2005] eKLR

Neutral citation: [2005] KEHC 2759 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 38 OF 2003

MK KOOME, J

JANUARY 21, 2005

BETWEEN

PETER MUCHIRI KAMIRI ..... 1ST APPELLANT

PRISCILLA GATHONI BORO ..... 2ND APPELLANT

AND

DAVID KABUGO KAMIRI ..... RESPONDENT

JUDGMENT

1. Peter Muchiri Kamiri and Pricilla Gathoni Boro (hereinafter referred to the Appellants) have appealed against the Order/Ruling of the Senior Resident Magistrate S.B.A. Mukabwa dated 10th August, 2000 at Githunguri in Succession Cause No. 49 of 1999

2. According to the appellants, the learned Senior Resident Magistrate erred in law and fact by confirming the letters of Administration without giving directions on whether or not to take viva voce evidence. As at the time the grant was confirmed, the first Appellant had filed an affidavit on 16th May, 2000 protesting the proposed mode of distribution by the Respondent. On 10th August, 2000 when the application for confirmation came up for hearing, the Appellant was present in court. The grant was confirmed without due consideration of the affidavit in protest.

3. The Appeal was opposed by the Respondent on two grounds: -

> Firstly, counsel for the Respondent submitted that the Appeal is incompetent, as the record of Appeal does not contain a certified copy of decree or order. The only document relied upon is a ruling. Since the law of Succession does not provide the documents that should

be included in an appeal, one has to refer to order 41 of the Civil Procedure Rules, which provide that a certified copy of a decree is mandatory.

Secondly and in the alternative, counsel for the Respondent submitted that the appeal lacks merit as there was no valid objection before the Learned Magistrate, In any event, the 1st Appellant was made a co-administrator, and he is also a beneficiary. Since the Appellant was represented in court and due to the fact that he did not apply for a probate of a written will until he has no valid complaint.

4. I have carefully considered the material that was placed before me. I will deal with the issue of the validity of the Appeal first. Under Section 50 of the Law of Succession, an appeal is allowed to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court shall be final. As regards the provisions of order 41 of the Civil Procedure Rules, I am of the humble view that every appeal to the High Court should comply with the rules set out there under. Order 41 rules 1(a) specifically provides that a certified copy of the decree or order appealed against should he be filed with a Memorandum of Appeal.

5. I have before me a Memorandum of Appeal and the original file from the Senior Resident Magistrate in Succession Cause No. 49 of 2000. Although, there is no formal decree extracted, there is a certificate of confirmation of the grant that was issued on 10th August, 2000. I am of the humble view that the certificate of confirmed grant that is duly certified is a decree absolute, which is the final order of the court in respect of the Administration of the estate.

6. Accordingly, I find that the Appeal is properly before the court. The other issue that was raised has to do with the merit of the Appeal. The Appellants principal complaint is that the affidavit of protest was not considered contrary to the provisions of rule 40(8) of the P&A Rules. That rule clearly provides that, where there is an affidavit of protest, or where any of the persons beneficially entitled has not consented in writing, the court shall order that the matter be set down as soon as possible for directions in chambers or notice in form 74 to the Appellant and the protestor and to such other persons as the court may think fit.

7. When the summons for confirmation came up for hearing, the learned Senior Resident Magistrate noted as follows and then made the order

> ‘’The Respondent has not filed a replying affidavit to that supporting the application. The effect is to grant the orders sought’’

Order

> ‘’The application is granted with costs’’.

8. With tremendous respect, the Learned Magistrate erred in Law by failing to consider that an affidavit by the 1st Appellant was filed on 16/5/2000 whose effect was to oppose the summons for confirmation. The Leaned Magistrate should have given directions as to the hearing and even if she should have proceeded to hear the summons, the provisions of rule 41 of the P&A rules should have been followed.

9. The issue of the 1st Appellant being a co-administrator was raised and his failure to apply for probate. The alleged document of will of the deceased does not name the executors and in my view the issues raised therein ought to have been considered before the grant was confirmed.

10. In this regard therefore, I allow the Appeal and set aside the order confirming the grant. The parties are at liberty to apply for confirmation of the grant in accordance with the law. The Appellant shall have the costs of the Appeal.

12. It is so ordered

JUDGEMENT READ AND SIGNED IN NAIROBI THIS 21ST DAY OF JANUARY, 2005

MARTHA KOOME

JUDGE