



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION NO. 1940 of 1996

CONSOLIDATED WITH SUCCESSION CAUSE NO. 1860 OF 1996

IN THE MATTER OF THE ESTATE OF FREDRICK POLWARTH KIBUTHU KUBAI (DECEASED)

CHRISTINA GAKUHI KUBAI.....EXECUTRIX/APPLICANT

VERSUS

SIDI MENZA.....RESPONDENT

RULING

1. Fredrick Polwarth Kibuthu Kubai popularly known as Fred Kubai is one of the 6 legendary freedom fighters, arrested in 1952, tried in a Court in Kapenguria and imprisoned for 7 years by the British colonial authorities. After Kenya attained her independence Fred Kubai went on to become a member of parliament and served in various capacities in the government. Fred Kubai died on June 1st 1996 at the age of 79 years.
2. Following his demise, a legal battle ensued pitting his widow Christina Gakuhi Kubai the Applicant herein and his children which lasted over 20 years. At issue was the deceased's handwritten will dated 19.12.91 in which the deceased left his estate to the Applicant. The record shows that the will was declared valid by the Court in a judgment of 19.12.13 and a grant of probate issued to the Applicant on even date. The Court in its ruling of 2.8.19 declined to grant the summons for dependant filed by the deceased's children Moses Menza Kibuthu Kubai (Moses) and Andrew Kamau Dennis Kubai under Section 26 of the Law of Succession Act and proceeded to confirm the grant issued to the Applicant.
3. Moses died on 6.6.2020 and following his demise, his daughter **Sidi Menza, the Respondent herein sought to bury his remains in Title No. Kijabe/Kijabe Block 1/3241 on 16.6.2020. This provoked the Applicant to move this Court by her** application dated 15.5.20, seeking orders restraining the Respondent either by herself agents and/or servants, from burying the remains of the late Moses Mendza Kibuthu in the said property or any other parcel of land owned by the Applicant either on 16.6.20 or on any other day.
4. In her affidavit in support of the Application, the Applicant averred that the Respondent and some other people requested her to allow her bury her late father on the Applicant's land, a request she declined. She argued that the deceased, a famous nationalist who participated in freedom struggle for this Country was buried in a museum built on the said parcel of land. The Applicant further averred that the Respondent's quest to bury her father on the Applicant's parcel of land without her consent was intended to legitimize the claim Moses and Andrew have been making to the estate of the deceased. According to the Applicant, none of the deceased's children who have died, have been buried on the Applicant's parcel of land. She therefore she wonders why the Respondent wants to bury her father thereon. On 14.6.20, the Applicant got information from the area Chief and the OCS, Mai Mahiu that they had received bundles of documents which directed the Applicant that the Respondent's deceased father was to be buried on the suit property on 16.6.20.
5. The Court after considering the Applicant, granted interim orders on 16.6.2020 but the time the order was extracted on 17.6.2020, the remains of Moses had already been interred on the property. This provoked the filing of the Application dated 23.6.20 seeking exhumation and removal of the remains of Moses from the suit property and that the same not be reburied at any of the suit properties of the estate of the deceased. The Applicant also sought orders that the Officer Commanding Mai Mahiu Police Station, the Area Chief and/or Assistant Chief and the Public Health Officer, Naivasha County (sic) supervise and provide security during the exhumation of the remains of the Moses from the suit property.
6. I have considered the Application as well as the averments of the Applicant in her affidavit in support of the 2 Applications. The matter herein relates to the estate of the deceased. I note that Plot No. Kijabe/Kijabe Block 1/3241 was registered to the Applicant in 1992, about 4 years before the demise of the deceased. I have looked at the judgment of Musyoka, J of 19.12.13 in which he made a finding *inter alia* that the handwritten will of the deceased was valid and that the Applicant was a widow of the deceased. The learned Judge outlined the inventory

of the estate of the deceased as indicated by the parties in their pleadings. Notably, the suit property did not feature in the list. The property was therefore never part of the estate of the deceased

7. The Applications herein were filed under the provisions of *inter alia* Section 47 of the Law of Succession Act and Rules 49, 63 and 73 of the Probate and Administration Rules. The long title of the Law of Succession Act describes it as:

An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto.

8. A careful reading of the long title of the Act indicates that the jurisdiction of a succession Court is limited with testamentary succession and administration of estates of deceased persons and for purposes connected therewith and incidental thereto. The suit property does not form part of the estate of the deceased herein or of any other deceased person. The suit property belongs to the Applicant who is very much alive. Accordingly, this Court has no jurisdiction to deal, in this cause, with the suit property for the reason that it does not form part of the estate of the deceased. The fact that the deceased was buried in the suit property does not bring the same within the ambit of the proceedings herein. The Applicant ought to have moved the Court in separate proceedings and not the present. It follows therefore that the Applications dated 15.6.2020 and 23.6.2020 being incompetent, are hereby struck out. Given that no responses were filed, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16TH DAY OF JULY, 2021.

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**