



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 732 OF 2000
IN THE MATTER OF THE ESTATE OF NJOROGE NJIU (DECEASED)

KAMAU NJOROGE APPLICANT

VERSUS

NJIU NJOROGE RESPONDENT

RULING

Before me is summons dated 23rd November 2000 for Revocation of Grant made on 3rd November 1999 in favour of the Respondent, then Petitioner and now present Administrator, Njiu Njoroge, in Kiambu Senior Principal Magistrate's Succession Cause No. 108 of 1986. The Applicant, Kamau Njoroge, has based his application on the following grounds that:-

“1 (a) The proceedings to obtain the grant and especially the certificate of confirmation of the grant were defective and deliberately untruthful.

(b) The Court did not hear all those entitled to be heard at the hearing of the application for confirmation of the grant.

© The administrator lied when he swore his supporting affidavit that all the beneficiaries had agreed on the distribution of estate.

(d) The administrator during the hearing of the application for confirmation of the grant did not disclose that the Court had already decided the shares of the beneficiaries.”

From those grounds and following from what the advocates, Mr. Njanja for the Applicant and Mr. Njoroge for the Respondent, told me during the hearing, the Applicant is not complaining about the granting of letters of Administration to the Respondent. His complaint is about the distribution of the estate. Strictly speaking, therefore, this summons the Applicant has filed does not fall within the provisions of sections 74 to 76 of the Law of Succession Act (Cap.160 Laws of Kenya). Rules 43 and 44 of the Probate and Administration Rules do not, therefore, apply although, with due respect, Mrs Njiru Karanja, then Senior Principal Magistrate at Kiambu on 28th March 2000 thought those provisions applied.

I notice the Applicant has not cited any provisions of the law. As that omission was not questioned, I may not know the reason why there is that omission. But since the application is by way of summons supported by an affidavit, I think the application is properly before me under Rule 49 of the Probate and Administration Rules, notwithstanding that the application prays for revocation of the grant in this matter. For the ends of justice and in order to prevent abuse of the process of the court which could result

if parties in this dispute, who are before me under a certificate of urgency and have between them a restraining interlocutory injunction, are left without a ruling aimed at a final settlement of their dispute in this matter, I do hereby invoke this court's inherent powers under Rule 73 of the Probate and Administration Rules to handle this matter as an application for rectification of the certificate dated 18th January 2000 confirming the grant of Letters of Administration dated 30th November 1999.

The above having been said, the position in this matter is that the Deceased Njoroge Njiu was the elder brother of the Applicant Kamau Njoroge. In accordance with Kikuyu customary law, the suit property, in this matter, which had belonged to the father of the Deceased and the Applicant, was registered in the name of the Deceased to hold it for himself and in trust for his younger brother the present Applicant.

When the Deceased died and by the time a petition for grant of letters of administration in his estate was filed in the Principal Magistrate's court at Kiambu being Succession Cause No. 108 of 1986, on 23rd July 1986, the Deceased was shown to have left four sons surviving him. They included the Respondent before me Njiu Njoroge.

In that petition eight men were included and specifically mentioned as beneficiaries in the estate of the Deceased Njoroge Njiu. The Petitioners then were Njiu Njoroge and one of his brothers, Kiari Njoroge sometimes referred to as Joseph Njiu Njoroge and Kiarie Njoroge respectively.

This is a case in which the parties have done a number of things and it is not easy, for me handling the matter for the first time and in the absence of a clear outline by the advocates conducting the proceedings, to record the events as it should have been done given pressure of other work. At one time it looked as if all the sons of the Deceased were Petitioners. Finally the Grant of Letters of Administration was by consent issued to Njiu Njoroge alone.

But before that stage was reached the Applicant before me now raised objection in the Senior Principal Magistrate's court Kiambu Succession Cause No. 108 of 1996 concerning the distribution of parcel of land No. GITHUNGURI/GITHIGA/688 measuring 10.4 acres claiming that he should get half of that piece of land while the family of his deceased elder brother got the other share on the basis that that piece of land belonged to him and his brother as the only sons in the house of their mother because the whole of that piece of land had been given by their father to their mother alone. The Petitioners did not agree as they argued that the Deceased brother of the objector had been registered to hold that land on behalf of himself and on behalf of the rest of the family of the father of the Objector, now Applicant.

The learned Senior Principal Magistrate, F.N. Muchemi, in his reasoned judgment dated 24th April 1996 agreed with the Objector, now Applicant, thereby awarding him half share in parcel of land No. GITHUNGURI/GITHIGA/688. The other half was to be shared by the petitioners in a manner agreed upon by them and

“then file a schedule showing the respective shares in court. Failure to file the schedule within 30 days from the date of” that “judgment, the Objector” was “to file the same for approval by the Court.”

By that time no grant of letters of administration had been made. There was an appeal and unfortunately the parties have filed before me two inconsistent documents purported to show what transpired in the appeal being H.C.C.A. No. 154 of 1998 at Nairobi.

One of the documents is purported to be a Court order made on 24th February 1999 by Sheikh Amin J. striking out the appeal. The Appellants are named as Mwaura Njoroge, Njiu Njoroge, Kiarie Njoroge, Stephen Mungai, Njoroge Njiu and Njuguna Njiu. The Respondent is named as Kamau Njoroge. That was signed by the Deputy Registrar on 7th May 1999.

The second order also said to have been made by Sheikh Amin J on 24th February 1999 shows that the appeal was dismissed. It is unsigned and the date of issue not given. The parties are shown as Njiu Njoroge – Applicant and Kamau Njoroge – Respondent.

Since the inconsistency was not drawn to my attention during the hearing and has not, therefore, been explained, I do not understand why the parties have not cared about that inconsistency and in each case they have not filed the relevant judgment or ruling – making it difficult for me to see the right way.

I will however, say this. As both documents suggest that the judgment of Senior Principal Magistrate Muchemi remained and I have not been given evidence to show that that judgment is no longer there, I hold that it is still there.

From the appeal the parties went back to the Senior Principal Magistrate's Court at Kiambu to continue with that court's Succession Cause No. 108 of 1996. First, they had to obtain a grant of letters of administration. Secondly a certificate of confirmation of that grant was to follow.

On 30th November 1999 both the Applicant and the Respondent before me appear to have been before Senior Principal Magistrate Wanjiru Karanja each represented by an advocate and there appear to have been an application dated 23rd July 1999 or was it 23rd July 1998? Mr. Njau Kiania for the Applicant also Objector and Mr. P.K. Njoroge advocate for the Petitioner/Respondent.

By consent the grant of Letters of Administration to the estate of the late Njoroge Njiu was to be issued to Njiu Njoroge. The court gave the parties leave to file an application for confirmation of grant without having to wait for six months as the court considered that the matter had been in court for too long. The application dated 23rd July 1998 or was it dated 23rd July 1999? Was also by consent withdrawn, apparently to give way for the application for confirmation of grant to be made.

The said application for confirmation was subsequently made. But no consent of all the beneficiaries to the distribution of the estate of the deceased was sought and filed before the grant was confirmed. The application was dated 23rd December 1999. Surprisingly it was the learned counsel for the Petitioner/Administrator, then Applicant for confirmation, who was telling the trial magistrate Mrs Wanjiru Karanja, Senior Principal Magistrate, that all the parties were in court and proceeded to ask for the confirmation of the grant

“as per the schedule

It appears that it was the learned magistrate herself who checked and found that two of the beneficiaries, namely, Stephen Muchai and Kamau Njoroge, were not present.

However, the learned Senior Principal Magistrate proceeded to confirm the grant on the basis that all the beneficiaries then present in court were in agreement.

It be noted that the schedule of the distribution of the estate as attached to the application for confirmation of grant and subsequently part of the resultant certificate of confirmation of grant dated 18th January 2000. completely ignored the same court's judgment by Senior Principal Magistrate Muchemi dated 24th April 1996 concerning the sharing of parcel of land No. GITHUNGURI/GITHIGA/688. When the Applicant, Kamau Njoroge, subsequently raised that issue in an application before Senior Principal Magistrate Wanjiru Karanja, the learned magistrate in her ruling dated 28th March 2000 declined to look into what the Applicant was talking about and directed that the issue deserved the filing of an application for revocation of the grant issued in this matter and that the application be filed in the High Court under section 76 of the Law of Succession Act.

I get the impression that the learned magistrate gave that direction because before her was an advocate or two who stood up to prosecute his client's case without caring to familiarize himself with what had already happened in the matter in the court. Such an advocate would mislead. Talk of more than one parcel of land having been shared in the judgment dated 24th April 1996 was clearly misleading. Talk of other properties which were left out of that judgment was misleading. The learned magistrate in that judgment had opened by this statement:

“In the estate of the deceased Njoroge Njiu who died in 1972 the only issue in dispute is

distribution of parcel number Githunguri/ Githiga/688 measuring 10.4 acres.”

He was dealing with the only issue in dispute before him. The distribution of that particular parcel of land. Since before him there was no dispute over the distribution of the rest of the assets, the learned magistrate did not deal with the distribution of those assets. It means the distribution of those other assets was to be subsequently done by the parties themselves bearing in mind what the court was deciding about the distribution of Githunguri/Githiga/688.

If at the confirmation of the grant the distribution of the whole estate was not done to the satisfaction of any of the beneficiaries and he comes up to question that distribution, that does not call for a revocation of the grant issued. Distribution of the estate is not the granting of letters of administration. The granting of letters of administration is separate and is done earlier than the distribution and is a condition precedent to the distribution of the estate under a certificate of confirmation of grant.

Had the learned magistrate who handled the matter on 28th March 2000 been given the correct information only, she would not have told the parties to come to this court.

Before me, in this court these parties still continue with the same trend. Listening to the Applicant's Advocate the Court will be excused if it made a bad ruling. First, all the necessary documentary evidence is not brought. Secondly, counsel stands up to say anything; so that though the judgment dated 24th April 1996 concerned the distribution of parcel of land Githunguri/Githiga/688 only, I was told that judgment concerned the distribution of other assets as well. Counsel is not sure whether the appeal from that judgment was struck out or was dismissed and why. Although after the end of that appeal the parties went back to Kiambu Court in Succession Cause No. 108 of 1996 to continue from where they had stopped, I was told they went back with a new petition which was fraudulently filed and prosecuted without the knowledge of the Applicant. Counsel did not know the cause number of that new petition. But knows there was a consent recorded in that matter. I was told that consent did not involve the Applicant here as a participant. The record goes on to say more.

It is my humble view, with all due respect, that Counsel who handle client's cases in that manner, create more problems for their clients and may end up solving none of those problems. In this matter, therefore, I am not surprised to see this old case of 1986 in Kiambu court, still going on as if the matter were filed in the year 2001. The file before me is a huge volume with strings round it to contain its unsteady shape.

I will send the parties back to Kiambu. Back there they may perhaps learn that it is important to tell the court the truth and that you cannot tell the court the truth unless and until you have searched for that truth and found it and that part of that truth is found recorded in the court case file.

It is my view that the learned Senior Principal Magistrate erred in holding, on 28th March 2000, that she was unable to make any changes on the distribution of the deceased estate or change the certificate as it stands now. She is able and has the jurisdiction to do all that as no revocation of grant is involved. It was therefore not proper for her to have declined to give the orders and to have directed the parties to come and file this application before me. Furthermore, the principle of resjudicata must be observed.

Accordingly, it is hereby ordered that there be a re-trial, in the Senior Principal Magistrate's court at Kiambu, of the Applicant's application in that court dated 28th January, 2000 with amendments if need be, for the rectification of the certificate, dated 18th January 2000, of confirmation of grant with regard to the distribution of the assets in the estate of the Deceased in this matter taking into account that court's judgment in this matter dated 24th April 1996. To that effect, the case file from the Senior Principal Magistrate's court Kiambu Succession Cause No. 108 of 1986 be returned to that court.

Since it was the Respondent's counsel who persuaded the magistrate at Kiambu to have this matter sent to this court for revocation of grant, the Respondent to pay costs of the proceedings in this court to the Applicant.

Delivered, dated and signed at Nairobi this 25th day of January 2002.

J.M. KHAMONI

JUDGE