



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

PROBATE AND ADMINISTRATION CAUSE NO. 212 OF 2012

IN THE MATTER OF THE ESTATE OF THE LATE STEPHANO KAMONDE.....
DECEASED

AND

MARY WANJIKU KAMONDE.....APPLICANT

VERSUS

DANIEL MURIITHI KAMONDE.....RESPONDENT

RULING

1. **MARY WANJIKU KAMONDE**, the applicant herein has through a Chamber Summons dated 17th June, 2015 applied for the following orders from this court:

- i. *That service of the application be dispensed with in the first instance.*
- ii. *That this honourable court do stay the application dated 11th June, 2015 pending the determination of this application.*
- iii. *That this court do set aside all orders issued in this matter after 24th May, 2012 and all applications be served and be heard interpartes.*
- iv. *That sub-division of the land parcel No. MUTIRA/KAGUYU/281 be cancelled and resultant title deeds be cancelled as they were issued irregularly without involving the applicant.*
- v. *That this court do award the 1st applicant half acre that was not distributed by the court.*
- vi. *Costs be provided.*

2. The applicant has based his prayers on the following grounds namely:-

- i. *That the estate was distributed to people who are deceased and that the respondent has been misleading the court.*
- ii. *That the grant was issued secretly without involving the applicants.*
- iii. *That ½ acre of the estate was not distributed.*
- iv. *That the applicant may be evicted.*
- v. *That the applicant has no means of livelihood and has debts which were not taken into consideration.*
- vi. *That there was concealment in the summons for confirmation of grant.*
- vii. *That the applicant's life is in danger.*

3. The applicant has sworn an affidavit in support sworn on 17th June, 2015 where she has deposed that the property comprised in the estate was originally **MUTIRA/KAGUYU/281** and that the appellate court in Nyeri appeal No. 348 of 2005 granted her life interest on the estate. She has accused the respondent for proceeding in the succession cause secretly without involving her. She has cited an incident on 1st November, 2015 when she alleges that some people under instructions of the respondent attempted to evict her from a semi-permanent dwelling house. She has further stated that the sub-division of the estate which have resulted in new numbers was done without involving her, putting her interests at risk of elimination.
4. The applicant has also deposed that she has suffered since the demise of her husband (the deceased in this cause) and that she should not be evicted because she is entitled to life's interest on the estate and that she has been occupying 2 acres in the estate where she has tea bushes while the respondent occupies ¼ of an acre. She has contended that Ruben Warui and Fredrick Karingi the beneficiaries in the estate are deceased and that the Executive Officer should not have executed documents on their behalf without substitution.
5. The respondent Daniel Muriithi Kamonde has opposed this application vide a replying affidavit sworn on 23rd June, 2015. The respondent has faulted the application for seeking blanket orders without specifics or basis. In his view, the applicant withdrew her summons for revocation of grant dated 20th November, 2012 on 19th November, 2014 which gave her the feet or the grounds upon which to stand and make this application. The orders being sought here in his view are being sought without a substantive motion and as such the applicant lacks *locus standi* to seek for the orders.
6. The respondent through Mr. Ngangah Advocate further submitted that the orders being sought are not available to the applicant and accused the 1st applicant for bringing this application as a way of stopping the respondent's own application dated 11th June, 2015 where he has sought for security to survey the property comprising the estate.
7. The respondent has deposed that the estate has been distributed fully and denied that half an acre remained undistributed. He has accused the applicant of irregularly selling part of the estate to unsuspecting 3rd party – James Mwangi Kaiguri when she had no capacity to do so. The respondent has deposed further that it is the illegal purchasers who are causing trouble by denying the respondent access to the estate as ordered by court.
8. The respondent has further submitted that the Court of Appeal decision in Nyeri settled interests of parties in this cause when it adopted the decision of the lower court which had ordered that the estate be divided into 2 acres each among the 3 beneficiaries and the 1st applicant to have life interest as the surviving widow to the deceased. In his view the lower court just issued orders as per the decision of the Court of Appeal and the applicant could not allege prejudice in any way. The Respondent has denied not involving the 1st applicant pointing out that the 1st applicant has sworn an affidavit stating that she has filed a land case at Environment and land Court due to this cause and therefore she cannot claim ignorance of what was going on. It was also argued that the application dated 12th June, 2012 was made after the Court of Appeal decision delivered on 24th May, 2012.
9. The application was also opposed by Macharia for the interested party who also faulted the application for being vague particularly in prayer 3 of the application because in her view the orders being sought to be set aside should be specific in order to enable the respondent and the interested party respond adequately.
10. Mr. Macharia further contended that the sub-division sought to be reversed was as a result of a confirmed grant and in his view a party who wishes to challenge a confirmed grant can only do so by seeking for its revocation but not through a blanket order aimed at going round a provision of the law. Mr. Macharia submitted that in the absence of a proper application to revoke the grant the prayers sought here cannot stand especially in the face of the decision of the Court of Appeal.
11. The interested party denied the 1st applicant's contention that her life interests had not been recognized in the subsequent sub-division saying that her interests are recognized as per annexure "MWK1" exhibited by the 1st applicant.
12. I have considered this application and the response made by both the respondent and the interest party's counsel. The application before court is made in the names of two persons **Mary**

Wanjiku Kamonde the 1st applicant and the widow of the deceased herein. The 2nd applicant **James Mwangi Kaiguri** has not been described and I find his participation in this application misplaced as he lacks any legal basis to be involved in this application.

13. I have looked at the grounds upon which the prayers have been sought and I must say from onset that the grounds listed above are grounds that can be invoked by a party seeking to revoke a grant under the provisions of **Section 76** of the **Law of Succession Act**. When the applicant states that the grant was inadvertently issued by mistake to deceased persons or that there was concealment of material facts, she is in essence asking this Court to invoke **Section 76** of the Act and revoke the grant herein. This however, is not tenable in view of the fact that this matter has been litigated upto the Court of Appeal in Nyeri and a decision made on how the estate of the late STEPHANO KAMONDE KUBUTA (deceased) was to be distributed. I have looked at the decision of the Court of Appeal Nyeri vide Civil Appeal No. 348 of 2005 between the 1st applicant herein and the respondent – Daniel Muriithi Kamonde – the appellant in the Court of Appeal in Nyeri. The appellate court overturned or set aside the decision of this court which had granted Mary Wanjiku Kamonde, the widow and the respondent in the appeal a share in the estate and instead upheld the subordinate court’s decision that had made the following decision. That the estate of the late Stephano Kamonde Kubuta comprised in MUTIRA/KAGUNYU/281 measuring approximately 6 acres be distributed as follows:

1. Frederick Karingi Kamonde -2 acres.
2. Ruben Warui Kamonde - 2 acres.
3. Daniel Muriithi Kamonde - 2 acres

Mary Wanjiku Kamonde was to get life interest over the entire parcel of land. That is how the grant was confirmed by the subordinate court and upheld by the Court of Appeal.

14. The 1st applicant made attempts to revoke the grant vide Summons for Revocation of Grant dated 20th November, 2012 but perhaps on advise about the futility of the exercise withdrew the application on 19th November, 2014. This Court could not be asked to overturn a decision of the Court of Appeal and in my considered view once the applicant withdrew her substantive application, she lacked further ground or *locus* to ask this Court to grant the prayers sought in this application. I agree with the respondent that the applicant cannot sustain the prayers sought without a substantive motion. The prayers sought are pegged on a pendency of a substantive issue in this court but there is nothing substantive pending. The only application pending is the application dated 11th June, 2015 by the respondent which application in essence is seeking to execute the judgment of the subordinate court.

15. I also find that prayer 3 of the application is too general and unspecific. If the applicant is aggrieved by any specific order issued by this court or the subordinate court, she should specifically point out the order and move the court appropriately for a remedy known in law but she cannot seek a blanket relief to set aside unspecified orders. That would amount to abuse of court process and cannot be allowed.

16. The prayers sought under prayer 3 and 4 are unsustainable in view of clear decision of the appellate court. The applicant cannot ask this Court to set aside a decision of the appellate court. This Court lacks power and jurisdiction to do so and the applicant knows that because she is represented. The question of ½ acre of the estate remaining unadministered in my view cannot arise because there is no survey work conducted on the ground that reveals that the property comprising the estates measures more than what is reflected on the title and even if it was to be established I do not think that the 1st applicant can claim anything more than life interest on the same.

17. The application has however, posed one issue which I consider important to dwell into in order to bring this matter to rest. This is in relation to the life interest of the 1st applicant and what constitutes the same. The 1st applicant was granted life interest in the estate in this cause and all the parties in this cause are in agreement to this fact. So what does life interest mean? According to Black’s Law Dictionary 9th Edition, life interest means **“an interest in real or personal property that last for the life of the holder or interest that is measured by the duration of the**

holder's life or another named person's life." This means that the 1st applicant's interest on the estate herein will last for the duration of her life. The **Law of Succession Act** does not define what constitutes life interest but **Section 35 (1)** provides that a surviving spouse shall be entitled to;

"(a) A personal and household effects of the deceased absolutely and,

(b) a life interest in the whole residue of the net intestate estate."

The net intestate estate is what remains after all the debts, liabilities and estate duty have been paid. The law also provides that the surviving spouse's life interest shall be extinguished if she remarries. There is no evidence that the 1st applicant herein has remarried so her interests in the estate subsists.

18. The respondent alleged that the 1st applicant has purportedly sold part of the estate to a 3rd party and the 2nd applicant specifically. The 1st applicant has not denied the allegation but whatever the case the position of the law is clear. A surviving spouse enjoying a life interest cannot sell interests held unless he has permission from her children and/or with the authority of the court. **Section 37** of the Act provides as follows:-

"A surviving spouse entitled to a life interest under the provisions of Sections 35 or 36, with the consent of all co-trustees and all children of full age or with the consent of the court, may, during the period of the life interest sell any of the property subject to that interest if it is necessary for his own maintenance:

Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court."

This therefore shows that any purported sale of the estate herein by the 1st applicant is a nullity and void. This is because when a surviving spouse holds life interests over a property such as in this cause, the property does not pass to her absolutely and it cannot be registered in her name absolutely since she only enjoys a life interests and effectively only holds it in trust for the children and other heirs. She can utilize the estate by ploughing and can even lease it out if she is unable to plough to enable her get some funds for upkeep and maintenance but she cannot sell it unless she gets express authority from the other beneficiaries and this Court.

19. It is also important to note that so long as the surviving spouse is still enjoying the life interest on the estate, the estate cannot be subject to distribution. In the case of **Tau Katungi -VS- Margrethe Thorning Katungi & Anor [2014] eKLR** made the following observation relevant to this cause:

"The effect (of Section 35) is that the surviving spouse enjoys rights over the property and at his or her death the property passes to other persons. In the context of Section 35, the widow is entitled to enjoy rights over the residue of the net intestate estate that is after taking away the chattels and settlement of liabilities, during her lifetime with the property passing to the children upon her demise or remarriage.....The effect of Section 35(1) is that the children of the deceased are not entitled to access the net intestate so long as there is surviving spouse. The children's right to the property crystallises upon the determination of the life interest following the death of the life interest holder or her remarriage....."

20. The above position was also held in the case of the Estate of **John Musambayi Katumanga (deceased) [2014] eKLR** where the court made the following observations:-

"Section 35 of the Law of Succession Act caters for a situation where the deceased is survived by a spouse and children. The surviving spouse is entitled to the deceased's

chattels and a life interest on the residue and upon the determination of the life interest, the estate should be shared equally between all the children.”

The court went further and observed that ideally the estate ought not to be distributed during the subsistence of life interests. Also see the case of **Bod Njoroge Ngarama -VS- Mary Wanjiru Ngarama (2014) eKLR.**

21. In the present case before this court, the respondent and the other named beneficiaries appear to be in a hurry to sub-divide the estate and have it distributed to the respective beneficiaries overlooking the interests of the 1st applicant. This Court considers such moves in the light of the law and the above cited decisions to be premature as the 1st applicant has not remarried and is alive. The decision of the subordinate court which was upheld by the Court of Appeal was that the widow would hold life interest on the entire estate meaning as things stand now she holds the property in trust of her children including the respondent herein. The widow should therefore be allowed to enjoy possession of the estate herein without any threat of eviction or dispossession. After all the property belonged to her late husband and the children should treat her with respect as their mother. She however, cannot misuse the trust bestowed upon her by law by trying to sell the estate or any part thereof to any 3rd parties save for the exceptions which I have highlighted in accordance with the law. The 2nd applicant's claim on the estate is not protected under **Section 93** of the **Law of Succession Act** unless he can establish basis for the same.

22. In the end I find no merit in the Chamber application dated 17th June, 2015. The same is dismissed but I shall make no order as to costs. I will however, direct that the 1st applicant, Mary Wanjiku Kamonde, being a surviving spouse, shall continue enjoying her life interest on the estate as per the decision of the appellate court. She will continue occupying where she has been occupying and utilizing for upkeep. The other dependants including the respondents will also continue occupying where they have been occupying and utilizing. The distribution of the estate as ordered by court shall only be done after the determination of life interests of the widow as provided by law.

Dated and delivered at Kerugoya this 11th day of July, 2016.

R. K. LIMO

JUDGE

11.7.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Ndana holding brief for Ngangah for Respondent.

Wanjiru holding brief for Maina for Interested party

Ann Thungu absent for the applicant.

COURT: Ruling signed, dated and delivered in the open court in the presence of Ndana holding brief for Ngangah for Respondent, Wanjiru holding brief for Maina for Interested party and in the absence of Anne Thungu for the applicant.

R. K. LIMO

JUDGE

11.7.2016