



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 60 of 2001

IN THE MATTER OF THE ESTATE OF MUCHIRI GITUMADECEASED.

CATHERINE KANGAI BAINI.....PETITIONER

V E R S U S

TIMOTHY MICHENI KANAMPIU.....OBJECTOR

Law of Succession Act

**ü Setting aside – of orders in Succession – must be based on specific provisions
of law and cogent grounds.**

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R U L I N G

The Petitioner herein, Catherine Kangai Wilfred also referred to as Catherine Kangai Bauni in the Affidavit in support of Petition for Letters of Administration intestate sworn on 6th March 2001 applied for and was issued with a Grant of Letters of Administration Intestate on 25th May 2001. That Grant was confirmed on the 10th December 2001 and a Certificate of Confirmation of a Grant was issued on that date. The sole asset in the net intestate of the deceased, namely land title No. Mwimbi/Chogoria/476 was transferred to one Timothy Micheni Kanampiu.

This Timothy Micheni Kanampiu is not named in the Petitioner’s Affidavit as one of the survivors of the estate of the late Muchiri Gituma and the circumstances under which the deceased’s entire nett estate was transferred to him are not disclosed in the application for confirmation of the temporary grant made on 12th November 2001. He was however named as the person beneficially entitled to the estate land.

Perhaps out of a tinge of conscience that she had thrown her father’s jewel to a complete stranger, and thus disinherited her blood brother ASHFORD GITONGA MUCHIRI, the Petitioner by an application dated 10th March 2003 applied for revocation of the Confirmed Grant. That application was granted by orders made on 5th March 2003, when the grant confirmed on 10th December 2001 was annulled and revoked, and a direction made that the land be registered in the name of Ashford Gitonga Muchiri, the brother of the Petitioner and son of the deceased Muchiri Gituma.

However by a Notice of Motion dated 22.06.2004 and filed on 1.07.2004, Timothy Micheni

Kanampiu, the original beneficiary who now described himself as an “Objector” prays that the orders of 5.05.2003 revoking and nullifying the confirmed Grant to himself be in turn nullified and vacated and orders of 10.12.2001 confirming the Grant to the Petitioner and designating him as sole beneficiary be reinstated.

The Objector claims in the Supporting Affidavit and the grounds of the Motion among others, that he is the rightful person to inherit the parcel of land known as MWIMBI/CHOGORIA/476, that the application for nullification was “perjurious” and that it was an afterthought motivated by duress and undue influence by forces associated with Meru Chief Magistrates Court Civil Case No. 862 of 2001.

Attached to the Objector’s Supporting Affidavit are the Proceedings and Judgment in Meru CMCC No. 862 of 2001. The evidence by Ashford Gitonga Muchiri in that case clearly shows that the Petitioner and the Objector tried to short change and deprive Ashford Gitonga Muchiri of his inheritance through a sale that apparently never was as Ashford Gitonga was never involved and never knew what his sister the Petitioner was doing behind his back. Later realizing her folly at depriving her brother of his sole inheritance, she applied for the revocation and nullification of the Grant and the fraudulent transfer of the beneficial interest to the Objector. On the facts therefore there is completely no merit in the Objector’s application so far as the facts are concerned. I do not think the position is different with regard to the law. The motion is premised upon the provisions of Order L rule 1 of the Civil Procedure Rules Section 3 and 3A of the Civil Procedure Act (Cap 21, Laws of Kenya) and Rule 73 of the Probate and Administration Rules. Commencing with Rule 73, it provides:-

73 “Nothing in these rules shall limit or otherwise affect the power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

That rule is a direct copy of Section 3A of the Civil Procedure Act which section reads:

3A Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

And Section 3 of the Civil Procedure Act says:-

“In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force”.

The special jurisdiction in this matter is the Probate and Administration Rules. We have referred to Rule 73 above. The other relevant provision is Rule 63 which reads:-

“63 Save as in this Act or in these Rules otherwise provided and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX together with High Court Practice and Procedure Rules, shall apply so far as relevant to proceedings under these Rules”

The Objector has not relied upon any of those orders V (service of summons); X (interrogatories discovery and inspection) XI (Summary and Attendance of Witnesses) XVIII (Affidavits) XXV (Security for Costs) XLIV (Review), and XLIX (Time). Instead the Objector has relied upon Order L, Rule 1 of the Civil Procedure Rules. This is an omnibus rule which comes handy where the rules do not provide for any other manner of moving the court. This is specifically so where the ordinary rules of civil procedure apply, and in ordinary civil suits.

The application herein arises from intestate succession and not a civil suit. Apart from the specific Civil Procedure Rules applied under Rule 63 (above) of the Probate and Administration Rules no other Rule of Civil Procedure applies to matters of probate and administration of estates. Reference by the Objector Order L rule 1 of the Civil procedure Rules was therefore incompetent.

As already stated above, the application lacks merit. It is brought after nearly thirteen months on (22/06/2004) after the orders of 5/05/2003. It has taken five (5) years to have it prosecuted. There is no explanation for the inordinate delay, and even if there is no reason why the Objector should be heard, he has no interest in the deceased's estate as a son, nephew, or other relative or dependant nor is he any creditor of the deceased, there is no evidence he was a bona purchaser but a schemer and manipulator of the Petitioner to defeat the legitimate interest of her brother Ashford Gitonga Muchiri.

The Objector gives the impression that the Objector's application is no more than a groping in the dark and abuse of the process of court. There is no good reason for the application at all. It is no more than an attempt to obstruct the course of justice. If it were otherwise the Objector would have cared to respond to the Replying Affidavit of the Petitioner sworn on 25.10.2004 and the grounds of opposition by the Petitioner's counsel dated 25.10.2004 and filed on 27.10.2004.

For all those reasons, I find the Motion as lacking a basis, and the same is dismissed with costs against the Petitioner.

Those are the orders of the court.

Dated, Delivered and Signed at Meru this 3rd Day Of July 2009

M. J. ANYARA EMUKULE

JUDGE.