



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
Succession Cause 123 of 1995

IN THE MATTER OF THE ESTATE OF GITHAË MUGWERU.....(DECEASED)

HERBERT WANGUKU GITHAË

ESTHER WANJIKU GITHAËAPPLICANTS/PETITIONERS

Versus

JOSEPH GATHENDU KIBIRA.....RESPONDENT/OBJECTOR

RULING

In the Notice of Motion dated 17th November 2004, the Applicants/Petitioners are praying for order:

“1. **THAT** the elders award filed herein and read in court on 21.10.2004 be set aside.

2. **THAT** this case do proceed to hearing in open court.

3. **THAT** the costs of this application be borne by the Respondent.”

The Applicants have given grounds of the application on the body of the Notice of Motion – mainly challenging the procedure adopted by the elders.

I propose to be brief, first noting that the application by way of Notice of Motion was not in the prescribed form since provisions of the Law of Succession Act do not prescribe any application by way of Notice of motion. See Rule 59(1) of the Probate and Administration Rules which is in mandatory form. The applicants are represented by an advocate who made no attempt to rectify the situation. On that basis the said application is incompetent.

But assuming the application is competent, the court order referring these succession proceedings to arbitration was a consent court order dated 15th May 2003 before my learned brother Mr. Justice J. V. O. Juma. It stated:

“By consent Petitioner and Objector are hereby appointed joint administrators. Matter in dispute be arbitrated upon by D.O. Mathira assisted by four elders, two to be appointed by each side. Parties at liberty to call witnesses. Arbitrations to determine heirs of the deceased, to determine share of each heir. Award to be filed within 60 days. Matter be mentioned on 14.7.2003.”

It is understood that this reference was made under Order XLV of the Civil Procedure Rules, though not cited. This was in accordance with Rule 63(1) of the Probate and Administration Rules whereby an order of the court may authorize use of any provisions other than those specified by Rule 63. Rule 73 also comes into play in the circumstances.

When the matter came for mention on 14th July 2003, the case was brought before me as I had replaced Hon. Justice Juma who had gone on transfer to Eldoret. By then no reference had been sent to the D. O. and Mr. Mukunya, then appearing for the Applicants, was not sure whether the Minister of Land's order dissolving land control boards in the country affected the order. There was no appearance for the Objector. But at the next mention date on 28th July 2003, when both sides were represented, Mr. Mukunya and Mr. Nderi, the latter holding brief for Mr. Maina, it was made clear that the aforesaid Ministerial order had not affected the court order dated 15th May 2003 and it was agreed that the order be complied with. By then 60 days were over and the parties did not remember to set another time limit within which the arbitration award was to be filed.

The D.O. was instructed accordingly and subsequently filed the arbitration award forwarded by his letter dated 14th June 2004 and received by this court on 23rd June 2004. It was read in court to the parties on 21st October 2004 and thereafter this Notice of Motion filed on 18th November 2004.

The reference court order did not instruct the arbitrator to follow a particular procedure when handling the matter. The proceedings and the award are in the court case file. I note the two elders brought by the Applicants to assist the arbitrator filed their own decision separate from the decision of the elders brought by the Respondent. That having been done, the District Officer Mathira, as the arbitrator made his separate award – which, I think constitutes the final arbitration award.

Substantially, I think that is what the parties wanted. I therefore find no good reason to interfere with that award.

Accordingly, the Notice of Motion herein dated 17th November 2004 be and is hereby dismissed. Each party to bear its own costs of this Notice of Motion.

Dated this 8th day of November 2005.

J. M. KHAMONI

JUDGE

Parties present