



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
Succession Cause 1366 of 1995 (1)

IN THE MATTER OF THE ESTATE OF JAMES KARANJA KIOI (DECEASED)

RULING

The Grant of Probate of written will of the late James Kioi Karanja who died on 3rd February 1995 was issued on 15th December 1999 after protracted hearing of an Objection proceedings that culminated in the ruling of the same dated whereby similarly the Grant of Probate was issued. Probate and Administration Cause No. 1366 of 1995 and P & A 1366B of 1995. The deceased had left three different wills in respect of his estate.

The Executrices of the three wills of the deceased have sought for a confirmation of the grant of Probate. Those applications are dated 30th May 2005, 26/5/05 and 21/2/01 respectively.

There are summons that were scheduled for hearing on 17th October 2005. On the same date Counsel for the Objector Mrs. Wahome informed the Court that she had resubmitted the summons for Dependency which was dismissed on 9th May 2005 for lack of evidence and want of prosecution. Counsel for both Executrices submitted that the hearing of the summons should proceed as scheduled there was no valid application for Dependency to allow the adjournment. The adjournment would have been necessary because the summons for confirmation cannot be confirmed if there is an application for Defendants as provided for under Part III of the Law of Succession.

Thus Counsel for the Objector argued that the Summons dated 6th September 2005 being such an application under Part III should be held first before the summons for confirmation.

On the other hand Counsel for both Executrices contested the validity of the application dated 6th September 2005 when they served incompetent and an abuse of the Court process and meant to delay the effectual conclusion of this matter.

On the part of Dr. Kuria counsel for the Executrix in P & A 1366 of 1995, he had filed a Preliminary Objection. The Court directed that the provisions of objection on the summons dated 6th September 2005 be presented together with the summons for confirmation.

Counsel urged the Court to confirm the Grant of Probate issued on P & A 1366 "A" and "C". The application for confirmation dated 26/5/05 is supported by the Appellant of Mary Wangui Karanja the Executrix and in respect of the summons dated 30/5/05 the same is supported by the affidavit of Jeddy Nyanjugu Murage the Executrix.

The Beneficiaries under the will except the Objector Mrs. Rhoda Karanja and her son have duly contended to the confirmation. Since there is no affidavit of protest by the two Objectors the question that this Court ought to address is whether there is a valid application for Dependency the same having been disposed on 9th May 2005.

Since the application dated 9th May 2005 which is for all interests and purposes similar to the current application. The same Objector filed an application dated 24/5/04 seeking to set aside the orders of dismissal of 9th May 2005.

This Court dismissed the said application on 5/8/05 and the effect of the dismissal is that there cannot be a similar application. Thus Counsel urged this Court to exercise its inherent jurisdiction and dismiss the application dated 6/9/05 summarily without much hearing to prevent the Court being turned into an institution of injustice other than that of justice. To that end Counsel put forward an Article on the inherent jurisdiction of the Court current legal problems page 40 **“what then is the meaning of this term?. Clearly it is a term which has great significant in relation to the inherent jurisdiction of the Court as well as under the Rules of the Supreme Court. It connotes that the process of the Court must be used properly, honestly and in good faith, and must be abused. It means that the Court will not allow its function as a Court of law to be misused, and it will summarily present its machinery from being used as a means of vexatious or oppression in the process of the litigation.”**

Secondly Counsel argued that this application was res-judicata as the application dated 6/9/05 is incidental to the one dated 24/5/05 and in this regard the case of **Stephen Kamotho in Misc. No. 833 of 2004** was referred to Court for reasons that although rule 63 of the P & A rules does not report the provisions of Section 7 of the Court procedure Act. Parliament when enacting the law of Succession Act just like in the constitution assumed the general principals applicable to the administration of justice would apply. The case of **Mburu Kinyua vs. Gachini Tuti 1978 K. L. R 69** was also cited. The Applicant made two applications to seek the order of setting aside the grounds that the second application was a res-judicata since the facts on which it was based were known to the Appellant at the time when he made the first application.

The application for dependency dated 7th April 2003 was not struck out but dismissed for lack of evidence. The Applicants were caused to tender evidence on merit and hence the application was dismissed on merit. Objectors also filed a Notice of Appeal against the ruling of 5/8/05.

According to Mr. Nganga Counsel for the Executrix in P & A 9366 “A” of 1995 his client was issued with probate in respect of only one asset L. R. No. 204/7723. The pending application for provisions tend to ask for a specific part of the estate which is not within the will of his clients account. There is no affidavit of protest and in the interest of justice he urged this Court to confirm the Grant so that his client should not be dragged any longer. He also agreed with Dr. Kuria that the present application was a play by the Objector to ensure that this matter would never be resolved.

In response to those Objections Mrs. Wahome depended her clients application for reasonable provisions for Dependency. Firstly, she put forward the argument that what happened on 9/5/05 was not a hearing as anticipated by principals of trial and it is true that the matter should be tried. No evidence by the Objector was recorded to enable the Court form and opinion on the fact and evidence. In the absence of the evidence the Judicial mind of the Court was not approved to determine the matter on evidence.

Secondly, there are many times that suits are dismissed for non attendance and a fresh suit is filed as long as theof limitation is not a barrier. In this regard Counsel referred to the decision of **Kibogy vs Chemweno (1981) KLR page 35** where it was held:

“ Where a matter is directly and substantively in issue between the same parties, it is a condition precedent to the application of the doctrine of res judicata that the issue has been finally decided by the Court.

Thus Counsel urged that her client was not given an opportunity to state her case and that is why she has resubmitted the application. Several other authorities were used but more so Counsel emphasized that the principal of res judicata is not applicable in this case as Section 7 of the Civil Procedure Act is not one such Sections that are envisaged under rules 63 of the P & A rules.

Finally, the Counsel for the Objector contended that an appeal is not an option as regards the order dismissing the application there is no appeal and the appeal only relates to the order referring to reconstitute the suit.

In my efforts to evaluate the merit of the preliminary objection and the issue that was put before me for determination whether there was a valid application under Part III of the law of Succession. I have carefully considered all the material that was placed before me.

A similar application to the one dated 6th September 2005 i.e. the Summons of Dependency by the same Applicant was dated 7th April 2003 and came up for hearing on 9th May 2003. The Applicant/Objector did not offer any evidence in support of the summons and Counsel for the Objector sought leave of the Court to be exercised from participating in the matter as he argued his instructions were limited to applying for an adjournment. The application was thus dismissed for lack of evidence.

The Objector filed an application to set aside the order of dismissal and to reinstate the dismissal application for hearing on merit and by a ruling dated 5th August 2005, that application was dismissed.

Thus the Counsel for the Executrix sought for the confirmation of the Grant of Probate and argued the present application is an abuse of the Court process and not.....impediment to stop the confirmation.

The argument by Counsel for the Objector that the matter, no evidence was put forward by the Objector or Executrix to enable the Court exercise its judicial mind is without merit.

It should be noted that the application dated 7th April 2003 was by the Objector.

It is the Objector who alleged that there was inadequate provision for her Dependency, it was the Objector who had a burden of probability the case she alleged. The Objector was called out to present her case and put ... forward, her Counsel walked out of the proceedings and the Court therefore dismissed the case. I agree with Counsel for the Objector that there was no point of calling the Executrix, no allegations were put forward to necessitate their evidence.

Secondly, the Objector applied for the setting aside of the said order of dismissal and in my view when the Objector made the application to set aside the order of dismissal, the fact relied upon in the current application i.e the matter was not heard on merit those facts were known to her at the time she made the first application. I agree as it was held in the case of **Mburu Kinyua vs. Gachini Tuti** (supra). The present application is res-judicata, it was dismissed on 9/5/05 and when the Objector applied for setting aside the facts alleged were in their knowledge.

This point is further reinforced by observation made in the case of **Bank of India vs Patel Ltd.** E.A LR 1965 EA page 541.

I believe I stated the rule of the Court correctly when I say that where a given matter became the subject of litigation in and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not permit the same parties to open the same subject of litigation in respect of whose right have been brought forward as part of the subject in contest; but which was not brought forward only because they have from negligence, inadvertence or even accident omitted part of their case.

I am of the humble view that the remedy for the Objector lies in an appeal. The Objector having failed to appeal but choose to file the application for setting aside when indeed they had the facts alleged in the same application within their knowledge. I consider it is an abuse of the Court process.

I am also of the firm view that this Court has inherent jurisdiction to control and regulates its proceedings and to make orders for the ends of justice to prevent abuse of the Court.

The history of this month and the record of proceedings clearing shows how the Objectors have consistently applied for adjournment to stop the effective conclusion of this Succession matter. Litigation must be brought to an end somehow otherwise the Courts believe the means of vexatious or oppression to the party who is on the receiving end.

In this regard, I see no merit in the application dated 6/9/05 and I allow the Preliminary Objection and hereby dismiss the same summarily with costs to the Executrixes.

Since there was no application for protest, I hereby confirm the Grant of Probate of written will issued on 15th December 1999 in P & A 1366 "A", P & A 1366 "B" and P & A 1366 "C".

Costs of the application for confirmation be in the cause.

It is so ordered.

Ruling read and signed on 2nd December 2005.

MARTH KOOME

JUDGE