



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
SUCCESSION CAUSE 1366 OF 1995
IN THE MATTER OF THE ESTATE OF JAMES KARANJA KIOI (DECEASED)

RULING.

This is a ruling made in respect of an application for adjournment made by counsel for Rhoda Wairimu Karanja an objector and applicant in the application dated 7th April, 2003.

This is a protracted matter that has been in court since June, 1995 when the application for the grant of probate was first made and Rhoda Wanjiru Karanja, the widow of the deceased whom I will refer in this application as the dependant filed the objection to the making of Grant of Probate.

The court gave in my view a very lengthy and considered ruling in the determination of the objection proceedings. The grant of Probate was issued and the petitioner applied for the confirmation of the grant. The respondents herein filed an application under section 17 of the married women's property Act of England 1882 whereby the Respondent has sought for declarations against executrixes of the wills of the late James Karanja who died on 3/2/95. The application was meant filed on 18/11/2003 and the application for reasonable provision was scheduled for hearing on 25/11/2003.

The respondent seeks for declarations that LR NO. 7842/1 and LR NO. 11595 one half share be given to her as the deceased lacked power to dispose the whole in his will. The Respondent also seeks for an order that all the moveable and immovable property registered in the name of the deceased and in the hands of his personal representatives be divided equally between the Respondent and the deceased estate.

This application under Married Women's Property Act is brought under order 36 Rules (1) of the Civil Procedure Rules, which Counsel for the Respondents submitted is the procedure envisaged under Rules 41(1), (3) of the P&A Rules Law of Succession, which provides and I quote: - Rule 41(1) of the P&A Rules

“Where a question arises as to the identity, share or estate of any person claiming to be beneficiary interested in, or of 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 an 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 I of the Civil Procedure Rules and may there upon, subject to the provision to section 71(2) of the Act, proceed to confirm the grant.”

Hence the Respondent requested the court to adjourn the hearing of the application for reasonable provision and to order the said application be consolidated with the application under the Married Women's Property Act. The procedure followed by the respondent, it was submitted is proper and the

cause of action survived the deceased by virtue of section 2 of the Law Reform Act, the Respondent can pursue all the claims, which she could have pursued during the lifetime of the deceased. The property was held by the deceased as her Trustee and the claim can be pursued under the Trustee Act.

The Court was also asked to consider whether the Respondent's application is resjudicata by virtue of the ruling of Githinji J. as he then was and in view decision of 15/12/99 and the order by consent striking out prayer Number 3 of the summons dated 7/4/2003. Prayer No. 3 in the application dated 7/4/2003 is whereby the sought that the

‘‘Court do investigate and determine the 1st Applicant's right to ½ share interest in parcel of land known as Muguga Farm LR NO. Muguga Farm LR NO. 7842/1 and developments therein Including the matrimonial home to whose acquisition and Development the 1st Applicant contributed, directly or indirectly’’

This prayer is essentially similar with some of the prayers being sought in the application dated 18/11/2003. The Respondent submitted that there will be no delay caused as the Originating Summons is now ready for hearing and if heard together with the application for reasonable provision there will be no prejudice caused to the Applicants as this Court has wide power to give directions and consolidate matters. This application was vehemently opposed by the Applicant, the Executrixes and one of the beneficiary on the following grounds inter -alia:-

- 1) That the objection by the Respondent seeks to achieve is to further delay the distribution of the deceased's estate who died on 3/2/95 and to-date the distribution of the Estate is has not taken place.
- 2) The Respondent has filed an application for reasonable provision under section 26 of the Law of Succession which is still pending and the Respondent has not withdrawn it in favour of the one under the Married Women's Property Act and therefore the Respondent is using the court process to gamble by trying to find out how she will benefit more.
- 3) The delay the Respondent is causing the Applicants and other beneficiaries who have been waiting and whose lifestyle get affected by this inordinate delay will be affected as the suit that has been filed although filed by way of Originating Summons that presupposes quick disposes, where there are contested issues this will invariably require discovery of documents, calling of witnesses and the court should expeditiously determine the rights of litigants.
- 4) Fourthly, Counsel for the Applicants submitted that the Respondent choose to object to the issue of probate and to file an application for reasonable provisions and now changing her mind to add the Married Women's Property Act application will cause delay in the effective determination of this matter, will cause the Applicants prejudice which is tantamount to denial to their access to inheritance for more than 10 years which can not be compensated by an award of damages.

I have considered submission by all the counsel herein, the authorities cited very carefully. I have evaluated the material before me, in considering the twin applications for adjournment and whether the application filed on 18/11/2003 under the Married Women's Property Act should be consolidated and heard together with the application for reasonable provisions dated 7/4/2003.

The Respondent has interests to pursue both applications as indeed that was her original intention before the court struck out her claim for determination of one half share contained in prayer No. 3 of the application for reasonable provision.

In considering an application for adjournment, which is discretionally, I believe this court should exercise its discretionally powers Judiciary and to be able to do so, there must be material before this court and based on sound legal principles. The material before me is that the Respondent objected to the granting of Probate and on 15/12/99 her application was dismissed.

On 7/4/2003, she filed an application for reasonable provision prayer 3 was struck out and on 18/11/2003, she filed an application under the Married Women's Property Act by way of an Originating Summons whereby she seeks for determination and declaration that " *all moveable and immovable*" property registered in the deceased names, and one half share be registered in her names.

It is difficult to understand the Respondent's interests in wanting to proceed with both applications, but perhaps she is not sure from which one she will reap more benefits. Can those two applications be consolidated and heard together? my humble view is that the claims are quite distinct as one challenges the entire cause. The application that seeks for one half share of the deceased Estate is fundamental and goes to the rest of the entire Estate. It challenges the ownership of the property and the deceased ability to bequeath.

It is not provided for under the Law of Succession what is provided for are simple issues to do with the determination and identification of a deceased share, whereby that aspect can be referred for determination under order 36 of the Civil Procedure. The Respondent is now claiming the ownership of the entire Estate and the power of the deceased to dispose of the same. Therefore, the Respondent's wish would be for the entire proceedings to be adjourned, and the issue of her claim for one half share be determined, then she can pursue her claim for reasonable provision and lastly, the grant can be confirmed.

I find the request coming in this late hour unreasonable. The court should act as a Guardian Angel of all the parties before it. No party should be allowed to use the court process and procedure as a tool of oppression of any party. The Respondent in this regard should have filed her claim under Married Women's Property Act and Pursuant to the provisions of order 36 in June 1995 when she filed the objection proceedings or at least after 15/12/99 when she lost her objection proceedings.

The delay by the Respondent in filing the application dated 18/11/2003 is not only inordinate but is unreasonable and should her application for adjournment be granted, it will definitely prejudice and - inconvenience the Applicants and the Beneficiaries who have been waiting for the determination of their rights for over 10 years.

As indicated earlier, the request for consolidation of the two matters is denied. This court cannot however stifle the Respondent's desire to pursue her claim of her one half share of properties as she claims should be hers. The claim is valid as it has not been determined, but the request to consolidate it within the application for reasonable provision is not reasonable and will compound the problem even more as the Respondent intends to pursue both claims.

Accordingly, the Respondent can proceed with the application dated 18/11/2003 separately as she deems fit and I decline to give directions on consolidation and adjournment as the same is not properly before me. I direct that the application dated 7/4/2003 upon which directions were given on 28/7/2003 should proceed to hearing. Parties, to fix another date for hearing. Costs of this application shall be in the cause.

It is so ordered. Ruling read and signed on 16/1/2004.

M. KOOME J.

16/1/2004.