



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 16 OF 2003

**JAMES THOGO MWAI
JAMES THOGO NGUGI
FRANCIS NDUNGU KANGETHE**

MOSES THOGO MBUGUA.....APPELLANTS

versus

**STEPHEN NJUGUNA MBUTHI
JOHN MBUTHI MWAI**

PETER MBUTHI MWAI.....RESPONDENTS

JUDGMENT

This is an appeal from the ruling of the SRM Court at Limuru in Succession Cause No. 19 of 2002 which was delivered on 28th May 2003.

The appellants were the petitioners in the above cause. James Thogo Mwai, James Thogo Ngugi, Francis Ndungu Kangethe and Moses Thogo Mbugua who described themselves as the grand son of the deceased petitioned for Letters of Administration in respect of the sole estate of the deceased the late Thogo Mwai who died on 30th November 1941.

The deceased estate is a parcel of land known as Limuru/Bibirioni/17 measuring about 11.3 acres.

An objection to the making of the grant was promptly filed by the respondents namely Stephen Njuguna Mbuthi, John Mbuthi Mwai and Peter Mbuthi Thogo. The objectors are apparently either the children or grandchildren of the late Mbuthi Mwai the brother of the deceased herein.

According to the record the court heard oral evidence in determination of the objection. It is clear that the court made a visit to the suit premises and established that the land was occupied by the families of the deceased and Mbuthi Mwai almost in equal shares.

The learned Magistrate proceeded to make a finding that the deceased “held this land in trust for himself and for the family of Mbuthi Mwai”. The Magistrate proceeded to make the following orders.

“That the petitioners and the objectors be joint administrators of the estate of the deceased and that I now nominate James Thogo Mwai, James Thogo Ngugi (petitioner) and Stephen Mbuthi and Peter Mbuthi Thogo (objectors) as co-administrators”

The petitioners being dissatisfied with the said orders have filed a total of nine(9) grounds of appeal. According to the appellant, the learned SRM erred in law by using the term “Nomination” which is not provided for under the Law of Succession. Moreover, the persons who were so nominated as administrators have no locus standi under Section 66 of the Law of Succession because Stephen Mbuti admitted in evidence that he is the nephew of the deceased while Peter Mwai is a grandchild. Moreover the objectors ought to have brought their claim under part 3 of the Law of Succession as they claimed to have depended on the deceased parcel of land. The other complaint by the appellant is that the learned SRM declared the existence of a trust which finding was not based on evidence. There is no declaration of trust in the Title the title is registered in the name of the deceased and in the absence of trust deed to show a common tenancy the court was wrong.

Counsel for the appellant argued that the court was wrong to consider the issue of advance possession during the hearing of the objection. At the objection stage, the court ought to have considered that the persons who have petitioned have priority in law and that every beneficiary has been served with the notice or citation and going into the issues of adverse possession was tantamount to exceeding the jurisdiction.

The appeal was opposed by the respondent who requested the court to ignore the use of the term “Nominate” instead of “appoint” as the use of the wrong term cannot be the basis of invalidating an order that was properly made.

According to the respondent the court did not distribute the estate and there was overwhelming evidence that the respondent had lived on the land for over sixty (60) years and thereby the inference of an existing trust was properly made.

As regards the issue of adverse possession the objectors used this forum to ventilate their claim which they could not do anywhere else as there was no personal representative of the deceased until the petitioners petitioned for the grant of Letters of Administration.

I have carefully considered this appeal, it refers to the procedure applicable in granting the Letters of Administration. Section 66 of the Law of Succession gives the order of preference to be given to the persons to be given the Letters of Administration and refers to part V and in particular I find Section 39(1) of the Law of Succession relevant to this matter.

Section 39(1) provides:

Where an intestate has left no surviving children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority

a) Father or if dead

b) Mother or if dead

c) Brothers and sisters and any child or children of deceased brothers and sisters in equal shares or if none

d) Half- brothers and half sisters and any child or children of the deceased half brothers and half sisters, in equal shares; or if none

e) The relatives who are the nearest degree of consanguinity up to and including the sixth degree in equal share

Although the grand children of the deceased are left out under Section 39 they feature in the second schedule of the table of consanguinity while the nephews are third after the first degree of priority.

In determining who should be issued with the Letters of Administration the trial of issues such as the

allegation of Trust or the existence of Trust and the issues of adverse possession or even dependency for that matter are not relevant.

The Law of Succession clearly stipulates the procedure to be invoked when applying for provision for dependency and also for the determination of what assets or shares form part of the deceased estate.

I am satisfied that it was not necessary for the learned SRM to determine the issue of Trust and adverse possession of the suit premises at the stage of the objection proceedings.

The provisions of Rule 41(3) of the P & A Rules clearly spell out the procedure to be followed

“Where a question arises as to the identity, share or estate of any person claiming to be beneficiary interested in, or if any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under order XXXVI Rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to Section 7 (2) of the Act, proceed to confirm the grant”.

In view of these provisions, I am satisfied that the learned magistrate overlooked the procedure and proceeded to consider issues that can properly be determined during the hearing of the confirmation and distribution of the estate.

This now brings me to the issue of appointment of administrators. I am in agreement that the term “Nominate” is not provided for under the Law of Succession but the mere use of the wrong term cannot invalidate the appointment if it was properly done. The issue of whether the appointment of the administrators was proper is also crucial to determine.

An objection was filed and the answer to the petition, which led the court in giving directions that the matter be heard and determined by oral evidence.

As pointed out earlier the only evidence that was necessary at this stage is to determine who among the petitioners and objectors had the priority in law and the court should have been guided as set out above by the provisions of Section 66 of the Law of Succession and Rules 26 and 27 of the P & A rules. Under the provisions of Rule 26 (3) of the P & A rules, the court is given inherent powers and there are exceptions, to the rules of priority under Rule 27 of the P & A rules which provides:

“Nothing in rule 26 shall operate to prevent a grant being made to any person to whom a grant may be made or may be required to be made, under this Act.”

I have considered this proviso alongside with the provisions of rule 73 of the P & A rule, that gives the court inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

In view of the above provisions and considering that the Lower Court made some inquiries and that the powers of personal representatives of the deceased estate are clearly set out under section 82, of the Law of Succession Act even if it was argued that the objectors have no locus standi, I am not convinced that their appointment will not prejudice the estate in any manner. They reside on the land and it is important that they remain as administrators. There is perhaps total acrimony and breakdown of communication between the parties but on the other hand the deceased estate is only one parcel of land and the duties of the administrators is perhaps to file an application for confirmation and to comply with Rules 41 of the P & A rules if there are issues affecting the suit premises. If the parties cannot agree on the mode of distribution they are at liberty to file an application for confirmation either jointly or singularly.

In this regard, I would set aside the findings on the issues of Trust and adverse possession but I find no

reason of setting aside the order appointing the administrators which was largely in exercise of the learned Magistrate inherent powers. I will therefore allow the appeal as regards grounds Nos 2,3,4,5 and 6 and set aside the holding in respect of the issues of Trust and adverse possession. The appellant shall be entitled to one half costs of this appeal as they were partially successful.

It is so ordered.

Judgment read and signed on 15th day of April 2005.

MARTHA KOOME

JUDGE