

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO 1968 OF 1998

IN RE ESTATE OF MBURU GITAU (DECEASED)

RULING

It was on 19th September 2001 when for the first time this matter came before me and Mr Mwangi who held brief for Mr Kirubi for the petitioner, in the absence of appearance for the objector, told me that as far back as 27th September 2000 directions had been given by this court that the parties herein make submissions so that the court makes its decision and that the petitioner's advocate had been trying in vain to get the objector's advocate fix the case for submissions. The petitioner's advocate had therefore taken the date for that mention and served the objector's advocate to come to court for further directions as to the submissions. As I have stated, there was no appearance for the objector.

I directed that the advocate for the petitioner/respondent should fix the date for submissions and serve the advocate for the objector.

On 7th May 2002 I was surprised to see the case file in this matter being brought before me without any further step having been taken and with Mr Mugo, holding brief for Mr Kirubi the advocate for the petitioner, telling me that the case was being mentioned for him to file the petitioner/ respondent's written submissions so that the court makes its decision. He told me that what he was doing was in accordance with previous court directions in this matter which was filed in October 1998. I was therefore left with the case file to write the court's decision and looking at the previous proceedings, it was not clear what type of succession application was before me.

I have now perused the file and it appears to me that the objector Gichiri Gitau filed this case as a summons for annulment of the grant issued by the Principal Magistrate's Court Muranga in that court's Succession Cause No 27 of 1998 on 24th April 1998 and confirmed on 12th June 1998. This concerns the estate of the late Mburu Gitau whose son Gitau Mburu is the administrator and is the one being referred to as the petitioner/respondent.

I note that after the summons for annulment had been filed and served upon the administrator, no replying affidavit was filed by the administrator and no step was taken to bring the Muranga Succession Cause file here, but the matter were, nevertheless, set down for a decision following submissions which the objector has neglected to file.

Doing my best in the circumstances, therefore, I look at the summons dated 29th September 1998 for annulment of grant as filed by the objector and note that he is relying on the grounds set out in section 76 of the Law of Succession Act that the grant was obtained by means of untrue allegation of fact and that the grant was obtained fraudulently by the concealment from the Court of material facts and that the transfers effected by the administrator were fraudulent.

But when I read those grounds together with the objector's affidavit in support of the summons, I find that the said affidavit does not in fact support the summons as the summons is against the petition and issuance of the grant while the affidavit purported to support the summons says nothing against the petition for and the issuance of the grant. The affidavit is complaining about the distribution of the estate of the deceased.

Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied

with the distribution of the estate only to proceed to ask for the revocation of annulment of the grant which, as in this case, has nothing wrong.

While section 76 of the Law of Succession Act should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them.

Further, it is apparent that when Succession Cause No 27 of 1998 was being handled in Muranga Court, the objector came out to show his interest in the estate of his deceased brother whom he now claims had been registered as proprietor of the two parcels of land in the estate as a trustee for the family of their father. Moreover, the objector as an adult, lived with this brother for many years before his brother died after being registered as the proprietor of the two parcels of land. If truly the deceased had been registered as a trustee, nothing would have been easier than the objector to have approached his brother before his brother died, to transfer to him his share in the parcels of land. The conduct of the objector therefore leaves a lot to be desired.

Further more, the administrator has already completed his work in so far as the distribution of the two parcels of land is concerned. In the process of that distribution, the administrator/respondent, transferred one of the parcels, namely Loc6/Kandani/15, to Patrick Muiruri Muiru who is not a party in these proceedings. The said Patrick Muiruri is a purchaser for value, probably without notice. That being the position, I do not see how the objector can succeed in realising his interests through these proceedings.

On the whole therefore, not only do I find the summons of the objector herein defective and incompetent but also find it lacking in merits and the same summons dated 29th September 1998 be and is hereby dismissed with costs to the administrator/respondent.

Dated and delivered at Nairobi this 14th day of June , 2002

J.M KHAMONI

JUDGE