



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 25 OF 2016

PETER NJOROGE KARIUKI APPELLANT

VERSUS

DOMINIC NDUNGIRE NJOKI 1ST RESPONDENT

ELIZABETH WANJIKU NDUGIRE 2ND RESPONDENT

KENNETH NJOROGE NJOKI 3RD RESPONDENT

*(Being an appeal from the ruling and order of the Chief Magistrate's Court at Kiambu (Hon. J. Kituku)
Delivered on 04/05/2016 in Kiambu Succession Cause No. 46 of 2016)*

JUDGMENT

1. On 15/02/2016, the Appellant, Peter Njoroge Kariuki, and his brother, George Kamau Kariuki, (hereinafter, Co-Petitioners) filed a Petition for Letters of Administration with respect to the estate of their late father, Samuel Kariuki Gatuguta (Deceased). They did so on behalf of seven other siblings or spouses of deceased siblings who all signed a Consent to the Making of a Grant of Administration Intestate to a Person of Equal or Lesser Priority.

2. Simultaneously, the Co-Petitioners filed a Citation to Accept or Refuse Letters of Administration Intestate with respect to the three Respondents herein. The gist of the Citation was that the Civil Appeal No. 25/2016 2nd Respondent (Elizabeth Wanjiru Ndugire) was an employee of the wife of the Deceased and that the other two Respondents are her children but that after the death of the Deceased, the three Respondents have posed as the second family of the Deceased, have assumed possession over the property of the Deceased and are intermeddling with the property.

3. Two days after filing the Petition and Citations, the Co-Petitioners took out Summons under sections 45 and 47 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules. The Summons sought two prayers:

a. That the Court gives orders “that maintain, preserve the assets of Samuel Kariuki Gatuguta (Deceased) pending the hearing and determination of the Succession Petition No. [46] of 2016.

b. That the “Respondents be stopped from intermeddling with the estate of the deceased and the property of the applicant whilst the succession cause is pending and/or before Grant of Letters of Administration are issued by the Honourable Court.”

4. That Application was stiffly opposed by the Respondents. The 1st Respondent filed a Replying

Affidavit responding to most of the allegations raised by the Co-Petitioners.

5. The picture that arose from the initial court documents filed was one of a disputed succession cause – with the Co-Petitioners Civil Appeal No. 25/2016 and their siblings on the one hand claiming that the Deceased had only one wife (house) that was entitled to benefit from the estate of the Deceased with the Respondents claiming that the Deceased had two houses and that they belonged to the second house. The Respondents further claimed that the property respecting which the Co-Petitioners sought control over through their Application was always in control of their family and that the Deceased had distributed the property as such before he died.

6. It was clear from the documents filed in Court that the dispute had escalated to a level of physical altercations between the parties with various parties making several reports to the Police and local area administration officials. Indeed, some of the documents exhibited in the affidavits of the Respondents included medical forms and a P3 form evidencing that they had, at some point, been attacked by the Co-Petitioners.

7. After hearing the Summons inter partes, the Learned Trial Magistrate was not persuaded that the orders sought were merited. In a relevant section of his ruling, the Learned Trial Magistrate opined:

Granting the orders sought in the present application may cripple the operations of the Respondents, who clearly are dependants of the estate of the Deceased under section 29 of the Act. I say so because they have been included in the Petition by the Applicant herein, and also issued with Citation under Rules 21 and 22 of the Rules. In the end result, I dismiss the Application dated 9th February, 2016 with no order as to costs.

8. The Appellant is aggrieved by the findings and orders given by the Learned Trial Magistrate and has filed ten grounds of appeal. The ten grounds of appeal are as follows:

a. The learned Magistrate erred in law and fact by ruling that the respondents belonged to the second House of Samuel Kariuki Gatuguta.

b. The learned Magistrate misdirected himself by concluding that the second respondent was a spouse of Samuel Kariuki Gatuguta.

c. The learned Magistrate erred in law and fact by failing to consider the appellant's submissions that there was no recognized marriage contracted between Samuel Kariuki Gatuguta and the 2nd respondent either under customary law or under statutory provisions.

d. The learned Magistrate erred in law and fact by holding that respondents belonged to the second House of Samuel Kariuki Gatuguta in absence of the respondents tendering any evidence to prove the relationship.

e. The learned Magistrate erred in directing that each House to the Succession Cause nominated one person to act as an administrator

f. The learned Magistrate erred in law and fact when he directed that in the event of any dispute between parties, the local Area Chief would arbitrate and resolve any dispute

g. The learned magistrate erred in law when he directed that the Area Chief would resolve disputes given the partisan, impartial history of the area Chief towards the appellant and his family members.

h. The learned Magistrate misdirected himself when he failed to take into account that the respondents were not recognized as family members of the late Samuel Kariuki Gatuguta in customary law or through statutory provisions under the Laws of Kenya.

i. The learned Magistrate erred in law and fact by holding that the 2nd respondent was a spouse of Samuel Kariuki Gatuguta and not an employee of Veronica Njoki, the wife of the deceased

The learned Magistrate erred in fact and law by concluding that the respondents were dependants of Samuel Kariuki Gatuguta.

9. All the ten grounds can truly be grouped into two:

a. The Appellant is aggrieved that the Learned Trial Magistrate made a finding that the 2nd Respondent was a spouse to the Deceased and that therefore the Respondents were a family of the Deceased and dependants of the estate; and

b. The Appellant is aggrieved that the Learned Trial Magistrate directed that any disputes regarding the use of the estate be resolved by the area Chief whom the Appellant contends is partisan and has a history of favouring the Respondents in the dispute.

10. The Appeal was canvassed by way of Written Submissions.

11. In his submissions, the Appellant argues that he is particularly aggrieved by the Learned Trial Magistrate's order that the Chief should mediate the dispute since, in his opinion, the Chief is blatantly partisan. The Chief, the Appellant argues, is the genesis of what they see as a falsity that the 2nd Respondent was a spouse of the Deceased.

12. The Appellant argues that the Deceased did not sire or adopt the Respondents and that they are total strangers to the estate. The Appellant is concerned that the net effect of the Learned Trial Magistrate's holding is that the Respondents have been adjudged to belong to the second house of the Deceased meaning that the Appellant and his siblings will have to share the assets of the Deceased with them.

13. The Appellant ends his submission thus:

[T]he Appellant has pleaded that the Chief is openly biased against his family and has on several occasions sought solace from local administration to no avail. The holding that the Office of the Chief would be required to arbitrate in any potential disputes fails to recognize that the bias of the Chief of Kiratina Location is at the heart of this dispute.

The appropriate venue, Your Lordship, would have been a superior office in the Local Administration given the Appellant's belief of bias towards the Petitioners in the succession cause.

14. In their submissions, the Respondents frame the issues as three-fold:

a. Whether the 2nd Respondent is a wife to the Deceased;

b. Whether the 1st and 3rd Respondents are children of the Deceased;

c. Whether the Respondents are entitled to inherit from the estate of the Deceased.

15. The Respondents have proceeded to submit at length on these three questions – referring to both the contested evidence in the lower Court record and decisional law.

16. The very framing of the issues by the Respondents betrays the confounding procedural posture of the case. While the Appellant is singularly obsessed with the direction that the area Chief should be the mediator of the dispute involving the succession of the Deceased the Respondents are intent on having this Court make findings of fact about the status of the 2nd Respondent as a spouse and 1st and 3rd Respondents as children of the Deceased.

17. This confusion may have something to do with the way the Learned Trial Magistrate framed his

ruling on an otherwise routine interlocutory Application. The phraseology the Learned Trial Magistrate used that the Respondents are “clearly dependants” of the estate of the Deceased was, in the circumstances of this case, premature in the face of the factual disputes before the Court. There is a live dispute before the Court on how the beneficiaries and dependants of the estate of the Deceased are. The gravamen of the Citations is a denial by the Co-Petitioners that the Respondents are beneficiaries or dependants of the Deceased. It was, therefore, to prejudge the issues for the Learned Trial Magistrate to have made those comments.

18. Despite the Learned Trial Magistrate’s framing of his ruling, what he clearly aimed to convey is that the documents filed in Court had given him a glimpse of the fact that there was an intense conflict among potential and competing beneficiaries of the estate and to grant the orders sought by the Co-Petitioners would have amounted to disadvantaging the Respondents in a yet-to-be decided Succession Cause.

19. For that reason, the Respondents need to hold their ammunition and make the arguments they are making now on appeal before the Trial Court in the determination of the Succession Cause. They will have to persuade the Probate Court that the 2nd Respondent was, indeed, a spouse and that the 1st and 3rd Respondents are children to the Deceased.

20. What about the grievance by the Appellant about the direction that the Chief should resolve any dispute involving the estate of the Deceased? The Appellant seems to have a point but it is, in my view, exaggerated. The Learned Trial Magistrate did not arrogate the Chief any powers or authority he does not already have as an administrator. The Learned Trial Magistrate merely intended to ensure that there is peaceable co-existence among the protagonists as the succession cause is being determined. Usually, the area Chief is responsible for ensuring security in his area of jurisdiction and dealing with minor disputes. This must have been what the Learned Trial Magistrate had in mind in giving the directions that he did.

21. A Chief does not, of course have any jurisdiction to settle succession disputes and I do not understand the Learned Trial Magistrate’s directions to have been that the area Chief should settle questions of who the beneficiaries or dependants are.

22. In the circumstances of this case, the directions that I will make are as follows:

a. The ruling made by the Learned Trial Magistrate dated 04/05/2016 shall not be construed to mean that any findings have been made about who the beneficiaries and dependants of the estate of the Deceased are.

b. The Succession Cause (Kiambu Chief Magistrate’s Succession Cause No. 46 of 2016) shall be set down for hearing and determination of the Citations in order to ascertain who the true beneficiaries and dependants of the estate of the Deceased are as well as the extent of the estate of the Deceased.

c. In place of the order by the Learned Trial Magistrate to dismiss the Application dated 15/02/2016, there shall, instead, be an order that status quo (as it existed on 15/02/2016) be maintained until the Succession Cause is heard and determined.

d. The Succession Cause to be heard on a priority basis in view of the potential breach of peace.

e. The Succession Cause to be heard by a Magistrate other than the Honourable J. Kituku who heard the earlier Application.

f. Each party to bear its own costs.

23. Orders accordingly.

Dated and delivered at Kiambu this 1st day of February, 2018.

JOEL NGUGI

JUDGE