



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO.454 OF 2008

IN THE MATTER OF THE ESTATE OF M'MBUI M'IMANYARA (DECEASED)

STANLEY GITONGA MBIJIWE.....PETITIONER

CHARLES MBIJIWEM'MBUI.....CROSS PETITIONER

JUDGMENT

Citation was issued

[1] I note that, in the Ruling dated 3rd December 2009, this court (Kasango J) the court dismissed an application made by way of Summons dated 8th April 2009 solely on the ground that the said application was incompetent for having failed to follow the law as per the Law of Succession Act, i.e. Rule 17(1) of the Probate and Administration Rules which requires objection proceedings to be commence by way of an objection in Form 76 or 77. The court also directed the Registry to gazette the petition filed by the Petitioner. The petition was gazetted 30th April 2010 calling for objections to the petition as prescribed in law. The Cross-petitioner filed his objection in the prescribed form on 21st May 2010. The cross-petitioner also filed answer to petition and a cross-petition for a grant of letters of administration intestate of the estate of the deceased. The major grounds of the objection, the answer to and the cross petition are:-

(a) That the he is the only son of the deceased;

(b) That the Petitioner is not a beneficiary of the estate because he is the son of the cross-petitioner and therefore, the grandson of the deceased. Accordingly, as the cross-petitioner is still living, the petitioner has no locus to apply for grant of representation of the estate.

(c) That in any case, the petitioner is not of equal or greater priority but of a lesser priority to the cross-petitioner in matters of succession of the estate in question. Despite that deficiency, the petitioner neither cited nor procured the consent of all beneficiaries or persons with priority in applying for grant of letters of administration of the estate.

[2] Makau J directed that parties shall file submissions on the objection. Counsels were allowed sufficient time to file their submissions which they did. The Objector filed his submissions and essentially amplified the aabove grounds of objection. The Petitioner also filed his terse submissions and emphasized two things; (1) that the objector has raised the very grounds he raised in his application dated 8th April 2009, which were considered by the court and a decision was made; and (2) that the estate property is a gift that was granted to him by the deceased- a fact that is within the knowledge of the objector.

[3] I have carefully considered the rival submissions filed by the parties herein. I have also

considered the facts as they emerge from the filings by the parties, and of course the law; and I take the following view of the matter. The application dated 8th April 2009 was dismissed for being incompetent. It was not decided on merit. Therefore, there is nothing which prevents the objector from raising similar grounds in a subsequent application which is competent having been filed properly under the law. Once, the application for a grant of letters of administration was gazetted, the objector had the right to file a proper objection thereto. I will therefore consider the merits of the grounds set forth by the parties herein.

[4] It is not in doubt that the Petitioner is the son of the objector. It is also not in doubt that the objector is the son of the deceased, and the objector is still living. The petitioner is, therefore, the grandson of the deceased. There is no surviving spouse in this cause. But, the deceased left children surviving him namely:-

- (i) Charles Mbijiwe M'Mbui.....son
- (ii) Evangeline Kaburo.....daughter
- (iii) Monicah Regeria.....daughter
- (iv) Margaret Mwari.....daughter

Accordingly, in light of the above, and going by Part V of the Law of Succession Act, all the arguments by the objector; that he is the son of the deceased and a beneficiary of the estate; that the petitioner is not a beneficiary of the estate; that the petitioner does not stand in equal or greater but lesser priority in relation to the estate; that the petitioner neither cited nor obtained consents of all the people with priority over him for purposes of the petition; make a lot of legal sense. Similarly, the Petitioner has urged grounds which merit a hearing, especially the fact that he alleges that the land in question is a gift that was given to him by the deceased during his life time- gift *intervivos*. I agree with the Petitioner that the fact of gift *inter vivos* which is the basis of his claim deserves to be unraveled upon hearing of *viva voce* evidence. However, that notwithstanding, one thing is absolutely clear from the record: that he did not obtain the consents of all persons with equal or higher priority when applying for letters of administration. Even in a petition that is filed by the citee after a citation, consents of all persons who enjoy equal or higher priority under Part V of the Law of Succession Act must be obtained especially where the citor was only one of the persons with equal or higher priority to administer the estate of the deceased. However, I think the consent by the defaulting citor may be unnecessary if he had failed to take out letters of administration upon being served with a citation. But in this case there were other persons ranking higher than the petitioner and from the record I do not see any consents which were sought from them or dispensed with. Such persons, if they have not renounced their right to apply, may, subject to section 56(b) of the Law of Succession Act, apply subsequently to be enjoined as administrators of the estate. As such, I will treat this case under section 66 of the Law of Succession Act and act in the best interest of all persons concerned, and make a grant of letters of administration to both the Petitioner and the Objector as joint administrators of the estate of the deceased. I have said this before and I will repeat; that an administrator is merely a personal representative of the deceased with huge responsibilities in law to administer the estate in accordance with the law. He need not be a beneficiary. Therefore, I want to disabuse the notion that that, by being appointed an administrator you enjoy a vantage position in the estate in respect of entitlement or that you become the dominant or sole beneficiary of the estate. With the peculiar facts of this case, I direct that the joint administrators shall apply within thirty days either jointly or severally for confirmation of the grant herein. This route will enable the court to resolve the other issue of entitlement to the land in question once and for all- at least in my jurisdiction. This being a succession cause, I will not make any order as to costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 1st day of February 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Mutegi advocate for Mr. Gitari advocate for petitioner

Mr. Mutegi advocate for Mr. Kaumbi advocate for objector

F. GIKONYO

JUDGE