



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 624 OF 2008

IBRAHIM GIKARIA NDONGO *alias* GIKARIA NDUNGU..... DECEASED

AND

JAMES MWANGI GIKARIA..... PETITIONER

RULING

HISTORY

1. On 6th July 1998 JAMES MWANGI GIKARIA the petitioner herein filed a chamber summons under section 67 of the Law of Succession for issuance of limited grant in respect of the estate of IBRAHIM GIKARIA NDONGO deceased in succession No. 124 of 1998 which was granted and grant issued on 8th July 1998.
2. On 21st June 2001 ESTHER WAIRIMU GIKARIA filed an application for the revocation of the said grant and an order that the petitioner do render a just and true account of the proceed irregularly withdrawn from Kenya Commercial Bank Othaya Branch, Nyeri District Co-op Union.
3. Directions were given that the dispute be heard by way of viva voce evidence at a date to be fixed at the registry on 17th September 2002.
4. On 3rd November 2008 the petitioner herein issued a citation to accept or refuse letters of administration to NYAWIRA GICHUKI, LYDIA WANGECHI KIRAGU & ELIZABETH WANJIRU THUNI all married daughters of the deceased and on 11th December 2008 one SIMON THEURI GIKARIA filed a caveat. The petitioner subsequently applied for grant of letter of administration herein which was issued on 2nd July 2010.
5. On 19th August 2010 the petitioner applied for confirmation of grant of letters of administration and on 29th November 2010 LUCY NYAWIRA GICHUKI filed an affidavit of protest in which she stated that the deceased had two widows both deceased namely ESTER WAIRIMU GIKARIA PRISCILLA NYAGUTHII and named the children of the second widow and proposes division equally between the two houses.
6. The protest was heard by justice Sergon who on 18th November 2011 dismissed the protest and adopted the mode of distribution proposed by the petitioner as a true reflection of the wishes of the deceased.

PRESENT APPLICATIONS

7. On 20th December 2011 the applicant SIMON THEURI GIKARIA filed summons general

application in which he sought an order of stay of execution of the certificate of confirmed grant and review or setting aside the judgment of justice Serگون dated 18th November 2011.

8. In support of the said application the applicant swore an affidavit in which he deponed that the ruling held that he had been given two parcels of land known as LR No. OTHAYA/KIANDEMI/966 and URUKU PLOT NO. 1413 by the deceased while the said properties never belonged to the deceased and that he is the one who transferred LR No. OTHAYA/KIANDEMI/965 to the deceased upon an understanding that he would share in his parcel of land No. OTHAYA/KIANDEMI/30 in his life time while he remained in OTHAYA/KIANDEMI/966. He further deponed that he purchased plot No. 1413 URUKU during the deceased life time.

9. He deponed that he only became aware that that respondent had filed documents purporting to show that the two properties belonged to the estate when he perused the copy of the judgment.

10. On 21st May 2013 the petitioner filed an application under rule 73 of P&A Rule for the Deputy Registrar to sign all transfer documents mutation forms on behalf of RAHAB WANGECHI KIRAGU and for the District land Registrar to dispense with the production of the documents and further an order for the removal of any caution, restriction and or inhibition lodged against LR OTHAYA/KIANDEMI/965 and OTHAYA/KIHUGIRU/30.

11. It was supported by the petitioner's affidavit in which he deponed that the 2nd objector who was his co administrator had refused to execute transfer documents. In response to the said application SIMON THEURI GIKARIA that his application dated 19th December 2011 for review be heard first.

12. In reply to the said application the petitioner deponed that there are no new matters which were not before the judge and that the applicant who is a grandson of the deceased was registered as a trustee of the deceased in OTHAYA/KIANDEMI/74 when he was toddler and the deceased caused it to be subdivided into two while Plot No. 1413 had been purchased by the deceased in the name of his first wife ESTHER WAIRIMU the applicants grand mother.

SUBMISSIONS

13. Directions were given that the two applications be heard together. On behalf of SIMON THEURI GIKARIA Mr. Muhoho submitted that the court took into consideration matters which were introduced to court through a further affidavit which had not been served upon the applicant to enable him respond. That the court did not share any part of the deceased property on the ground that he had been provided for two property which he had already inherited from his mother who was a Dependant and a beneficiary of the deceased.

14. It was therefore submitted that based on the aforesaid the applicant was denied a share of the deceased estate and therefore seek review of the said judgment since there is no evidence that the further affidavit was served upon the applicant's advocate then on record.

15. Miss Mwai for the respondent submitted that the said further affidavit contained the facts on the family and that the applicant who is a grandchild of the deceased who was born before his mother had been married was provided for by the deceased to settle any future disputes. It was submitted that there are no new matters presented before court.

LETTER

16. The ruling was scheduled for 19th September 2014 and in the process of writing the said ruling I received a letter dated 24th June 2014 allegedly from KENYA NATIONAL COMMISSION ON HUMAN RIGHTS REF.

1. IRREGULARITIES IN THE HONOURABLE COURT

2. MISGUIDE OF THE HONOURABLE COURT

3. MISLEADING OF THE HONOURABLE COURT.

In which one Danie K. Macharia purported to give the court the history of this matter and pointed to some law of polygamous intestate under section 40 of Law of Succession.

17. The matter was therefore fixed for mention on the said date when all the parties denied having written the said letter and or instructed the alleged KENYA NATIONAL COMMISSION OF HUMAN RIGHTS to write the said letter on their behalf.

18. I would wish to point out that this court decides matters placed before it based on the pleadings and evidence tendered and not on any other information and or direction in fulfillment of the constitutional mandate under Article 161(1) which states as follows:

Article 160(1) In exercise of judicial authority the judiciary as constituted by Article 161 shall be subject only to this constitution and the law and shall not be subject to the control or direction of any person or authority (emphasis added)

19. Having said the above and for avoidance of doubt I must point out that this letter could only have come from the applicant in application for review based upon the following paragraphs of the said letter.

“you can see how the petitioner fraudulently obtained the grant of administration”

“It was at this time when the first house heard a tip of....”..

It was on this day 15th July 2011 when the court took a judgment date which was fixed on 7th October 2011. Your Lordship it was in between 15th July 2011 and 7th October 2011 when the petitioner collaborated with the secretary of the judge and they inserted the extraneous matters documents and they were backdated to read...”

20. The applicant and or his agents should have been candid enough to swear an affidavit in respect of the matters herein which goes to the integrity of the court and to provide any evidence of the alleged collaboration between justice Serگون's secretary and the petitioner. In the absence of the said evidence I hereby expunge the said letter from the court record.

21. The only issue for determination in the application for review is whether the applicant has met the test set under the civil procedure for review of a judgment and or order of the court as imported by Rule 63(1) of P & A which are as follows:

a) There is a discovery of a new and important matter of evidence which after the exercise of due diligence was not within the knowledge of or would not be produced by the applicant when the order or decree was made or

b) On account of some mistake or error apparent on the face of the record.

c) Any other sufficient reason.

d) Application has been brought without unreasonable delay.

1. From the further affidavit filed on 9th June 2014 the applicant contains is that in regards to URUKU plot No. 1413 he would have presented to court transfer letters and that in respect of OTHAYA/KIANDEMI/74 he subdivided it 1985 in the deceased life time. The issue then is whether the evidence could not have been produced by the applicant or whether the same was not within his knowledge at the time of the judgment.

2. It is clear from the further affidavit that this evidence was available to the applicant since the transfer in respect of URUKU Plot No. 1413 was effected by a letter dated 26th January 1985 and share certificate issued on 4th day of January 1986 while the subdivision of Othaya/Kiandemi/74 was also done in 1985 and was therefore within the knowledge of the applicant. It is also clear that there is no error apparent on the face of the judgment sought to be reviewed.

3. This therefore leave the applicant with the ground of any sufficient ground and the issue is whether the judge would have ruled different had the applicant presented the evidence which he says he did not have an opportunity to present. The applicant has not demonstrated how he came into possession of OTHAYA/KIANDEMI/74 which he subdivided and transferred one parcel to the deceased. Further the same has not demonstrated how his grandmother came into possession of Plot No. 1413 URUKU.

4. The applicant has therefore failed to demonstrate any sufficient reason to enable the court review the judgment of justice Serگون herein and would therefore dismiss the application for re view as the judge was clear in his judgment that the deceased had desired to provide land for his sons and unmarried daughters of which the applicant is not one.

5. Having dismissed the application for review and taking into account the fact that RAHAB WANGECHI KIRAGU has not filed a reply to the application by the petitioner dated 23rd May 2013 I hereby allow the said application as prayed for in terms of prayer No. (a), (b) and (c).

6. This being a family dispute each party shall meet their own cost.

Dated, signed and delivered at Nyeri this 15th day of October 2014.

J. WAKIAGA

JUDGE

Court: Ruling read in open court in the presence of Mr. Ombongi for Mr. Muhoho for the respondent. No appearance by Miss Mwai for the Petitioner.

J. WAKIAGA

JUDGE