



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
SUCCESSION CAUSE NO. 1700 OF 1995
IN THE ESTATE OF MUTHONI KIROGO – DECEASED

RULING

1. The application for determination is the summons dated 11th December 1997. It seeks in the main the review or setting aside of the orders of the court made on 19th November 1997 dismissing the applicant's application dated 28th July 1997. There are secondary prayers that the applicant's application for revocation of grant be allowed to proceed to full hearing, that oral evidence be taken on the question of the objector's marital status and entitlement to a share in the estate of the deceased, and injunctive orders to restrain the disposal of Muguga/Jet Scheme/336.
2. The applicant, Rachel Wanjiru Njuguna, swore a lengthy affidavit on 11th December 1997 to support the application. She pleads for the reinstatement of her revocation application. She avers that her revocation application dated 28th July 1997 was filed in person and as a lay person she did not cause the matter to be listed for directions on the disposal of the application which meant that she did not call evidence to prove her matter to be listed for directions on the disposal of the application, which meant that she did not call evidence to prove her customary law marriage. She also avers that as a layperson she omitted vital facts from her application which contributed to its dismissal. The rest of the affidavit is devoted to placing material before the court to demonstrate the fact of marriage.
3. The application dated 11th December 1997 was placed before Kuloba J. on 18th December 1997, the appeal who dismissed it.
4. An appeal was lodged against the said dismissal order of 18th December 1997, being CA No. 28 of 1998. The appeal was allowed on 18th October 2010, and the application dated 11th December 1997 was remitted to the High Court for determination by a judge other than Kuloba J.; that is how the matter has found its way to my desk.
5. When the application was placed before me on 30th July 2013, counsel informed me that they were agreed on disposing of it by way of written submissions. Whereupon I directed that the said application be so disposed of and gave the parties time to file their written submissions. The applicant filed her submissions on 24th September 2013, while the administrators filed theirs on 28th August 2013.
6. I will consider the administrators' submissions first for they were the first to be placed on record. They argue that the said application does not meet the requirements of Order 45 of the Civil Procedure Rules upon which it is premised, as discovery of new and important matter of evidence is not demonstrated, neither is it founded on any other sufficient reason.
7. On his part the applicant grounds her application on "other sufficient reason." From the arguments in

her written submissions it would appear that she is also alleging existence of an error apparent on the face of the record. Her case is that there was an error on the part of the court in failing to cause the revocation application to be placed before a judge for directions on its disposal where the court could have ordered the disposal of the application by way of oral evidence.

8. The record shows that the applicant was at the time of the revocation application acting in person. The said application is dated 28th July 1997 and was filed in court on the same date. There is a minute by the Executive Officer, made on 30th July 1997, to the effect that the applicant appeared in person before him and caused the application dated 28th July 1997 to be fixed for 19th November 1997. It is not indicated in the record for what purpose the matter was to come up on 19th November 1997.

9. The record shows that on 19th November 1997, the matter was placed before Kuloba J. In attendance were the applicant and the respondent, both in person. There is no indication as to whether the parties addressed the court or not, but there is an order by the judge dismissing the application on the grounds that the evidence in the affidavits did not demonstrate existence of a marriage between the applicant and the deceased.

10. The applicant's case is that this record reveals an error on the face of the record. She says Rule 41 (3) of the Probate and Administration Rules ought to have been complied with.

11. Rule 41 (3) of the Probate and Administration Rules is not relevant to these proceedings for it touches on applications for confirmation of grant. Applications for revocation of grant are governed by Rule 44. The applicant must have been referring to Rule 44(3) of the Probate and Administration Rules, which reads –

“The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any) shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service; and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice in Form 68, and every person so served may file an affidavit stating whether he supports or opposes the application and his grounds thereof.”

12. Rule 44(4) is also relevant, it reads-

“When the persons (if any) so directed to be served (or such of them as the applicant has been able to serve) have been served with a copy of the proceedings, the matter shall be placed before the High Court on notice by the court to the applicant and to every person so served and the court may either proceed to determine the application or make such other order as it sees it.”

13. Under rule 44(3)(4) of the Probate and Administration Rules, the taking of directions before a judge with respect to the conduct of the revocation application is a mandatory requirement. After a revocation application is lodged in court it is a mandatory requirement of the law that the matter be placed before a judge for directions in terms of Rule 44(3) and (4) of the Probate and Administration Rules.

14. It is quite evident from the record that no directions were taken under Rules 44(3) of the Probate and Administration. The registrar did not issue notice to the applicant to appear before a judge for directions and when the matter was placed before the judge on 19th November 1997 directions were not given, instead the court proceeded straight into determining the revocation application. No directions were given as to service of the application, and it is not surprising that none of the persons who would have been affected by the application filed any papers in reply to it. Quite clearly, there is an error on the face of the record.

15. There is merit in the application dated 11th December 1997. I will hereby make the following final orders with respect to it:-

- a. That the orders made on 19th December 1997 are hereby set aside;
- b. That the application dated 28th July 1997 is hereby reinstated;
- c. That the same shall be served on Joseph Ngugi Kirogo, James Karanja Kirogo and Josephine Njeri Kirogo;
- d. That after compliance with order (c) above, the Deputy Registrar shall fix the matter for directions in conformity with Rule 44 (4) of the Probate and Administration Rules; and
- e. That each party shall bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 2nd DAY OF May, 2014.

W. MUSYOKA

JUDGE

In the presence ofadvocate for the applicants.