



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 31 OF 2001

In the Matter of the Estate of Kirima Mungania (Deceased)

SIMON KABURU.....PETITIONER/RESPONDENT

V

JANE NKUENE.....OBJECTOR/APPLICANT

RULING

Signing transfer documents in succession cause

[1] Before me is a Notice of Motion Application which is expressed to be brought under Section 3 and 3A of the Civil Procedure Act CAP 21 of the Laws of Kenya. In the application, the Applicant has sought the following orders:

- 1. That this honourable court be pleased to empower the executive officer of this honourable court to sign the necessary documents on behalf of the Petitioner to transfer L.R NO. Igoji/Kinoro/845 and plot NO. 2B Muchongomone market as ordered by this court.***
- 2. That this honourable court to order the land registrar to dispense with Title to Land Parcel No. Igoji/Kinoro/845.***
- 3. That cost of this application to be paid by the Petitioner.***

[2] The said application is premised on the following grounds:

- 1. The Petitioner has totally refused to sign the necessary forms to give effect to courts judgment on the distribution of the deceased estate.**
- 2. Despite the matter having been concluded by the court of appeal the petitioner has refused to comply with courts judgment.**

[3] Briefly the Applicant's case is that the deceased to whose estate these proceedings relate was his husband and that she filed an objection in this cause which was heard and judgment given on 24th July 2007 by Hon Justice Isaac Lenaola. In the said judgment, the court ordered that the Applicant gets Igoji/Kinoro/845 and Plot No. 2B Muchogomone market. Being dissatisfied by that judgment the Petitioner filed an application in the Court of Appeal in Nyeri for extension of time to file and serve Notice of Appeal out of time which application was dismissed on 31st October 2008. It was the Applicant's contention that the Petitioner has been very cruel to her and that he had totally refused to

cooperate with her to give effect the courts judgment on the distribution of her late husband's estate. Further, she claimed that the petitioner has refused to sign the necessary forms to have her registered as the owner of L.R Igoki/Kinoro/845 and Plot No. 2B Muchogomone Market.

[4] The Applicant also filed submissions to amplify her application and she reiterated the contents of her supporting affidavit. She submitted that the Petitioner had refused to sign the forms to facilitate distribution of the estate of the deceased claiming inter alia that he had properties on the land and that the issue of properties was not an issue for determination either in this Court or in the Court of Appeal. She stated that the Petitioner's replying affidavit dated 8th February 2014 clearly showed that he was not ready to sign the documents unless he was paid for his properties.

[5] On the other hand it was submitted for the Respondent that the application was hopelessly incompetent and a gross abuse of the court process as the same was said to be brought under Sections 3 and 3A of the Civil Procedure Act CAP21 of the Laws of Kenya which provisions do not apply to succession proceedings. In addition, the Respondent argued that it was common knowledge that not all provisions of the Civil Procedure Act and Rules are applicable in respect of succession proceedings. Consequently, the Respondent urged the court to find the application to be devoid of merit and dismiss it with costs.

DETERMINATION

[6] I have carefully considered this application and the rival submissions by the parties. It is critical that before I can determine this application I must be equipped with the correct facts. I will, therefore, set out on a preliminary plan to establish the relevant facts and the appropriate proportion of importance to attach to those facts. It is indeed not in dispute that there is a judgment given on 24th July by Lenaola J in which it was inter alia ordered that the Applicant gets Land Reference No. Igoji/Kinjoro/845 and Plot No. 2B Muchogomone Market. The Petitioner was dissatisfied with the said decision and he filed an application to the Court of appeal for extension of time to serve and file Notice of Appeal out of time, but which application was dismissed on 31st October 2008 by Githinji JA. The Petitioner was dissatisfied with the Ruling of a single Judge of Appeal and he subsequently made a reference to a full bench (Waki, Tunoi and Otieno (JJA) which also dismissed his application with costs on 12th June 2009. Without doubt, the outcome of his judicial ventures in the Court of Appeal dealt a final blow to the Petitioner's claims. Although the Respondent contended that Rule 63 (1) of the Probate and Administration Rules limits the application of the Civil Procedure Rules to Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX I do not think the citing of substantive law from the Civil Procedure Act especially on inherent jurisdiction would be fatal to the application before me. The ultimate yardstick, which is article 259(2) (d) of the Constitution, depreciated such objection into mere technicality. I should, however, state that there are sufficient provisions in the Law of Succession Act, Probate and Administration Rules, and the Constitution which support the need to serve substantive justice and allows the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. For instance see rule 73 of the Probate and Administration Rules which makes it unnecessary to resort to the Civil Procedure Rules.

[7] The preliminary hurdle has been surmounted. I now turn to the merits of the application. If matters were left to stand as they are the Applicant would be left with a judgment only on paper as she will not be able execute it. To allow such thing to happen will be sanctioning a violation of the law by a personal representative of the estate of the deceased who has been clothed with legal duty to administer the estate of the deceased to the exclusion of all others. Again, a court of law should never issue orders in vain. The judgment in this matter was delivered on 24th July 2007. This is a period of approximately nine years since the said judgment was delivered. It has certainly been a long wait for the Applicant who has not been able to enjoy the fruits of her judgment. The period consumed when the Petitioner set out for a journey to the Court of Appeal could be excused. But, any other delay coming from the Petitioner on the same reasons which he raised and failed in the Court of Appeal is untenable. I need not state that it is now a constitutional principle of justice that justice delayed is justice denied. The Petitioner has acted contrary to the law as well as the legal duties of personal representatives of the estate of the deceased enshrined in

section 83 of the Law of Succession Act. The administrator is under an obligation to give effect to the judgment of the court herein by signing all the necessary transfer and conveyancing documents for purposes of distributing the estate according to beneficial interests identified in these proceedings. Failure to do so may cause the grant issued to him to be revoked. But before I close, I insist that courts should be slow to ask the Deputy Registrar or the Executive officer to sign transfer or conveyance instruments on behalf of personal representatives of the deceased as that would encourage default by administrators who are not willing to do their duty. The best and expeditious path to follow is to revoke the grant issued to the defaulting administrator and make a grant to another person who is able, ready and willing to complete the administration of the estate. Once the power of the grant of representation is taken away, the right message of the law will be passed. But, this will depend on the circumstances of each case. As for this case before me, nine years have passed by and that is certainly a long period of time; the Applicant is yet to enjoy the fruits of her judgment. No more time should be wasted. Therefore, taking into account the totality of the circumstances of this case I find the Applicant's application dated 2nd March 2010 to be meritorious and I accordingly allow the Application in terms of prayers 1 and 2 of the application. Accordingly, I make the following specific orders:

1. *That the executive officer of this honourable court shall forthwith sign all necessary documents on behalf of the Petitioner for purposes of transfer of L.R NO. Igoji/Kinoro/845 and plot NO. 2B Muchongomone market to the Applicant in accordance with the judgment of the court herein.*
2. *That the relevant Registrar of Lands shall exercise the powers vested upon him in law and dispense with production of the original Title in respect of and effectively register transfer of Land Parcel No. Igoji/Kinoro/845 and plot NO. 2B Muchongomone market into the name of the Applicant on the basis of documents executed in accordance with order (1) above.*
3. *This being a succession matter I make no order as to costs.*

Dated, signed and delivered in open court at Meru this 12th day of July 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Gikunda advocate for Mr. B.G. Kariuki advocate for petitioner.

Mr. Anampiu advocate for objector

F. GIKONYO

JUDGE