



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 321 OF 2010

(IN THE MATTER OF THE ESTATE OF GATUNGU GUANDARU (DECEASED))

GEORGE KIRERU GATUNGU.....PETITIONER/APPLICANT

VERSUS

FRANCIS GATERE GATUNGU.....1ST RESPONDENT

GUANDARU GATUNGU.....2ND RESPONDENT

ESTHER WAMUYU PAUL.....3RD RESPONDENT

RULING

By a summons in general form dated 6th June 2014, the applicant sought to have this honourable Court expunge from the record all proceedings in this cause since 8th October, 1991 to date; he also sought to have an order to the effect that this cause proceeds in accordance with the provisions of the Law of Succession Act, Cap 160 and that the costs of the application be in the cause.

According to the affidavit he filed in support of the summons, that applicant deposed that he filed this cause on 21st March, 1991. One Regina Wanjugu (deceased) filed an objection to the grant of letters of administration but that the said objection was never heard.

On the 8th October, 1991, the court referred the matter for arbitration by the elders under the chairmanship of the District Officer, Mathira Division. The elders made their award which was subsequently adopted as the judgment of the court on 26th March, 1993.

The applicant filed an application to set aside the award but that application was rejected on 26th March, 1993.

It is now the applicant's position that the procedure for determining matters succession was not followed. According to him the objection raised by Regina Wanjugu ought to have been heard and a grant of representation thereafter made before it could eventually be confirmed. Without following this procedure, so the applicant has deposed, the proceedings are a nullity and void.

Francis Gatere Gatungu swore a replying affidavit on his own behalf and on behalf of the rest of the respondents. Mr Gatungu swore that the issue of distribution of the deceased's assets was referred to

arbitration and the award thereof was adopted as the judgment of the court on 26th March, 1993. The applicant's efforts to set aside the award were rejected. And even after he filed an appeal against the rejection, he did not follow it through but withdrew it on 31st October, 2007.

It is the respondent's view that the applicant's application is in bad faith and is only intended to circumvent the execution of the judgment entered in the cause in 1993, more so considering that the applicant has taken more than two decades to file and prosecute this application. The respondents' position is that the estate should be distributed in accordance with the judgment that is already on record.

From my study of the record in this cause, I have gathered that the deceased, whose estate this succession cause was filed, died on 31st August 1975. On 21st March, 1991, the applicant herein petitioned for the letters of administration of the deceased's intestate estate in his capacity as one of the sons of the deceased. The petition was filed in the magistrate's court as succession cause number 67 of 1991.

The petitioner named himself and seven others as the survivors of the deceased. One of these survivors, named as Regina Wanjugu and who was one of the deceased's wives, objected to the grant of representation being made to the petitioner mainly on the ground that being the surviving wife of the deceased she was better placed to be the administratrix of his estate rather than his son, the applicant herein.

On 20th September, 1991, the applicant herein filed a chamber summons in which he sought the court's determination of the heirs of the deceased. Subsequently, and more particularly on 8th October, 1991 parties entered a consent to the effect that:-

“...the matters in dispute referred for Arbitration before D.O. Mathira who will determine who are the heirs. The parties to appoint four (4) elders, two (2) by each party to assist the D.O. Award to be filed with (sic) next 90 days.”

The award was subsequently made and as far as I can gather, the elders, under the chairmanship of the District Officer, Mathira, Division, distributed the deceased's estate amongst his three houses. This award was filed in court on or about the 19th January, 1993; on that date, the court gave parties thirty days to file the objection to the award if they had any. The applicant was apparently not satisfied with the award and therefore he filed the objection and sought to have it set aside. The objection was rejected on 26th March, 1993 and on the same date the award was adopted as the judgment of the court.

Still not satisfied, the applicant filed an appeal against the decision of the magistrate's court adopting the award and rejecting his application to set it aside; it was filed in this Court as **High Court Civil Appeal No. 28 of 1993**. On 31st October, 2007, the appeal was withdrawn by consent of the parties and the respondents were awarded costs.

There is an order on record showing that the deceased's surviving wife, Regina Wanjugu Gatungu, made an application in this Court in Miscellaneous **Application No. 395 of 2009** in which she asked this court to transfer the succession cause in the magistrates' court to this Court. I called for this file and noted that the application was heard before Serгон, J on 9th March, 2010; my learned brother and allowed the application on the same date. The main ground upon which the application was made was that the magistrates' court did not have jurisdiction to entertain the petition. The cause was transferred to this court and eventually registered as **Succession Cause No. 321 of 2010**.

Parties agreed to have the application disposed of by way of written submissions; I have had chance to consider those submissions and noted that the parties have more or less reiterated their contentions in their respective affidavits filed in support of and in opposition to the application.

There is no dispute that there is a judgment on record in **Nyeri Principal Magistrates' Court Succession Cause No. 67 of 2007**. The effect of this judgment, in my humble view, was to determine conclusively the succession cause or any dispute arising therefrom. The record, as noted, shows there were attempts to

set aside or overturn that judgment by way of an appeal; however, the appeal was withdrawn and thus the judgment has remained intact to date.

By seeking to nullify the proceedings that culminated in the judgment, the applicant is also seeking to have the same judgment nullified and declared void. If his bid succeeds he would have achieved what he sought to achieve when he unsuccessfully applied to set aside the elders arbitration award and when he appealed against the judgment which adopted the award.

I am of the humble view that the applicant is seeking to get round the award and the subsequent judgment that adopted it and to that extent his application is malafides and an abuse of the due process of the Court. The application is hereby dismissed with costs.

Signed, dated and delivered in open court this 7th October, 2016

Ngaah Jairus

JUDGE