



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION MILIMANI LAW COURTS
SUCCESSION CAUSE 1732 OF 2015
(FORMERLY KIAMBU SUCC. CAUSE No 130 OF 2000)

FLORENCE MUKAMI KAMUIRUAPPLICANT

VERSUS

EVAN GITAU KAMUIRU RESPONDENT

RULING

1. The Application now before the Court is brought by the Widow of the Deceased (David Kamuiru Muruu), Florence Mukami Kamuiru. The Deceased passed away in 18th January 1975. The Petition was not filed until 5th June 2000. The Petitioners were named as the two co-wives of the Deceased, the Applicant Florence Mukami Kamuiru and Virginia Wamaitha Kamuiru. The Petition was for letters of administration intestate. The "Affidavit of Justification" was signed by Florence Mukami on 5th April 2000 before a Commissioner of Oaths. The Estate of the Deceased was described as land in Kiambaa/Kihara/328 - 6.7 acres and a Share Certificate No 1475 in Kenya Fuel and Bank Supply Company Ltd. The Affidavit in Support of the Petition was signed by Florence Mukami and had the thumbprint of Virginia Wamaitha. The Address given was P O Box No 63805, Nairobi. The Petition was filed at the Subordinate Court in Kiambu on 5th June 2000.

2. The Children of the Deceased attended the Court and signed the Consent forms signifying their agreement to the Grant as petitioned. The Petition was advertised and in the following 30 days there was no objection filed or recorded. The Letters of Administration Intestate were granted to the two Widows on 2nd August 2000. On 13th February 2001, the Summons for Confirmation was filed purportedly by the two Widows who were now Administrators of the Estate. The Affidavit appears to have been sworn before an officer in the Subordinate Court in Kiambu. That document sets out that the Estate is to be shared equally in relation to the Share Certificate, however in relation to the Land 3.30 acres would go to the House of Virginia Wamaitha and the remaining 3.4 acres would go to the House of Florence Mukami. The Hearing was fixed for 7th March 2001. The objection/protest was recorded. The dispute related more to the fact that a surveyor had not visited the Property rather than confirmation or distribution. Counsel asked for more time and the matter was SOG. The Parties were said to be discussing matters but there was no progress. In 2003 the firm of Gachombo & Co Advocates was closed because Counsel had left the Country. On 30th November 2006 the Matter came before the Court. Mr Kamonde was not acting for the Applicant/Objector. He told the Court that "My Clients have not shown up despite my having written to them three times. I am therefore unable to participate in today's proceedings for lack of instructions.

3. The Court held: "From the Protestor's Counsel's sentiments it is apparent that his clients are no longer

eager to pursue their Protest, there is no reason to keep the matter in abeyance any longer. Indeed it is this Court's view that the protestors will suffer no prejudice if the orders sought in the application for confirmation are granted. The Protest is dismissed and the Estate of the deceased is confirmed as drawn in the application dated 19/2/02. Costs will be in the cause." That decision sets out clearly that the Court was already alive to the issue of delay by the Protestor, even 10 years ago. The Objector of her own admission did nothing until 2009. She says that is because her lawyer did not inform her of the outcome of her protest. She says she heard from a neighbour in 2006. Eventually an application for review was filed in November 2009. It seemed Mr. Gachomba had returned.

4. SRM Kabucho who had conducted the Matter, delivered his Ruling on 24th February 2010. In it he recorded that the Grounds are that the Applicant was not informed by Counsel of the hearing of confirmation as the hearing notices were sent to the wrong address. The Learned SRM had perused the file and noted that the objection was not as to mode of distribution but that the survey of the property had not been carried out before the confirmation. He also noted that the Application was filed after an inordinate delay and that the Applicant had not demonstrated any prejudice. In closing he said "*I concur with my colleague Mrs Mulekyo who stated when passing the ruling that the protestor will suffer no prejudice if grant is confirmed. Reversing the orders will only open up a matter that is already closed to give the same orders to share the estate between the two wives. The ideal application would have been to have the surveyor on the ground but not to review the orders. The other alternative is to go to the high court to revoke the said confirmed grant. The application for review is therefore dismissed.*". Again nothing was done by the Protestor.

5. The Grant confirmed on 30th January 2006 provided for the land at Kiambaa/Kihara/328 to be shared equally between the two widows. Shortly thereafter, Virginia Wamaita Kamuru passed away and she was substituted with her son Evan Gitau Kamuiru. The Summons was dated 17th June 2014 and the Order was made on 19th August 2014. Again distribution is confirmed as the houses of the two widows receiving in equal shares. Following that Confirmation and attempts at distribution, which were successful. The Respondent here - Evan Gitau Kamuiru made an application for an officer of the Court to execute the relevant documents given the refusal of the Applicant herein to do so. She was personally served as demonstrated by the Affidavit of Service sworn by Paul Ndegwa Wandaka.

6. On 10th June 2015 there was an Affidavit filed said to be the Replying Affidavit of Florence Mukami Kamuiru. At paragraph 3 she states that "I am advised by my Advocates on record, which advice I verily believe to be true, that the said Application as drawn is fatally defective and does not lie and the Orders sought by the Applicant cannot issue to him and that the Orders sought will amount to this Honourable Court re-writing the will of the Deceased. She also says that The Applicant deliberately left me out in the entire process of obtaining the Grant of Letters of Administration to my late husband's estate and having the same confirmed I plan to apply to the High Court as soon as possible for revocation of the Grant issued to the Applicant in my absence.

7. The Summons for Revocation of Grant was not filed until 15th July 2015, under a Certificate of Urgency of the same day filed in the High Court. Directions were given for the file from the Lower Court to be sent up. It was and it has been considered at length.

8. Application seeks orders that:

(a) this Summons be certified as extremely urgent and deserving to be heard on a priority basis and service thereof be dispensed with in the first instance.

(2) pending the interpartes hearing and determination of this Summons this Honourable Court be pleased to order that all proceedings in Kiambu Succession Cause No. 130 of 2000 and especially the hearing of the Summons dated 19th February 2015 in the said Court be stayed

(3) pending the inter-partes (sic) hearing and determination of this Summons the confirmed grant of letters of administration issued to the respondent herein in respect of the estate of David Kamuiru Muuru (deceased) on 2nd December 2014 be suspended.

(4) That pending the hearing and determination of this cause the Honourable Court be pleased to restrain the Administrator/respondent herein either by himself his recognised agents and/or servants from selling, intermeddling, disposingH Honourable Court be pleased to restrain the Administrator/respondent herein eitehr by himsel, transferring, wasting or interfering in any manner whatsoever with the status of Title No Kiamba/Kihara/328 as it is on the ground.

(5) this Honourable Court be pleased if it so deems fit to order that the file in **Kiambu Succession Cause No 130 of 2000** be availed before it

(6) the confirmed Grant of Letters of Administration isseud to the respondent on 2nd December 2014 herein be revoked and/or annulled. Etc..”

9. As is readily apparent, the Supporting Affidavit goes to great length about a version of historical events that varies from previous affidavits and the contemporaneous documents. Notwithstanding, the suggestion from revocation came from a judicial officer of the lower court, it is unclear what it will achieve save for delay. The uncontested facts are clear. The deceased was survived by two widows. The deceased left behind a piece of land and a share certificate. The grant provided for equal division between the two houses. That is the equitable distribution taking into account the size of the land and the customary law of the parties. There has been inordinate delay in every sense as noted by the lower court. The only compliant that holds water is that a surveyor has not attended the land. This is said in the context that various members of the family have had their homes on particular pieces of land. In the circumstances, asking them to uproot their lives at this stage would be prejudicial. However, there is a distinct difference between the amount of land and its position. The only real complaint against the confirmation of grant and distribution is that a surveyor was not appointed to consider the property its division and the existing structures and usage. It is inevitable that there will be some disruption but that should be kept to the minimum. However, the Application as framed is not substantiated. The interests of justice require that there is finality in this long running matter.

10. However paragraph 40 is worthy of particular consideration. The Deponent states; *“THAT I am informed by my said Advocates on record, which information I verily believe to be true, that the grant issued to the Respondent is improper and it ought to be revoked for the following reasons:*

i) The Grant does not reflect the wishes of the deceased as he had left on the ground

ii) I was never given a chance to give my side of the story as pertains the position on the ground as left by the Deceased and it was out of no fault of my own that the suit proceeded in my absence. Indeed no oral evidence was tendered as had earlier been ordered earlier by the Court.

iii) The Grant was drawn amounts to altering and/or rewriting the Deceased’s will without any reason and/or justification for doing so whatsoever.

iv) The directions given by the Court at Kiambu that Succession Cause Number 120 of 2000 proceeds by way of viva voce evidence was never reviewed, varied and/or set aside. The fact that the Court at Kiambu did not take any oral evidence from any side at all was therefore irregular and improper.

v) The process that culminated in the issuance and confirmation of the grant was irregular and improper and thus the resultant Grant was irregular and improper

vi) Even if I was never present in Court, the Kiambu Court out not to have disregarded the Affidavit that I had filed and was properly on record. If the Court had considered that Affidavit it would have arrived at a different conclusion from the one it did.

vii) Each house has already accepted and settled on the protion of land allocated to them by the Deceased and any change will fudnmentally alter the position on the ground. This would thereby go against the wishes of the Deceased causing eternal acrimony and chaos in the family.

viii) It will be greatly prejudicial and unfair if the fate of the Deceased's property is decided without any Court having interrogated the facts as they are on the ground."

13. In the circumstances, it is ordered that:

- (1) The Application for revocation is dismissed with costs;
- (2) The two houses to agree to a single surveyor to attend the Property and report to the Court on (1) existing structures and land use. Such appointment to be made within 28 days.
- (3) In the event that there is no agreement, the Parties, each to file a list of two Surveyors, from which the Court will appoint a single surveyor.
- (4) Any distribution and/or sub-division and/or registration of the Property is stayed pending the Report of the Surveyor.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED AND DELIVERED AT NAIROBI THIS 6th DAY OF March 2017

In the presence of :

Wangechi and James Court Assistants

Evans Gita Kamiuru – Respondent

No Appearance - Applicant