



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 906 OF 1988

IN THE MATTER OF THE ESTATE OF IBRAHIM RUIRIE KIMARI

(DECEASED)

RACHAEL WANJIRU RUIRIE PLAINTIFF

VERSUS

DAVID NJOROGE RUIRIE RESPONDENT

R U L I N G

The two main prayers in this Chamber summons dated 19th September 1988 are that

“(a) The Grant of Letters of Administration to the Respondent David Njoroge Ruirie made on 6th January 1984, in Thika Resident Magistrate’s Court Succession Cause No. 173 of 1983 be revoked and/or annulled.

(b) This Honourable Court do order a stay of proceedings in Thika R.M. Succession Cause No. 173 of 1983 pending the final determination of this application.”

The last, is prayer © which says that costs of this application be awarded to the Applicant.

Since the practice is that once an application for revocation of a grant issued by a Magistrate’s Court is filed in the High Court, the High Court

calls for the relevant case file from the Magistrate’s Court and that case file remains in the relevant High Court case file until the application for revocation is determined by the High Court, prayer (b) in this chamber summons serves no purpose since I have been told by Mr. Murimi, the Advocate for the Applicant, that no Order of a stay is already obtained. That being the position, prayer (b) is as good as dismissed and I do hereby dismiss it.

I remain with prayer (a) and should now point out that the Applicant before me is Rachael Wanjiru Ruirie. Her advocate is Mr. Murimi. The Respondent is named as David Njoroge Ruirie a brother of the Applicant. The Respondent, though served, has not cared to file papers opposing the chamber summons. He only wrote on 7th May 1999 complaining that the application was not being prosecuted and that it should be dismissed. The Applicant’s chamber summons dated 19th September 1988 had been filed on 21st September 1988 and left unprosecuted and it is appalling that this is the year 2002. It started moving when the matter was first brought before me on 30th October 2001.

With the Respondent not appearing, Mr. Mbiyu Kamau, the advocate, who has prompted this hearing before me, is appearing for Kariuki Gichuri and Bidan Maina, interested parties, who claim to have

bought portions of land from the estate of the deceased. He is also appearing for Hellen Mukina.

The deceased, Ibrahim Ruirie Kimari, died on 7th August 1981. After his death, on 18th September 1982, his clan (Muhiriga) members are said to have held a meeting designed to distribute parcels of land belonging to him between his children. Although the deceased had more than three children, the clan is said to have decided that only three of the children were to be beneficiaries. They turned out to be the Respondent as the only son and his two adult sisters who were held to be unmarried at that time. These were the Applicant and another one called Hellen Mukina Ruirie.

It has been said that it was decided that parcel of land LOC.3/GITUNI/154 measuring approximately 7-8 acres be shared between the Respondent, 4.8 acres, and the Applicant, 3 acres; and that parcel number LOC.16/NDUNYU CHEGE/172 be shared between the applicant, 3.0 acres, and Hellen Mukina Ruirie 1.6 acres. It was further decided that the grant of letters of administration be issued to the Respondent.

After that decision and before the Respondent filed a petition for a grant of letters of administration, the Respondent and Hellen Mukina Ruirie purported to sell portions of land from the two parcels of land in the estate of the deceased to the two interested parties Kariuki Gichuri and Bidan Maina. It is not clear the size of the portion each interested person claims to have bought from each of the two beneficiaries. But it would appear that it was as a result of that purported sell that the Applicant was excluded when David Njoroge Ruirie petitioned in Succession Cause No. 173 of 1983 at Thika for a grant of letters of administration. The Applicant herein, who was to be included as a beneficiary only, was not so included. Instead, Kariuki Gichuri and Bidan Maina appear to have taken her place. Of course David Njoroge Ruirie and Hellen Mukina Ruirie were included and as I said earlier, the deceased's daughters who were married at that time were excluded. In that respect it be noted that although the Applicant has sometimes stated her case as if there were other genuine beneficiaries who should have been listed, she states and agrees also that she was the only genuine beneficiary who was left out as she also says that her married sisters were not supposed to be included.

That petition having been filed, the grant of letters of administration intestate was issued to David Njoroge Ruirie also referred to as David Njoroge, by the magistrate's court at Thika on 6th January 1984.

On 12th July 1984 the petitioner David Njoroge Ruirie applied for confirmation of the grant. It is not clear why that application was not prosecuted until Rachel Wanjiru Ruirie, filed her affidavit of protest on 14th May 1985.

There was no prosecution until the interested persons, Kariuki Gichuri and Bidan Maina, filed their respective replying affidavits dated 13th October 1986 and 22nd October 1986 respectively in response to Rachel Wanjiru's affidavit of protest.

For some unexplained reason the matter was left pending in that court until the protester in that court Rachel Wanjiru came to this court and filed her chambers summons dated 19th September 1988 for revocation of the grant issued by Thika court. As stated earlier, this chamber summons was filed on 21st September 1988. Thereafter, the parties went to sleep again, and David Njoroge, Hellen Mukina, Kariuki Gichuri and Bidan Maina, though apparently served, never bothered to file their papers in this court.

Parties in this matter do not seem to be easy to understand and previous record in this court's case file reveal that parties have ignored various court directions always getting the advantage of going before different judges to get away with it. From that way of behaviour, the parties succeeded in getting me to hear them before David Njoroge, Hellen Mukina, Kariuki Gichuri and Bidan Maina filed their respective responses in this case file concerning the Applicant's chamber summons dated 19th September, 1988. Yet there were advocates on both sides.

These being succession proceedings and the parties having already taken my time hearing them, I will, under Rule 73 of the Probate and Administration Rules, ignore technicalities and proceed to determine the chamber summons dated 19th September 1988 on its merits.

Mr. Murimi in his submissions stated that the Applicant's application is based on the grounds, firstly, that the proceedings to obtain the grant were defective in substance; secondly, that the grant was obtained fraudulently by the making of a false statement and by the concealment from the court of facts material and relevant to the case; and thirdly, that the grant was obtained by means of an untrue allegation of facts essential in law to justify the grant.

Having submitted that beneficiaries were as per the names given by the Applicant in paragraph three of her affidavit dated 21st September 1988 which paragraph includes all the children of the deceased who survived, the deceased, Mr. Murimi at the end of his submissions was saying that the beneficiaries are the Respondent David Njoroge, the Applicant Rachel Wanjiru and Hellen Mukina only.

He however pointed out that it was wrong for the Respondent to have left out the Applicant and to have included the interested parties.

He also pointed out that since the grant of letters of administration had not been confirmed, the Respondent and Hellen Mukina had no capacity to sell the portions of land alleged sold. Mr. Murimi added that since the parcels of land involved were agricultural land registered under the Registered Land Act, consent of the land control board to the sale transactions was necessary and that none had been obtained.

He contended that the Applicant had not been married although she had five children whose presence influenced clan members to decide that she be given a share in the estate of the deceased.

Mr. Murimi insisted that the grant be revoked or annulled because this application is filed under section 76 of the Law of Succession Act. He says that that should happen despite the fact that the estate is not yet distributed. The Applicant was to share in parcel No. 154 only and not in parcel No. 172. The Applicant should get a portion of three acres from parcel No. 154.

He explained that the Applicant does not want to be the administrator and is not therefore challenging the Respondent's entitlement to be the Administrator. She is also not saying that there has been confirmation as a result of which there has been distribution in which she has been left out. She is simply asking for revocation because the Respondent misled the court and the grant was obtained by means of untrue allegations.

Mr. Murimi said further that the people opposing this application are people who have no right to be beneficiaries. They bought from the Respondent and Hellen Mukina who had no title. He pointed out that no beneficiary is opposing the application.

On the other hand Mr. Mbiyu Kamau also referred to as Mr. Mbiyu stated he opposed the chamber summons dated 19th September, 1988. He said there was no dispute over the meeting said to have been held by clan members and over the meeting's decision. He pointed out that the only problem is that David Njoroge and Hellen Mukina decided to sell portions of parcel No. 172 to Kariuki Gichuri and Bedan Maina Njoroge. Mr. Mbiyu Kamau did not say that portions of parcels No. 154 were also sold and he in fact argues that the Applicant will not lose anything if this application is dismissed.

He points out that the sales were done with the full knowledge of the Applicant Rachel Wanjiru and argues that if the Respondent did not have power to sell the said parcels of land to the purchaser, the Applicant ought to have objected immediately she noticed that the sale was going on. Mr.

Mbiyu contended that since the Applicant did not object, she has not come to this court with clean hands.

Further, the purchasers started to develop and went on openly developing the portions bought, planting tea and coffee bushes. The Applicant raised no objection.

When the succession proceedings were instituted in the court at Thika and was advertised in the Kenya Gazette, the Applicant raised no objection.

All those, Mr. Mbiyu pointed out, showed how dirty the Applicant's hands were. The grant which was subsequently issued should not therefore be revoked.

Mr. Mbiyu Kamau brought out the issue of locus standi by the Applicant arguing that she had no locus standi to file this chamber summons because she was a married daughter of the deceased. But the learned counsel closed his submissions conceding that the Applicant was not married by the time the deceased died up to now.

He argued that purchasers were bona fide buyers who believed the portions sold belonged to the sellers with power to sell and went on to develop what they bought. If the grant is revoked, the purchasers will suffer irreparable loss due to the developments they have effected on the portions purchased planting tea and coffee bushes.

He said that the Applicant had nothing to lose from parcel No. 172 as she is not claiming anything from that parcel of land.

On the issue of consent of land control board, Mr. Mbiyu submitted that none was required since a succession cause was in court pending determination. He however conceded there was no court order preventing his clients from obtaining the consent of land control board. In any case, Mr. Mbiyu Kamau prayed that the chamber summons be dismissed.

From what I have been saying above, I think the Applicant is justified in bringing this application, technically not in the correct form, but not being opposed by the Respondent David Njoroge Ruirie who has left it to purported purchasers coming to oppose without formally filing their opposition.

Accordingly the Applicant's chamber summons herein dated 19th September 1988 be and is hereby granted in terms of prayers (a) and (c).

Dated this 19th day of April 2002.

J.M. KHAMONI

JUDGE