



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 2830 OF 2001

IN THE MATTER OF THE ESTATE OF MARY GACHURU KABOGO

(DECEASED)

RAWSON MBUGUA MACHARIA.....APPLICANT

Versus

FRANCIS BOB KAMAU

GEORGE KIOGORA KARONGA.....RESPONDENTS

**(Ruling in respect of Summons for revocation dated 12th August 2003 and
Summons dated 18th November 2003 consolidated and heard together)**

RULING

The Summons dated 12th August 2003 is brought by Rawson Mbugua Macharia it is brought under Section 76 of the L.S.A. and rule 44 of the Probate and Administration Rules.

The applicant seeks for orders that the grant of Letters of Administration issued to Waiganjo Kanunga, Macharia Kariuki Kiarie and Mbuti Duncan Mbugua on 23rd October 2002 be revoked on the following grounds.

- 1) That the proceedings, to obtain the grant were defective in substance
- 2) That the grant has become useless and inoperative through subsequent circumstances

That application is supported by the affidavit of Rawson Mbugua Macharia sworn on 18th August 2003. The gist of the matters deponed can be summarized as follows.

- It is not clear now the grant was issued on 23rd October 2002 when

- 1) Waiganjo Kahunya
- 2) Macharia Kariuki Kiarie
- 3) Mbuti Duncan Mbugua

Were issued with the grant of Letters of Administration.

- The court used the wrong procedure as it is not clear whether there was viva voce evidence or the hearing was done by way of submissions. The applicant contends that evidence from the bar was admitted which was prejudicial to his client.

- Thirdly the consolidation of this matter with P & A 2110 of 2001 was irregular as the grant had not been gazetted and

- Lastly the grant as issued has become inoperative and useless as the 1st Administrator passed away. The second Administrator has indicated his withdrawal of objection and hence the administrators appointed cannot administer the estate.

As regards the application dated 18th November 2003 which seeks to substitute the 1st and 2nd Administrators.

The applicant in opposition of the said application relies on his replying affidavit sworn on 20th January 2004 whereby he deposes that

- The proposed administrator, Bob Mburu Kamau has shown no interest in this matter. He has not been following the proceedings and his commitment to the administration of estate is questionable

- The issue of adopted children who have no formal documents or identification is meant to mislead the court.

- Lastly the proposal to appoint George Kiogora Karonga who is not a relative of the deceased is not acceptable. He cannot have priority over the relatives of the deceased who are ready and willing to carry out the administration of the deceased estate.

On the other hand the application dated 12th August 2003 was opposed by the cross-petitioners. Apparently one of the Administrators Waiganjo Kahunga passed away and Macharia Kariuki Kiarie has not shown any interest in the matter. Counsel for the administrator argued that the grant was issued by Hon. Aluoch J and to attack the proceedings upon which the grant was made would be tantamount to an appeal. This court has no jurisdiction to sit on a judgment or order by a court of similar jurisdiction.

The applicant had filed a Notice of Appeal and has failed/neglected to pursue the appeal. Although Macharia Kariuki Kiarie has withdrawn the objection there is no mention that he has withdrawn as a co-administrator.

In any event the application dated 18th November 2003 is for substitution. Counsel submitted that the two Succession Causes were properly consolidated within the powers granted by rule 63 of the P & A rules whereby order XI of the Civil Procedure which deals with consolidation of suits is applicable in Succession matters.

The applicant while applying for the grant of Letters of Administration in Succession Cause No. 2830 of 2001 had named the two adopted sons in Form P & A 5 filed in court on 15th November 2001. The fact that he denies that they were the deceased adopted sons should be ignored as the applicant is acerbating and reprobating. This is also a strong indicator that he cannot be relied upon to protect the interest of the minor children whom he tries to denounce vide paragraph 7 of the affidavit sworn on 20th January 2004.

I have carefully evaluated the two applications, the submissions by both counsels and all the material before me that was by way of affidavits. I will deal with both applications seriatim. As regards the application dated 12th August 2003, I find that this court exercising its jurisdiction in P & A matters especially rules 25 and 26 of the P & A rules, made the necessary inquiries which I believe were answered to the satisfaction of the court and therefore proceeded to make the grant. I also agree with counsel for the crosspetitioners that the appropriate steps for the applicants to take was an appeal as this court cannot or set aside an order made by a judge with similar jurisdiction in this matter as it would be

tantamount an appeal. The application dated 12th August 2003 therefore fails on that basis.

I now turn to the application dated 18th November 2003 which is seeking for the substitution of the deceased administrator Waiganjo Kanunga and Macharia Kariuki Kiarie who has expressed or shown no interest in the matter and also withdrew his objection herein. Both the proposed persons, George Kiogora Karonga and Francis Bob Mburu Kamau have sworn affidavits in support of the application for substitution. Francis Mburu Kamau is now living with the deceased adopted children since the demise of Waiganjo Kanunga. Francis Mburu was the cross-petitioner in this cause together with Macharia Kariuki Kiarie. He is the nephew of the deceased. Since Mbuti Duncan Mbugua is the remaining administrator he has not been able to administer the estate alone, the remaining Administrator would like his father Rawson Mbugua Macharia the brother of the deceased to be made a co-administrator. Rawson Mbugua indicates in his affidavit that he is not aware of the adopted minor sons of the deceased. This position could be an after thought as he had deponed in the application for Letters of Administration that the deceased was survived by the two sons. This position was also supported by a letter from the chief. In view of this inconsistency and the fact that he is the father of the only other administrator Mbuti Duncan Mbugua, I would be reluctant to appoint him as a substitute. I would also wish to remind the parties herein the duties of personal representative is provided for under Section 83 of the Law of Succession as there seems to be a confusion between the duties of a personal representative and the rights of the beneficiaries. The appointment of personal representatives have nothing to do with the beneficial interests in the estate. Accordingly I grant the application dated 18th November 2003. George Kiogora Karonga, Francis bob Mburu Kamau and Dancan Mbugua Mbuti are the personal representatives of the deceased herein. I further direct that the personal representative appointed herein should produce to this court a full and accurate inventory of the deceased estate and if possible to file an application for confirmation with a schedule of distribution within six months of this order.

Costs of the application he in the cause.

Orders accordingly.

Ruling read and delivered on 12th March 2004.

MARTHA KOOME

JUDGE