



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 418 OF 2007

IN THE MATTER OF THE ESTATE OF HENRY KARUORO MANGURE alias

HENRY KARUORO alias KARUORO MANGURE (DECEASED)

BEATRICE MUTHONI KARUORO.....APPLICANT

VERSUS

GIDRAPH MWANIKI KARUORO.....RESPONDENT

RULING

1. This ruling is in respect of a preliminary objection raised by counsel for Gidraph Mwaniki Karuoro, the respondent herein. According to counsel, the summons that is pending before the court for revocation of the grant under section 76 of the Law of Succession Act (Cap 160) Laws of Kenya is not capable of being disposed of by way of a preliminary objection.

2. The grounds upon which the revocation is being sought in terms of the summons of 22nd October 2015 are as follows:

- a. That the grant of letters of administration was issued on 18.09.2007 to the respondent and confirmed on 16.10.08.
- b. That since then, the respondent has not taken any steps to administer the estate.
- c. That it is now over six years yet the estate has not been distributed.
- d. That the respondent is very uncooperative and has refused to listen to other beneficiaries of the aforementioned estate as he wants to work alone.
- e. That the respondent has failed in his responsibilities as the administrator.
- f. That all the beneficiaries have agreed to have the current administrator replaced by the applicant.
- g. The summons for revocation or annulment of the grant is based on the supporting affidavit of Beatrice Muthoni Karuoro. According to her affidavit, the respondent is the administrator of the estate and he is their brother. She has further stated that in her affidavit evidence that the respondent has not taken any steps to have the said estate distributed, which is now well over six years. More importantly, she has also stated that the respondent has failed in his duties as an administrator and that he does not cooperate with the other beneficiaries. She has therefore applied

to the court to have the grant revoked and a fresh one be issued to her to enable her proceed with the administration of the estate.

h. Her application is opposed by Gidraph Mwaniki Karuoro on the ground that the application lacks merit, is misconceived, is vexatious, is frivolous and is otherwise an abuse of the process of the court. In his replying affidavit, the respondent has stated that he has been away in South Sudan and returned to Kenya in 2014. He has also added that it is her sister (Ann Wangui) and himself who have solely financed the whole succession process. Furthermore, he has stated that the rest of the family members have failed, refused and/or neglected to contribute to the succession process. More importantly, he has stated that when they called the other family members to contribute money for the survey of the succession land, the applicant together with another beneficiary (Josphat Maina Karuoro) unjustifiably restricted the suit property in order to frustrate the whole succession process.

i. According to him, the distribution of the estate has been partially implemented. In particular, he has stated that he applied and obtained consent from the Land Control Board for the subdivision of the land. Furthermore, he has also stated that he applied for the scheme plan which was duly approved by the necessary authorities, in respect of which he has annexed annex marked "GMKIIB".

j. It is clear that there is conflict in the affidavit evidence produced by the rival parties. The only way to resolve this issue would have been through oral evidence (*viva voce* evidence). It therefore seems to me that this matter cannot be disposed of by way of a preliminary objection.

k. The law in this regard has been clearly set out in the case of ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd (1969) EA 696 at 700***. In that case, the Court of Appeal stated that a preliminary objection consists of a point of law which has been pleaded and which if argued as such may dispose of the suit. That court went further to give examples of what amounts to a preliminary objection. The examples given included an objection to the jurisdiction of the court, a plea of limitation, or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration. Furthermore, the purpose of raising a preliminary objection is to seek expeditious disposal of the suit. According to ***N.A.S Services Ltd v. A.G (1959) EA 53***, the point of law that is being raised should be capable of deciding the disputing issues in one way or the other. The issues that give rise to a preliminary objection may arise from the pleadings but it should not be one which is subject to evidentiary proof. If evidence is needed to prove a point that gives rise to a preliminary objection, that point cannot be the subject of a preliminary objection.

l. The point taken by the applicant is that there has been delay of over 6 years and that the respondent has been uncooperative. On the other hand, the respondent has asserted in his affidavit evidence that he was in South Sudan until 2014. He has also asserted that he applied and obtained consent of the Land Control Board to subdivide the land. The issue as to whether there has been unexplained delay is a matter of fact which has to be proved by *viva voce* evidence. He has explained that for those six years he has taken certain procedural steps to implement the distribution of the estate. There is yet another issue raised by the applicant and that is that the respondent has been uncooperative. Again this is a matter that can only be resolved by oral evidence to be tendered by the applicant and the respondent together with their witnesses.

m. In the circumstances, this is not a proper case for disposal by way of a preliminary objection. The reason being that there is conflict in the affidavit evidence of the parties. It therefore follows that the application is therefore not warranted.

n. The upshot is that this application is hereby dismissed with no orders as to costs, as the parties are members of the same family.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this 12th day of April **2016**

In the presence of Mr Njru for the Applicant and in the absence of the Respondent

Court clerk Njue

J.M. BWONWONGA

JUDGE

12/04/2016