



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 294 OF 1996**

**IN THE MATTER OF THE ESTATE OF MOHAMED GATONGE (DECEASED)**

**GAUKU MOHAMED .....PETITIONER**

**VERSUS**

**GITONGA MOHAMED..... OBJECTOR**

**RULING**

1. This is a matter that commenced in 1996 for the succession of the estate of the late **Mohamed Gatonge** who died on 14<sup>th</sup> February, 1979. The petitioner having lodged the petition, the objector lodged the objection thereto together with one **Joseph Kinyua Mohamed**. The latter withdrew his objection and on 16<sup>th</sup> September, 2002, a consent was recorded whereby both the petitioner and the objector were appointed joint administrators of the estate of the deceased.

2. On 17<sup>th</sup> October, 2007, this court (Lenaola J as he then was) distributed the estate of the deceased between the two parties herein equally. The estate constituted a property known as **Plot No. 6, Meru Municipality**. By **Civil Appeal No. 64 of 2008**, the petitioner challenged not only the said distribution, but also the consent of 16<sup>th</sup> September, 2002 that had appointed both her and the objector as administrators of the estate of the deceased.

3. By a judgment delivered on 12<sup>th</sup> October, 2012, the Court of Appeal dismissed the said appeal and confirmed the distribution, of the estate as had been determined by Lenaola J on 17<sup>th</sup> October, 2007.

4. Not satisfied by that decision, the petitioner sought leave of the Court of Appeal to appeal against that decision to the Supreme Court. The Court of Appeal declined to grant the leave sought. Undeterred, the petitioner applied to the Supreme Court for the review of the Court of Appeal decision denying her leave to appeal to the Supreme Court.

5. By its ruling delivered on 18<sup>th</sup> March, 2015, the Supreme Court declined to upset the decision of the Court of Appeal. In dismissing the petitioner's application before it, the Supreme Court observed that the determination by this court on the paternity of the objector and the distribution of the estate of the deceased between the lawfully recognized beneficiaries of the deceased did not elevate the circumstances of this case to the level of the general interest of the public to warrant it be determined by that court.

6. While the matter was pending before the Supreme Court, the petitioner had lodged an application in this court to stay the confirmation proceedings. Ruling on that application on 19<sup>th</sup> January, 2016, Gikonyo J observed, inter alia, that:-

***“This cause is characterized by numerous fluctuating legal fortunes. It has seen many applications as well as legal journeys. It has traversed the entire system of superior courts; this court; the Court of Appeal and the Supreme Court, the highest court of the land. The most contentious matters which have impelled the petitioner to take all those legal journeys are two, namely:***

***(1) That the Objector, who is the joint administrator in the estate is not a biological son of the deceased;***

***and***

***(2) That the consent order recorded on 16<sup>th</sup> September, 2002 before Kasanga Mulwa J that both parties be joint administrators of the estate of the deceased was procured by fraud.***

***The above two issues were also the major grounds of appeal and were determined by the Court of Appeal in Appeal No. 64 of 2008. The eminent judges of appeal upheld the consent order as had been recorded before Kasanga Mulwa J. They also held that***

*the paternity of Gitonga Mohammed was conclusively determined that he was indeed a son of the deceased; ...*

*In the circumstances, I am bound on the two issues. The petitioner is trying to re-litigating these issues again before me which I think is against public policy of the law; that litigation must come to an end. ...*

*... and distribution of the estate of the deceased to be in accordance with the order of this court (Lenaola J) made on 17<sup>th</sup> October, 2007. For avoidance of doubt, I will restate the order:*

*“ ... that Plot No. 6 Makutano Meru Municipality shall be inherited in equal shares by both Gauku Mohammed and Gitonga Mohamed”*

*...”*

7. I have deliberately dwelt on the history of the matter for reason of the two applications that are before me for determination. On 2<sup>nd</sup> July, 2019, Gikonyo J recused himself from dealing with the matter on the ground that he had dealt with numerous applications in the matter and he may have formed an opinion on the matter. He therefore referred the matter to me for directions.

8. On the same date, I directed that the two pending applications be heard before me on the 4<sup>th</sup> July, 2019. These applications were: -

a) one dated 12<sup>th</sup> February, 2019 by the petitioner seeking to restrain the objector from in any way whatsoever dealing with **L.R No. Ntima/Igoki/6** and that the court inhibit the said title pending the hearing and determination of **Nyeri CA Civil Application No. 127 of 2018** between the parties herein.

b) an application dated 4<sup>th</sup> April, 2019 by the objector seeking the revocation of the grant, or in the alternative, that the signature of the petitioner as 1<sup>st</sup> administrator be dispensed with in effecting the grant, or in the further alternative, that the Executive Officer of the Court be authorized to execute all the documents necessary to effect the grant in this matter.

9. In the application dated 12<sup>th</sup> February, 2019, the petitioner contended that she had filed an application for extension of time within which to appeal against the decision of Gikonyo J out of time. That while the said application was still pending, the objector was at an advanced stage of selling the subject plot.

10. In her oral submissions, the petitioner stated that Gikonyo J had advised her to go to the Court of Appeal if she was aggrieved with his decision.

11. That application was opposed vide a replying affidavit of Gitonga Mohammed sworn on 2<sup>nd</sup> July, 2019. He contended that the application was an abuse of the process of the court, vexatious and driven by malice. That the application was only meant to obstruct the cause of justice and meant to frustrate the implementation of the grant in this matter. In his submissions, **Mr. Thangicia**, Learned Counsel for the objector, referred the court to the history of the matter and urged that the application be dismissed.

12. I have considered the affidavits on record in respect of the application and the respective submissions of the parties. The basis of the application is that the objector was at an advanced stage of selling the subject property. That there was an application pending before the Court of Appeal between the parties and that the property should therefore be preserved pending the determination of the said application.

13. The petitioner did not produce any evidence to show that the subject property was in danger of being disposed of by the objector. I note that the property is still in the name of the deceased and is yet to be transferred to the names of the administrators. Any transfer would require the active participation of the petitioner.

14. On the pending application before the Court of Appeal, I agree that it is not proper for any action to be taken that may jeopardize any proceedings pending before that court. However, the court has to consider the nature of such pending proceedings.

15. The pending application before the Court of Appeal seeks the extension of time to appeal against the order and decision of Gikonyo J. made on 31<sup>st</sup> July, 2018. I have looked at the decision sought to be appealed against. What the good Judge noted was that the court was *functus officio* as the matter had been conclusively finalized and that any party wishing to pursue any claim should do so in the Court of Appeal and not in this court.

16. I could not agree the more. Having distributed the estate of the deceased, there was nothing pending before this court for which the court would be called upon to pronounce itself. Any challenge to the court's determination of 19<sup>th</sup> January, 2016 should be before the Court of Appeal and beyond, if at all. Accordingly, this court is at a loss as to the purpose and tenor of the intended appeal that the application pending before the Court of Appeal seeks to achieve.

17. Accordingly, I find the application dated 12<sup>th</sup> February, 2019 to be without merit and the same is dismissed with costs.

18. On the application dated 2<sup>nd</sup> April, 2019, the objector sought that the grant be revoked, or alternatively, that the signature of the petitioner be dispensed with and the objector be the only one sanctioned to execute all documents necessary for the implementation of the grant herein. In the further alternative, the objector sought that the Executive Officer of this Court be empowered to execute all documents necessary for the implementation of the grant.

19. The grounds upon which the application was grounded were that; the estate was distributed to the parties herein on 17<sup>th</sup> October, 2007; that the two parties were appointed joint administrators but the petitioner had frustrated the implementation of the grant by refusing to co-operate with the objector. That the petitioner had refused to sign the mutation from the County Planner to divide the property in terms of the grant.

20. In his submissions, **Mr. Thangicia** submitted that the petitioner had refused to execute all documents meant to effect the grant; that she had been enjoying the property since 1996 and she had refused to file any accounts as had been ordered.

21. The petitioner opposed the application vide her replying affidavit sworn on 6<sup>th</sup> June, 2019. She contended that, **Gikunda Anampiu**, Advocate had sworn an affidavit denying having recorded the consent by which the parties herein were appointed joint administrators; that her mother had written a letter confirming that the objector was not a son of the deceased; that **Joseph Kinyua** having withdrawn his objection, that confirmed that she had been bequeathed the property by the deceased during his lifetime.

22. In her oral submissions, she reiterated that the objector was not her brother and that she had been dealing with the property since 1978 when the deceased was still alive.

23. The distribution of the estate was determined on 17<sup>th</sup> October, 2007. Due to appeals to the Court of Appeal and subsequently, the Supreme Court, the grant was not confirmed until 19<sup>th</sup> January, 2016. The objector alleged that the petitioner has refused to co-operate in the implementation of the grant. He produced a copy of the mutation form from the Meru County Planner which sought to divide the subject property into two in terms of the grant of this court.

24. Neither in her replying affidavit nor her oral submissions before me did the petitioner deny the allegations made by the objector. Her position, if I understood her well, was that the objector is not a son of the deceased. That the consent which led to both being appointed as joint administrators in 2002 was entered into fraudulently.

25. The two issues were settled by the Court of Appeal with a resounding finality in **CA No. 64 of 2008**. Indeed, as can be seen from the excerpts from the ruling of Gikonyo J. of 19<sup>th</sup> January, 2016, these two issues cannot be re-opened. They are already determined. The court is *funstus officio*.

26. Having carefully considered the matter, it is clear to this court that the petitioner is unwilling to have the grant effected. She seems resolved to frustrate its implementation at any cost. That is not the intent and spirit of the law.

27. The law provides for remedies where an administrator is unwilling to complete the administration of the estate. The court may under **section 76 of the Law of Succession Act** revoke the grant. However, in the circumstances of this case, I do not think that that will be the proper way to go. I will also not allow the objector to act alone.

28. Since what is sought is the execution of a lawful order of this court, I am inclined to having the Deputy Registrar of this Court be the one to execute the said order. This power is inherent in the court as well as under **section 47 of the Law of Succession Act**. Accordingly, I am satisfied that the application dated 4<sup>th</sup> April, 2019 has merit. The same is allowed on the following terms: -

**a) the Deputy Registrar of this court is hereby empowered and authorized to execute all documents that are necessary for the implementation of the grant herein;**

**b) that the Deputy Registrar of this court will ensure that he takes such steps as shall be necessary to ensure compliance of this order and have the administration of the estate herein finalized within 30 days of the date hereof;**

**c) due to the history of this matter although this is a family matter, I will grant costs to the objector.**

It is so ordered.

**DATED** and **DELIVERED** at Meru this 19<sup>th</sup> day of September, 2019.

**A. MABEYA**

**JUDGE**