



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS SUCCESSION CAUSE NO. 159 OF 2015

In the Matter of the Estate of LIVINGSTONE M'MUNGANIA (DECEASED)

MBOGORI BAICHU PETITIONER

JUDGMENT

1. In his Petition dated 29th May, 2015 brought under Section 54 of the Law of Succession Act, Mbogori Bhaichu (hereinafter “the Petitioner”) petitioned that Letters of Administration ad litem to the estate of the late Livingstone M’Mungania (“the deceased”) be issued to DAVID GITONGA M’MUNGANIA (“the Respondent”). The letters sought were limited to allow the Respondent represent the deceased in a suit identified as Meru HCCC No. 71 of 1995 (formerly Nyeri HCCC No. 60 of 1987) (hereinafter “the said suit”).

2. The Petitioner alleged that the deceased was a defendant in the said suit in which the Petitioner is the Plaintiff. That he had cited the deceased’s spouse in Meru High Court Miscellaneous Succession Cause No. 71 of 2013 and the Respondent in Meru High Court Miscellaneous Succession Cause No. 455 of 2008 to take up representation but they were unable or were unwilling to act.

3. The Petition was supported by the Affidavit of the Petitioner sworn on 29th May, 2015. He deponed that the deceased died in Meru in October, 2006; that the Petitioner had previously sought to cite the widow of the deceased and the Respondent as aforesaid but had been unsuccessful. That it was imperative that a representative of the deceased be appointed for the pending suit.

4. The Respondent opposed the Petition though his Replying Affidavit sworn on 20th August, 2015. He contended that this was the fourth citation against him and the widow of the deceased by the Petitioner. He gave the particulars of the previous citations as:-

(a) Meru High Court Miscellaneous Application No. 133 of 2007.

(b) Meru High Court Succession Cause No. 455 of 2008.

(c) Meru High Court Succession Cause No. 71 of 2013.

5. The Respondent contended that both Succession Application No. 133 of 2007 and Succession Cause No. 455 of 2008 were dismissed after inter partes hearing; that Succession Cause No. 71 of 2013 was still pending. He further contended that since the deceased had been dead for over nine (9) years, the alleged suit had abated by operation of law. The Respondent exhibited pleadings in the Miscellaneous Succession Cause Nos. 133 and High Court Succession Cause No. 71 aforesaid.

6. The Petition was heard by way of written submissions. Before writing the judgment, the Court made a

ruling on 30th March, 2017 on the following terms:-

“3. The Petition was heard by way of written submissions that were filed on 10th and 14th March, respectively. On retiring to write the judgment, I noticed two issues. Firstly, the Petitioner did not exhibit the pleadings in Meru HCCC No. 71 of 1995 to prove that that suit actually exists; secondly, the Respondent did not produce the ruling or proceedings in Meru Miscellaneous Succession Cause No. 133 of 2007 to show that those proceedings were actually dismissed. He only exhibited the Chamber Summons dated 9th August, 2007 and an application for execution of decree filed on 25th August, 2015.

4. I make this ruling well aware of the provisions of Sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya. As it stands, the record shows that the Petitioner may have some right under Section 54 of the Law of Succession Act, to bring the Petition but due to failure to produce the documents I have alluded to, the same cannot be properly discerned. On the other hand, the Respondent likewise seems to have had some rights enure to him on the alleged basis of the principle of res-judicata. However, the same are not clear in the absence of the ruling in Meru High Court Miscellaneous Succession cause No. 133 of 2007. If this Court proceeds to write a judgment on the basis of the material on record, the same would be inconclusive due to the missing material. In my view, that would be a decision based on technicality which I believe Article 159 (2) (d) of the Constitution of Kenya frowns upon.

5. ...

6. Accordingly, under Section 47 of the Law of Succession Act Cap 160 of the Laws of Kenya and Rule 73 of the Probate and Administration Rules, I direct that the Petitioner and the Respondent to supply this Court the aforesaid material by way of Supplementary Affidavits to be filed and served within 7 days of today without fail. Judgment in this matter will now be delivered on 4th May, 2017 to take into consideration the said material. In default of the parties complying with these directions a judgment will be delivered notwithstanding the aforesaid deficiencies. It is so ordered.”

7. Despite expressing the said sentiments and making the aforesaid directions, neither the Petitioner nor the Respondent complied with the same. However, on 19th April, 2017, well outside the prescribed time, the Petitioner filed a Supplementary Affidavit wherein he exhibited the Chamber Summons application in Miscellaneous Succession Cause no. 133 of 2007 and the Citations in High Court Succession Application No. 455 of 2008 and High Court Succession Cause No. 71 of 2013, respectively. Although filed out of time, I nevertheless looked at that Supplementary Affidavit and considered the same when preparing this judgment. I have also considered the submissions of Counsel filed on 10th and 14th March, 2017 respectively.

8. Having considered the Affidavits on record and the written submissions, the issue for determination is whether the Petitioner has established a case to warrant the granting of prayers sought.

9. Section 54 of the Law of Succession Act, Cap 160 provides:

“54. A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule of this Act.”

The said provision does not impose any condition on to whom the limited grant is to be issued. That however, does not exonerate an Applicant from satisfying the Court that he is entitled to such limited grant. In the present case, the Petitioner contends that he is a Plaintiff in Meru HCCC No. 71 of 1995 wherein the deceased was a defendant; that the deceased having passed on, a representative of his estate needs to be appointed to defend that suit.

10. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya provides:-

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

11. It is clear that the burden of proof in any claim lies on the party who alleges. In the present case, the Petitioner is supposed to prove that there was and still is in existence a suit named Meru HCCC No. 71 of 1995; that he together with the deceased were or are parties in that suit; that even after the deceased passed on the cause of action against him subsists. In its ruling of 30th March, 2017, this Court wondered how it could establish the existence of the said suit without a Plaint or any pleading thereof being exhibited. It gave the Petitioner time to produce at least a copy of the Plaint which would act as proof of the existence of the alleged suit and the parties thereto. The plaint would also have disclosed the nature of the case the deceased was facing in that case or whether the cause of action survived him.

12. Despite being given that opportunity, the Petitioner failed to file the Supplementary Affidavit within the time specified and even when he filed it out of time, he failed to produce any pleading relating to the alleged suit. He produced documents which are completely unrelated to the said suit. In this regard, there is no proof that Meru HCCC No. 71 of 1995 exists or who the parties therein are. There is also no proof whether the deceased was actually a defendant therein and if so, whether the claim against him survived him. To that extent, the Petitioner has failed to prove on a balance of probability that he is entitled to the orders sought in the Petition.

13. One other thing, even if the Petitioner had proved the existence of the said Meru HCCC No. 71 of 1995, he still had to show this Court that the orders would not be made in vain. The deceased died on October, 2006. The present Petition was filed nine (9) years after his demise. It is trite that a suit abates after one (1) year of a party passing on. That period can only be extended for a limited period and for good reasons. In the present case, there were no reasons that were adduced why there was a delay of nine (9) years in seeking to appoint the Respondent as the representative.

14. For the foregoing reasons, the Petition is unmeritorious. The same is dismissed. I make no order as to costs as the Respondent failed to file the Further Affidavit as directed on 30th March, 2017.

It is so decreed.

DATED AND DELIVERED AT MERU THIS 4TH DAY OF MAY, 2017.

A. MABEYA

JUDGE

04/05/2017