

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1178 OF 1997

IN THE MATTER OF THE ESTATE OF MUHORO GIKARU (DECEASED)

JUDGMENT

1. On 23rd May 2014, I delivered a ruling on a confirmation application dated 11th June 2013. It had been brought at the instance of Rahab Rakeri Wanjiku, a widow of one the sons of the deceased and an administrator of the estate of the deceased. The deceased had been survived by three sons. The administrator proposed that slightly over half of the estate was to devolve upon her on behalf of her late husband's estate, while the remaining part was to be shared equally by her two brothers in law. She argued that the deceased had left instructions that his estate was to be shared out in that manner. The deceased had died in 1966 or thereabouts. After considering everything, I directed that the estate be shared out equally between the three sons of the deceased, that is as between the applicant and her two brothers in law.

2. The applicant in that application was unhappy with the said ruling. She filed an application dated 22nd September 2014, seeking revocation of the grant made to her and one of her brothers in law, Evanson Muhoro. After perusing through her application it has become clear to me that the said application, which is purported to be anchored on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, cannot of the sort envisaged by that law. Section 76 gives the court discretion to revoke a grant where the same was obtained fraudulently, or through concealment of matter from the court or sheer misrepresentation. Or where there are problems with administration, such as where the administrator fails to apply for confirmation of grant within one year or fails to administer the estate diligently or fails to render accounts when required to. Or where the grant has become useless or inoperative due to certain circumstances, such as the death of a sole administrator. An application for revocation of grant can be mounted only on the said grounds, and no other.

3. The application dated 22nd September 2014 is not premised on the grounds set out in section 76 of the Act. It is therefore not a proper application for revocation of grant. From the affidavit of the applicant, her oral testimony and the sentiments made when the court visited the property, it is clear that she is dissatisfied with the way the estate was distributed by the court. She complains that the court in arriving at the ruling of 23rd May 2014 did not consider her affidavits, did not take her oral evidence into account, the material placed before the court by counsel who submitted orally at the hearing was false, the distribution was contrary to the wishes of the deceased who had already subdivided the land and that each of the beneficiaries lived on their land allocated to them by the deceased.

4. From the material presented in the application and affidavits and oral testimony of the applicant, it is clear to me that the applicant is prosecuting and presenting an appeal against the orders that I made on 23rd May 2014. An application for revocation is not in the same footing with an appeal. A party who is unhappy with the manner an estate has been distributed does not have the option of seeking revocation of the grant, but rather they should appeal against the said order on distribution. I cannot surely sit on appeal to my own decision.

5. The build up to the distribution started on 8th May 2013 when the applicant and Evanson Muhoro were appointed by Kimaru J, by consent, as administrators of the estate. She was specifically directed, to file for confirmation of her grant, with Evanson Muhoro being directed to file an affidavit of protest, if he was so minded. Thereafter, it was directed on 8th October 2013 that distribution would be undertaken by the court by counsel making oral submissions. The oral submissions were made on 25th November 2013,

followed by the ruling on 23rd May 2014. The applicant was all this while represented by Miss Kinyanjui; she cannot therefore express surprise that oral evidence was not taken, as those were the directions given by the court. Her advocate should have proposed a different mode of disposal if she had instructions to have the matter handled otherwise.

6. The submissions that Miss Kinyanjui made on 25th November 2013 were in line with what was in the applicant's affidavit sworn in support of the application for confirmation of the grant, in the instant application and the oral testimony she gave on 30th July 2017, it cannot therefore be said that Miss Kinyanjui presented a distorted position from that given to her by the applicant. Miss Kinyanjui submitted that the deceased had distributed his estate before he died. I was not convinced, and was more persuaded by the position stated by Mr. Kamonde in the same session.

7. I find it curious that the applicant seeks to have her own grant revoked.

8. I think I have said enough. I cannot sit on appeal with respect to my own decision. Ideally, the applicant should have moved the Court of Appeal appropriately once she became aggrieved by my orders of 23rd May 2014. The application dated 22nd September 2014 turns on the same facts and issues as that dated 11th June 2013. These matters are clearly *res judicata*. The applicant is no doubt seeking to have a second bite at the cherry. There is no merit in the application. I shall accordingly dismiss the same with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 14TH DAY OF JULY, 2017.

W. MUSYOKA

JUDGE