REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO.559 OF 2013

IN THE MATTER OF THE ESTATE OF DAVID KANGERI KANGANGI -DECEASED

ANTHONY GITHINJI KANGERI & 2 OTHERS.....APPLICANTS

VERSUS

MILLICENT MUTHONI KANGERI & 5 OTHERS.....RESPONDENTS

RULING

1. This matter relates to the estate of DAVID KANGERI KANGANGI, who died intestate on 4.7.2005. A grant of Letters of Administration was issued to Millicent Muthoni Kangeri on 21.5.2009. She proceeded and filed a summons for confirmation of grant dated 28.5.2010 and proposed the mode of distribution. The grant was confirmed on 4.6.2010. The estate of the deceased comprised in KABARE/GACHIGI/683, 684 and 685 was distributed to the Petitioner Millicent Muthoni Kangeri.

2. Thereafter Anthony Githinji filed summons under Rule 49 (1) and 73 of the Probate and Administration Rules seeking an order of inhibition on the said properties, that is KABARE/GACHIGI/683, 684 and 685. He was claiming that himself, Jane Nyawira and Watson Charles Njagi are children of the deceased and not involved nor consulted by the Petitioner when she filed the succession cause.

3. The applicants Anthony Githinji Kangeri, Anne Nyawira and Watson Charles Njagi proceeded to file a summons for revocation and annulment of grant under ***Section 76 of the Law of Succession* Act.** It was based on the grounds that the proceedings that led to the confirmation of grant were defective in substance, the grant was obtained fraudulently by making false statements and concealment from court something material to the case wand was obtained by means of untrue allegations of facts essential in a point of law. The petitioner failed to disclose to the court all the beneficiaries in the estate of their own father. It was further alleged that the petitioner had transferred the parcels of land to some children leaving out some. It is also alleged that the deceased had earlier on before his death indicated how his estate would be sub-divided among all his children and their mother. The applicants were not allowed to sign consent to allow the petitioner to get Letters of Administration.

4. The Petitioner filed a replying affidavit. The court gave direction that the application be heard by way of viva voce evidence.

The Petitioner/respondent during the hearing of the application for revocation of grant on 7.12.2018, adopted her replying affidavit sworn on 25.2.2014 as her evidence together with annextures. The applicants objected to the alleged diary of the deceased annextures MMK 8, MMK 11 and MMK 13 that is;

- MMK 8 - copy of deceased's diary
- MMK 9 - copy of deceased's diary
- MMK 11 - copy of agreement at chief's office dated 20.8.2007
- MMK 13 - copy of written agreement dated 12.5.2002

The objection was disposed by way of written submissions.

APPLICANT'S CASE

5. That the affidavit is sworn evidence and upon production and reliance by Petitioner, it became evidence in chief. That the only option for the applicant was to cross-examine the witness on the documents which they did. That the only consideration the court can do after such production is consider probative value of the evidence produced. That the maker of MMK 8 and MMK 9 is the deceased and they related to family affairs. That MMK 11 and MMK 13 are executed by the respondents and applicants and court can admit the documents as evidence of the respondents. That the evidence is already on record and there is no requirement that they be attested under section 75 of the Evidence Act to warrant calling the maker.

RESPONDENT'S CASE

6. That MMK 8 and MMK 9 is an alleged diary of the deceased, it is illegible and does not constitute any known signature of the deceased. That the respondents could have taken it to a documents examiner handwriting expert for him to verify it belonged to the deceased. MMK 11 was allegedly done by the Chief and the Law of evidence is clear only a maker of a document can produce. MMK 13 letter allegedly written by 3rd Applicant and she denies writing the same. He who alleges must prove by way of handwriting expert that the letter was written by the 3rd applicant.

Whether the court can allow production of the following annextures;

Section 35 of the Evidence Act, Cap. 80 provides: -

> ***1. In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say-***
>
> ***a) if the maker of the statement either-***
>
> ***i) had personal knowledge of the matters dealt with by the statement; or***
>
> ***ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and***
>
> ***b). if the maker of the statement is called as a witness in the proceedings, provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.***
>
> ***2. In any civil proceedings, the court may at any stage of the proceedings, if having regard to all***

the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence.

a). notwithstanding that the matter of the statement is available but is not called as a witness;

b). notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve as the case may be.

This form the law on admissibility of documents.

Ruth Njeri Kuniara Vs. Industrial & Commercial Development Corporation & 2 others [2018] eKLR the court held;

> The right to challenge evidence, including by way of cross-examination, is an integral component of a right to fair hearing. That right can only be compromised by extremely good reasons. If the reason given like here, is that the presence of the witness cannot be procured without undue delay, then there must be cogent evidence of that difficulty.
>
> ***Lilian Wangui Muhuyu & Another Vs. Sisters of Mercy (sued as the registered trustees of the Mater hospital [2017] eKLR.***

The Court held;

> "One of the key tenets of ***Section 35 of the Evidence Act,*** in considering whether a document is to be admissible as evidence in court is that the makers had personal knowledge of the matters dealt with by the statement, and the only way of ascertaining that Real Aliki are aware of the documents is by having the maker called to testify in court.
>
> Having considered the arguments from both counsels, I find that the plaintiff had the opportunity to address the court on the difficulties they faced in procuring the attendance of Real Aliki, which they failed to utilize even after the court gave him an opportunity after the 2nd plaintiff was recalled. Parties are reminded that justice is two ways and the defendant is also entitled to justice in equal measure".
>
> In effect, even if the maker of a document was available, but was not called as a witness, the court has a discretion to admit his statement in evidence.
>
> These documents were annexed to an affidavit. The respondent is the wife of the deceased who though not the maker was aware of these matters involving her husband and her children. These were maters within her knowledge and she has deponed them in her affidavit and annexed the documents. They are petitioners evidence. Section 33 of the Evidence Act allows the production of the documents. It provides;

Statements written or oral or electronically recorded of admissible facts made by a person who is dead….. ….. are themselves admissible in the following cases;

> ***(f) relating to family affairs***
>
> ***(h) made by several persons and expressing feelings.***

As submitted the annextures MMK 8 and MKK 9 relate to family and the petitioner was privy to the information in the diary having witnessed the events which led the deceased to write them. They relate to

family matters and the deceased was expressing his feelings. I find that the annexture are Petitioner's evidence. There will be no prejudice as the Petitioner has deponed the matters contained in the annextures in her affidavit. The court has discretion to admit them and consider the probative value. This is what was stated by the ***Court of Appeal in the case of N.K. Brothers Building Contractors Limited & Another Vs. Jane Wairimu Kamau*** cited by the Respondent. The maker cannot be called.

I have also considered the case of ***Trans Africa Assurance Co., Vs. National Social Security Fund [1999], E.A. 352*** where the Court of Appeal stated;

> ***"the best evidence rule does not apply to affidavits. Hence there is no reason for excluding from affidavits an interlocutory matters, statements of facts the knowledge of which was acquired from documents provided the knowledge is disclosed. It follows therefore that an affidavit would not be inadmissible merely by reason of omission to exhibit the documents from which the knowledge was obtained……..."***

7. What I am saying is that where the facts are deponed in the affidavit in which case the deponent has full knowledge of the matters and has annexed documents which are within her knowledge, the court has discretion to admit the documents and give a determination on their probative value. This is more so where the court is not only relying on the affidavit but the witness has appeared in court and offered for cross examination by the adverse party. This applies to the documents which the respondent has alleged were signed by the applicant. These are averments made on oath. The Court has discretion to admit them and determine whether it will attach any weight on them depending on the circumstances of the case, this as provided under ***Section 144 of the Evidence Act.***

8. I find that considering the circumstances of this case the documents are admissible. I overrule the objection.

Dated at Kerugoya this 18th day of October 2019.

L. W. GITARI

JUDGE

18.10.2019