



IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 796 OF 2007

**IN THE MATTER OF THE ESTATE OF THE LATE BERNARD NJENGA HINGA
(DECEASED)**

RULING

1. Before Court for determination is a Summons dated 23rd May 2012, taken out under section 22 of the Law of Succession Act, rule 24 of the First Schedule, rules 49, 59 and 73 of the Probate and Administration Rules and all other enabling provisions of the law.
2. The Applicant seeks orders that Court order that the property described as LR No. 1160/44 on Ndege Road, Karen in the deceased's will refers to LR No. 1160/41, Ndege Road, Karen, that the consent order given on 24th March 2010 in this matter be varied and or modified to the extent that the property therein described as LR 1160/44 is changed to read LR No. 1160/41, and that this court order that the gift takes effect notwithstanding the error on description.
3. The application is premised on the grounds that the deceased died testate and in his will a property described as LR No. 1160/44, Ndege Road, Karen was bequeathed to his son Antony Lawrence Hinga; that the only known property in Karen registered in deceased's name is LR No. 1160/41 and the part of the description stated as '44' in the will was erroneous. It is a further ground that the property the testator intended to bequeath can therefore be sufficiently identified from the description given in the will.
4. The application is supported by the affidavit of the applicant, Anthony Lawrence Hinga, sworn on 23rd May 2012. In it he gives the background to the application. The deceased had in his will bequeathed as LR No. 1160/44 on Ndege Road, Karen to him. A consent order was recorded that the said property be registered in his name, but when he got a copy of the title to the property he discovered that it was described as LR No. 1160/41 in the title document but not as LR No. 1160/44 on Ndege Road, Karen as described in the will. In his view the deceased made an error in his will by describing the property as LR No. 1160/44 on Ndege Road, Karen when he meant as LR No. 1160/41.
5. Elizabeth Njeri Hinga, one of the administrators, swore an affidavit in support of the application on 16th July, 2012. She avers that their deceased father in his will bequeathed the property LR No. 1160/44, Ndege Road, Karen to her brother, the applicant herein. She states that swears the affidavit to confirm her consent to the prayers sought in the application dated 23rd May, 2012.
6. The application is opposed. Grounds of objection dated 5th July, 2012 were filed on 6th July, 2012 by the co-administrator, Nyoike Hinga. It is argued that the application is incompetent, unsound and bad in law.
7. The matter was argued orally on 10th October, 2012 before Njagi J. (as he then was), Ms. Githinji

appeared for the applicant, and Mr. Kibanga for the respondent. Both counsel urged their respective clients' positions before the court.

8. The matter was mentioned on 29th April 2013, the court ordered the Land Registrar to issue a search certificate in respect of LR No. 1160/41 to the applicant. The matter was brought before this court on 18th June 2013 for amendment of the order of 29th April 2013 and this court reviewed the said order in the terms proposed and ordered that the Land Registrar to issue a search certificate in respect of LR No. 1160/44 to the Applicant. The title was to be searched for the purpose of confirming that the does not form part of the estate of the deceased.
9. I have carefully considered the application, the affidavits on record and the oral submissions by the parties.
10. The certificate of official search on record reveals that LR No. 1160/44 mutated to other sub-plots and the last owner according to the certificate of subdivision and certificate of title was one Samuel Kioko, and the deceased's name does not appear anywhere in the record. It would therefore be right to conclude that the deceased could not have meant to bequeath the said LR No. 1160/44 to the applicant simply because the said property did not belong to him, and indeed never belonged to him at any time at all.
11. The Respondent's contention before Njagi J was that the ownership of the said 1160/44 was not ascertained. That cannot be said to be the case at this point in time as the official search is now on record; the same does not show the deceased as having had any interest in the said parcel of land. Indeed, the ownership has since been ascertained and the Respondent's fears have been settled.
12. The will of the deceased, paragraph 5 (iv) thereof reads that "Property comprised in LR No. 1160/44 on Ndege Road, Karen in Nairobi to my son Anthony Lawrence Hinga absolutely."
13. I have also noted from the record before me that LR No. 1160/41 was transferred to the deceased, Benard Njenga Hinga, as entry no. 12 shows, on 23rd April, 1968. It therefore follows that it is the said LR No. 1160/41 that the deceased intended to bequeath. It is my view that the said property can be sufficiently identified from the description of it given in the will at page 2 paragraph 5 (iv). I am satisfied that the description "'44'" was erroneous. It is apparent to me that the property described as LR No. 1160/44 on Ndege Road, Karen in the deceased's will, refers to LR No. 1160/41, Ndege Road, Karen.
14. Being of that persuasion, it shall be my order that the said gift shall take effect as was intended by the testator. This court holds that the instant application is competent and merited. It is hereby allowed accordingly. Costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 4th DAY OF September, 2014.

W. MUSYOKA

JUDGE

In the presence of advocate for the applicant.

In the presence of advocate for the respondent.