



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

SUCCESSION NO.9 OF 2017

IN THE MATTER OF THE ESTATE OF MUNGAI NJUGUNA – (DECEASED)

JORAM MUNGAI & ANOTHER.....PETITIONER

- V E R S U S -

JAMES KANGETHE MUNGAI.....RESPONDENT

R U L I N G

For determination before me is the Chamber Summons dated 17/2/2016 filed by Waiganjo & Co. Advocates counsel for the applicant/petitioner. He seeks the following orders:

That the court be pleased to review and or set aside the holding in the ruling delivered on 14/5/2015, to the effect that Serah Wairimu was the wife of the deceased herein and allow that issue to go for full trial during the hearing and determination of the main petition.

The application was supported by the grounds, found in the body of the application and the applicant's affidavit.

The applicant was one of the petitioners who were issued with grant of letters of administration which were confirmed on 25/9/2011 but were later revoked on 14/5/2015 following an application filed by the objector, James Kangethe Mungai the respondent herein. The applicant contends that upon reading the ruling of the court, he found that the court found as a fact that Serah Wairimu was the wife of the deceased. The applicant contends that the said Serah Wairimu was the wife of Jesse Mungai but the deceased was not married which fact they can only prove by adducing oral evidence; that the finding of Sarah Wairimu as wife should not have been made before the matter was heard inter-partes.

The applicant's counsel also filed submissions urging the court to exercise its discretion under Rule 73 of Probate and Administration Rules to review the court's ruling.

A replying affidavit was sworn by the objector opposing the application contending that the court arrived at the correct finding because according to him, his mother, Serah, was the wife of the deceased, Mr. P.K. Njuguna for the objector also filed grounds of objection to the effect that the application is an abuse of the court process; that the jurisdiction of the court to make the orders sought under the provisions of law quoted do not support the grant of the orders and lastly, that the application is unmerited, ill advised and fatally defective.

The application came up for hearing on 19/2/2018 and there was evidence that Mr. Njuguna had been served by post on 24/11/2017. The counsel did not appear for the hearing of this application, though served and this court proceeded to hear the applicant's counsel ex-parte.

Following an application by the objector James Kangethe Mungai, the court on 14/5/2015 granted orders revoking the grant that had been issued to the applicant on 25/3/2011 and conservatory orders to preserve the estate; that fresh letters of administration had to be issued and in the ruling, the court recognized the objector's mother, one Serah Wairimu Mungai as the wife of the deceased.

The applicants did not appeal the decision but have moved this court under Section 47 and Rule 73 of the Succession Act and Probate and Administration Rules invoking the inherent powers of this court to review part of the ruling that found Serah Wairimu to be the deceased's widow. It is the applicant's contention that the issue of whether or not Serah Wairimu was a widow was not one of the issues canvassed in the application and should have been determined by way of viva voice evidence.

Rule 73 of the Probate and Administration Rules also grants to this court inherent powers to issue orders necessary to meet the ends of justice or to prevent abuse of the process of court. Respondents did not attend the hearing. I have duly considered the application, the rival affidavits, grounds of opposition and the submissions of counsel. Section 47 of the Law of Succession Act gives this court a wide discretion

to entertain any dispute and make orders that may be expedient. The Section reads:

“47 The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

Rule 73 of the Probate and Administration Rules also grants this court a wide discretion to exercise its inherent jurisdiction for purposes of doing justice to the parties. Rule 73 reads as follows:

“73 Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

The ruling that gave rise to the application under consideration was one dated 14/5/2015 revoking of letters of administration issued to the applicants herein and granted conservatory orders to preserve the estate. The court granted the said orders but went ahead to recognize Sarah Wairimu as a widow of the deceased. Directions had been taken in this matter as early as 9/5/2013 that the application dated 7/1/2013 seeking revocation of grant be determined by way of viva voce evidence. It is not clear how the application came to proceed by way of affidavits. The applicants still feel prejudiced because they had not been heard on the issue of whether Serah Wairimu was a widow or not. The said issue can only be determined by way of viva voce evidence as the issue of who the heirs of the deceased are is highly contested.

The applicant has alluded to the contradictory statements contained in the affidavits filed by the objectors as to who the beneficiaries to the deceased's estate are. The Chief's letter filed in court on 24/9/2013 by the objector indicated that there are 19 beneficiaries in total. The replying affidavit by James Kangethe of 8/7/2016 shows that the beneficiaries are 18, all inclusive. The affidavit of Sarah Wairimu dated 3/9/2013 however indicated that the beneficiaries are only 10. I agree with the submissions that a definite finding was not made on the issue of the deceased's beneficiaries. There is no evidence that the respondents will suffer any prejudice because the case is still pending. That being the case, I think that it is in the interest of justice that I allow the application. I review this court's order of 14/5/2015 only to the extent of the finding that Serah Wairimu was a widow of the deceased. The said finding is set aside so that Serah Wairimu will not be deemed to be a widow to await the hearing by way of viva voce to establish who the administrators are, the beneficiaries and then distribution.

It is so ordered.

Dated, Signed and Delivered at NYAHURURU this 11th day of July, 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mathea holding brief for Mr. Waiganjo for applicant

P.K. Njuguna for respondent – absent

Soi – Court Assistant