



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1073 OF 2011

IN THE MATTER OF THE ESTATE OF RAHAB WANJA KIMANI (DECEASED)

MARGARET WAMBUI KIMANI.....OBJECTOR/APPLICANT

JOYCE WAMBUI KIMANI.....OBTECTOR/APPLICANT

CATHERINE WANJIKU MARARO...RESPONDENT/ADMINISTRATOR

RULING

PLEADINGS

The deceased Rahab Wanja Kimani intestate on 19th February 2001. Catherine Wanjiku Mararo petitioned for grant of letters of administration and the same were issued to her on 22nd October 2009 and subsequently confirmed on 7th July 2010. The beneficiaries were listed as;

1. Margaret Wambui Kimani,
2. Joyce Wambui Kimani,
3. Jane Wambui Njogu (deceased) Teresia Wanja Njogu & Joseph Ngethe Njogu c/o Deceased.
4. Elizabeth Wangui Njoroge
5. Mary Wanjiru Thaitha
6. Lucy Wangare

The Administrator; Cathrine Wanjiku Mararo included Stephen Mararo Rubia her husband as dependent of deceased. The suit property Kiambaa/Waguthu/833 was/is the property that comprised of the deceased's estate.

Subsequently; Margaret Wambui Kimani and Joyce Wambui Kimani by certificate dated 7th June 2011 sought stay of the implementation of the said certificate of grant and/or the subdivision of L.R. No. Kiambaa/Waguthu/833. Accompanying the said certificate was an application dated 7th June 2011 seeking revocation of the said grant and certificate of confirmation on grounds that the grant was obtained fraudulently by making of false statement and concealment of facts material to this matter. The Court on 7th June 2011 certified the matter urgent and granted the stay. This is what prompted the current application dated 23rd August 2016. The applicant sought orders that;

- i) This Honorable Court dismisses this suit for want of prosecution
- ii) In the alternative, this honorable Court be pleased to vacate, set aside and or vary orders of stay prohibiting the administratrix herein from proceeding to implement and or sub-divide the parcel **Title Number Kiambaa/Waguthu/833.**
- iii) The cost of the application and entire suit be borne by the respondents.

The application is based on grounds that the suit was filed by objectors on or about 7th June 2011 and they have failed or neglected to prosecute this case and since obtaining injunctive orders on 8th June 2011. That the delay is inordinate and it is evident that the objectors have lost interest in prosecution of the case as they enjoy injunctive orders. That the applicant continues to suffer anxiety and proprietary possession even as this case sits abandoned in the court indefinitely.

In her affidavit in support of the said application Catherine Wanjiku Mararo avers that the applicants filed an application for revocation of grant dated 7th June 2011 together with an application seeking injunctive orders stay in implementation of the certificate of Grant and or subdivision of **L.R. Kiambaa/Waiguthu/833**. The ruling on the same was delivered on 8th June 2011 where the Court granted orders restraining the petitioner/administratrix from implementing the said certificate pending hearing and determination of their application for revocation. On or about 5th October 2012 they applied to the court to have the said orders varied or set aside but the same was withdrawn. That since the delivery of the said ruling dated 8th June 2011, no steps have been taken by the objectors to have the matter heard and determined. That the delay is inordinate and inexcusable and the objectors are using the injunctive orders to disinherit the beneficiaries who are entitled to the deceased's fortune. That should the court not dismiss this suit as prayed the applicant will continue to suffer further prejudice as the beneficiaries do not enjoy quiet possession of the said parcel of land. That the applicant faces anxiety of having the whole parcel of land waste away indefinitely as the suit drags on. That the objectors have lost interest in this suit and the same should be dismissed as prayed.

Peter Mungai Kimani; in his affidavit dated 16th April 2018 avers that the deceased was the registered proprietor of title No. **Kiambaa/Waguthu/833** which she inherited through succession from her late husband. On 5th February 2000 before her demise; the house of Kimani met in her house to deliberate on issues relating to the said parcel of land. During the said meeting; the deceased expressed her wishes on who should inherit her said parcel of land namely; Margaret Wambui Bedan, Mary Wanjiru Bedan and Joyce Wambui Kimani and no objection was raised. That a certificate of confirmation of grant issued in **Kiambu Chief Magistrate's Court in Succession Cause No.95 of 2006** does not express the wishes of the deceased as the same includes new beneficiaries namely Elizabeth Wangui Njoroje, Mary Wanjiru Thaitha, Catherine Wanjiku Mararo, Stephen Mararo Rubia, Joseph Ngethe Njogu and Keziah Wanja Njogu. That the new beneficiaries included were not in the meeting held on 5th February 2000.

The application is opposed Catherine Wanjiku Mararo by her replying affidavit dated 16th December 2016. She avers that the grant of letters of administration was issued on 22nd October 2010 before the Chief Magistrate's Court a Kiambu and was confirmed on 7th July 2010 before the said Court in **Succession Cause no. 95 of 2006**. That their late mother died on 19th February 2001 and was survived by the following children and beneficiaries.

Margaret Wambui Kimani, Joyce Wambui Kimani, Teresia Wanja Njogu-deceased (survived by Joseph Kangethe Njogu, Keziah Wanja Njogu and Catherine Wanjiku Njogu), Elizabeth Wangui Njoroje, Mary Wanjiru Thaitha, Lucy Wangari Kimani, Catherine Wanjiku Mararo and Stephen Mararo Rubia. That prior to her demise the deceased had pointed out to them what each of them was to possess and they had been given possession. However after her demise the 1st and 2nd respondents took over the whole parcel and occupied the same to the exclusion of the other siblings and rented out some to strangers. This prompted her to institute succession proceedings in Kiambu Law Courts, **Succession Cause No. 95 of 2006**. Grant was issued on 22nd October 2009 and confirmed on 7th July 2010. That the objectors fully participated in the said proceedings albeit reluctantly. The court upon taking the evidence pronounced itself and went ahead to confirm the said grant. Their objection was that most of the beneficiaries were married. That the Law of succession court does not discriminate between married or unmarried children of the deceased. That she moved the court to have the said parcel of land subdivided but the respondents did not comply. She applied for Land Control Board consent and got a court order from the District surveyor and the OCS Karuri Police was ordered to facilitate the same. However, the objectors rushed to court and obtained ex-parte orders stopping the survey from being undertaken. That since then the objectors have not taken any steps to have this matter set down for hearing. That Margaret is widowed and stands to inherit from her husband's estate at Ndenderu in Kiambu, hence if she is considered as beneficiary of deceased's estate other married children cannot be left out as beneficiaries of the estate.

APPLICANTS/OBJECTORS SUBMISSIONS

The parties filed written submissions. The applicant in her submissions gave a background of the matter culminating to the current application. The Objectors in their written submissions submitted that the deceased had in the meeting held on 5th February 2000 clearly expressed her wishes in a family/clan members of the house of Kimani gathering especially on how **L.R. No. Kiambaa/Waguthu/833** would be shared. That in the said meeting the same was to be shared between Margaret Wambui Kimani, Joyce Wambui Kimani and Lucy Wangari Kimani. The minutes of the meeting were taken in Kikuyu language and on Page 2 at paragraph 4, the deceased's wish in the matter of sharing of her estate that comprised of land the subject matter of these proceedings. A translated version annexed as **PMK 2** to the affidavit of Peter Mungai Kimani Chairman of house of Kimani filed the same on 16th April 2018. That the respondent does not deny that such a meeting ever took place. Further that had the petitioner disclosed the said information to the court the court would not have allowed the mode of distribution.

It was submitted that Stephen Mararo is a son-in law of the deceased and had been allocated the land of the deceased by the deceased while she was alive and that he depended entirely on the deceased's contribution when she was alive and had been living and cultivating on the said parcel of land. She urged the court to dismiss the application as it lacked merit.

It was further submitted that Stephen Mararo Rubia is not a beneficiary of the deceased he as is husband to the administrator, Catherine Wanjiku Mararo; a fact which they submitted that was fraudulent and untrue allegation. Further that the inclusion of Elizabeth Wangui Njoroje, Mary Wanjiru Thaitha, Catherine Mararo, Stephen Mararo Rubia, Joseph Ngethe Njogu, Keziah Wanja Njogu and Catherine Wanjiku Njogu as beneficiaries entitled to share **L.R.No. Kiambaa/Waguthu/833** was misleading and fraudulent and should not have been entertained and the proceedings were defective. It was submitted that the administrator alleged that Teresia Wanja Njogu is a daughter of the deceased, she is not; she is a grand-daughter to the deceased, mother to the late Jane Wambui Kimani who died 19th September 2008. That the people included in giving their consents and those in the certificate of confirmation of grant are not the same which renders the confirmation of grant defective. They denied allegations that they had taken over all the land to the exclusion of all the other beneficiaries and stated that if they had taken over all the land as alleged, the said beneficiaries would have since taken action or reported to the police.

It was submitted that the proceedings for grant and confirmation of grant were defective and were obtained by means of untrue allegations of facts essential to the law and concealment of material facts from the Court contrary to **Section 76 (a) (b) & (c) of the Law of Succession Act**. They urged the court to revoke the grant and substitute the administrator Catherine Wanjiku Mararo with Margaret Wambui Kimani as the administrator to the estate of the deceased. It was submitted that since all that is remaining is distribution that the deceased's sole asset **L.R. No. Kiambaa/Waguthu/833** it be distributed equally amongst Margaret Wambui Kimani, Joyce Wambui Kimani & Lucy Wangari

Kimani in accordance with the expressed wishes of the deceased.

RESPONDENTS SUBMISSIONS

The respondent raised 4 issues for determination.

- i. Whether there was a will
- ii. Whether the applicants participated in the proceedings for Confirmation of Grant
- iii. Whether marriage of the deceased's children bars them from inheriting her estate
- iv. Whether Stephen Mararo is a dependent of the deceased.

It was submitted that the allegations that there was a will leaving the estate to the two objectors to the exclusion of all others is baseless. Noting that the meeting was held on 19th February 2001, **Section 9(1) (b) the Law of Succession Act** requires that an oral will, save for that of a marine officer should be made within 3 months before death. The provision provides,

“No oral will shall be valid unless:-

(a) it is made before two or more competent witnesses and

(b) The testator dies within a period of three months from the date of making the will:

Provided that”

She alleged wishes of the deceased do not consist an oral will. Further, noting that the meeting between the deceased and her family was attended to by many people; no one person witnessed and/or countersigned those minutes or gave testimony qualifying the person as a competent witness giving testimony of the same. That nothing would have been easier than to make an application for proof of oral will as required under **Rule 13(1) of the Probate and administration Rules** before the subordinate court proceedings took place. The said provision provides,

“An application of oral will or of letters of administration with a written oral will or of letters of administration with a written record of terms of an oral will annexed shall be by petition in form 78 or 92 and supported by such evidence on affidavit in form 4 or 6 as the applicant can adduce as to the matters referred to in rule 7, so far as relevant together with evidence as to-

(a) The making and date of the will

(b) The terms of the will

(c) The names and address of any executors appointed

(d) The names and address of all the alleged witnesses before whom the will was made.”

It was submitted that the applicants were aware of the proceedings but refused to participate and at some point they had to be summoned to court. It was submitted that the applicants' application was an afterthought maliciously designed to forestall the lawful process. She relied on the case of **ELIZABETH WANJIKU MUNGE (DECEASED) [2015] eKLR**.

She denied the objectors allegations that they were not involved in the proceedings or consulted on the mode of distribution stating that at the lower court the applicant were made aware of the proceedings but refused to participate at all. That it's been 7 years since they lodge the application which time was adequate for them to get a copy of the said proceedings. That they only rushed to court when the court sought to sub-divide the said parcel of land. That the onus of proof lies squarely with the applicants. She relied on the case of **NAOMI WANGECHI MUNENE & ANOTHER V DORCAS WANJIRU GITONGA [2016] EKLR**,

“Cases are decided on evidence and the law applicable. This court in Lewis Karungu Waruiro Vs Moses Muriuki Muchiri[2] citing authorities held that:-

“All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in Rhesa Shipping Co SA vs Edmunds [3] remarked:-

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far

East Ltd[4] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

With the above observation in mind, the starting point is that whoever desires any court to give judgment as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person.

It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed.[5] The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of Miller vs Minister of Pensions, [6] Lord Denning said the following about the standard of proof in civil cases:-

‘The ... {standard of proof}...is well settled. It must carry a reasonable degree of probability.....if the evidence is such that the tribunal can say: ‘ We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

It was submitted that **Section 29 Law of Succession Act** provides that children are direct dependents of their parents. The same does not distinguish children based on their status in life or their gender. To distinguish married and unmarried children was discriminatory. That in that regard, **Section 29(a) of the Law of Succession Act [15]** recognizes “children” of the deceased as dependents. It does not state that such children are sons or daughters, either married or unmarried. Any practice that discriminates between the male and female children of a deceased person is retrogressive and cannot supersede the Constitution and the Law of Succession Act. This court agrees with the holding of Makhandia J (as he then was) in **RE ESTATE OF SOLOMON NGATIA KARIUKI (DECEASED)** at page 8 where he stated as follows:-

“The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased’s estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father’s estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father’s inheritance because they are likely to enjoy inheritance of their husband’s side of the family.”

It was submitted that it was erroneous and unlawful for the applicants to claim that the rest of the siblings were not entitled to benefit because they are married. Further, that **Section 38 of LSA** provides that the children of the deceased are entitled to equal shares of the estate.

“Where an intestate has left a surviving child or children but no spouse the net estate shall, subject to the provisions of section 41 and 42 devolved upon the surviving child, if there be only one, or be equally divided among the surviving children. That the share of the children of the deceased who are no longer alive but have left behind issues should be inherited by those issues. She added that the affidavit attached in the said mode of distribution showed that all the children got equal shares.”

DETERMINATION

I have carefully considered the application party pleadings and written submissions made by counsel for the applicant and defendants. In my view the issues for determination are;

- i) Whether the suit should be dismissed for want of prosecution.
- ii) Whether this honorable Court should vacate, set aside and or vary orders of stay prohibiting the administratrix herein from proceeding to implement and /or sub-divide the parcel Title Number Kiambaa/Waguthu/833.
- iii) Cost of the application

The application the applicant seeks to dismiss the suit. The objectors via their application dated 7th June 2011 obtained stay of the implementation of the said certificate of grant and/ or the subdivision of **L.R. No. Kiambaa/Waguthu/833**. More than seven years later the objectors have not taken any steps to prosecute their main application dated 7th June 2011. This I find is an inordinate delay on the part of the objectors.

Have the applicants then satisfied the requirements for dismissal of suit for want of prosecution? **Article 159(2) (b) of the Constitution** provides that justice shall not be delayed. **Section 3A of the Civil Procedure Act** gives the courts unfettered power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. Further, **Section 63 (e) of the Civil Procedure Act**, assigns the Courts the unfettered discretion where it is so prescribed, in order to prevent injustice.

Order 17 Rule 2(3) Civil Procedure Rules 2010 gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed is justice denied. The Court however in exercising this discretion the court should do so having in mind the interest of justice. The court in determining such an application should weigh whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. In the case of *IVITA V KYUMBA* [1984] KLR 441 it was held that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

Going by the above authority, in the instant case, the grant and confirmed grant for the deceased’s estate In Kiambu Chief Magistrate’s Court in **Succession Cause 95 of 2011**. The Applicants Objectors stated that they refused to attend Court due to fraud perpetrated by the administrator in including her husband, all beneficiaries and children of their departed sister. In this Court’s view the beneficiaries who did not agree with the list of beneficiaries, list of assets and/or proposed distribution ought to have filed Protest (s) and be heard and determined on its merits.

The Objectors/Applicants filed the instant matter and obtained orders to stop the subdivision of suit property L.R.Kiambaa/Waguthu/833. Since 2011 to date, the Objectors have failed to pursue their matter, no reasons, circumstances or situation that has been advanced and presented for the Court to consider. They failed to take dates and have the matter set down for hearing, except finally agreeing to dispose the same by written submissions. From the above circumstances, I find no reasonable ground to sustain the matter, it has been prolonged since 2011 and no excuse advanced, it ought to be dismissed/ is dismissed for want of prosecution.

DISPOSITION

- 1. The application dated 23rd August 2016 is granted, the suit and all consequential orders is dismissed for want of prosecution;**
- 2. There is no evidence of valid oral will and/or written will as required by Sections 9 & 11 of law of Succession Act Cap 160;**
- 3. The grant is amended to include Margaret Wambui Kimani as joint administrator with Cathrine Wanjiku Mararo;**
- 4. The deceased’s estate shall be distributed as per confirmation of grant in Succession Cause 95 of 2006 Chief Magistrate Kiambu Court as follows;**
- 5. Suit Property Kiambaa/Waguthu/833 shall be subdivided amongst the children of the deceased equally excluding Stephen Mararo as dependency was not proved and he is son in law and will inherit from deceased from his wife’s share Cathrine Wanjiku Mararo;**
- 6. The share of deceased’s daughter Jane Wambui Njogu’s (who died on 19th September 2008) share be shared equally among her children, namely Teresia Wanja and Joseph Kangethe.**
- 7. The subdivision of the suit property, Kiambaa/Waguthu/833 shall not entail or involve removing and/or demolishing permanent structures and/or evicting each/any beneficiary already settled and/or has developed portion.**
- 8. Subdivision costs be shared equally by all beneficiaries.**
- 9. Each party to bear own Costs**
- 10. Any aggrieved party to lodge appeal.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 3RD DECEMBER, 2018.

M.W.MUIGAI

JUDGE FAMILY DIVISION HIGH COURT

IN THE PRESENCE OF:

MR NDURURUMO- FOR APPLICANTS

MS FUNDI- FOR RESPONDENTS

PATRICK – COURT CLERK