



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Prob & Admin 1123 of 1989
(IN THE MATTER OF THE ESTATE OF ESTHER GATHONI KAMAU –
DECEASED)

RULING

By this application filed through a Chamber Summons dated 29.8.1998 under Sections 74 and 76 (b) and (c) of the Law of Succession Act Cap 160 Laws of Kenya

NUNGARI KAMAU (1st applicant) and ERNEST MWAURA KAMAU (2nd applicant) seek three orders from this court through MR. P.M. Kamaara Advocate namely:-

- (a) The grant of letters of administration issued on 27th June, 1990 and confirmed on 25th May, 1998 be revoked. The grant was issued to, and confirmed in the names of, JOSEPHAT KARIUKI KAMAU (the Respondent)
- (b) Alternatively, the grant of letters in question be altered or amended to include the applicants names as co-administrators and beneficiaries of the estate of ESTHER GATHONI KAMAU (the deceased).
- (c) Further the grant and certificate of confirmation be altered or amended to describe the heirs/beneficiaries adequately and to describe the various assets of the estate accurately.

This application is based on the grounds endorsed thereon, and on the supporting affidavit of the 1st applicant and submissions made by Mr Kamaara.

His first submission is that the Petitioner, when he applied for the grant, did not disclose all the heirs of the deceased. In particular that he did not disclose that he had other brothers and sisters. Ultimately the grant issued shows that he is the one entitled to inherit the deceased's estate. Mr Kamaara further submitted that, even during the life time of the deceased, the petitioner did not have such close relationship with the deceased so as to make him claim the estate.

The position of the parties appearing before me ought to be clarified right from the start. I have already stated above that the deceased, and owner of the estate in issue is, ESTHER GATHONI KAMAU. The documents filed show that she died on the 7th August, 1988 aged 85 years of heart failure and a certificate of death No. 37591 was issued on the 10th May 1989. Then on the 3rd October, 1989 the respondent filed a petition for grant of letters of administration intestate to administer the deceased's estate in his capacity as the deceased's brother. In paragraph of his supporting affidavit he gave a list of the deceased's surviving dependants as: Esther Gathoni Kariuki, aged 9 years; Joseph Murigi Kariuki - aged 14 years; Wakonyo Githingo Muriuki 18 years; and Margaret Njeri Kariuki aged 19 years.

These were the deceased's nephews and nieces. According to Mr Kamaara and the applicants, these were all the Respondent's own children. He submitted that there was PETER JOHN KAMAU GITHINJI (who has also since died) whom the deceased treated throughout her life, as one of her own children, although no formal adoption proceedings were filed. When Peter John Kamau Githinji was still alive, he had applied for revocation of this grant through an application dated 16.10.1992. Unfortunately as of the date of his death in June, 1997, the application had not been heard. His widow is now the 1st applicant and his son 2nd applicant. That application of 16.10.1999 was dismissed on 19th March, 1998, not on merit, but because the 1st applicant had not obtained a grant to administer the estate of her husband PETER JOHN KAMAU GITHINJI. She has now obtained a limited grant of letters of Administration AD COLLIGENDA Bona under S.67(l) of the Law of Succession Act issued by this court on the 15th July, 1998 through Nairobi High Court Succession Cause No.1317 of 1998. This limited grant was issued to both the applicants in order to file this matter.

Mr Kamaara submitted, and adopted the 1st Applicant's further affidavit filed on 13.7.1999 paragraph 5 thereof, that the deceased always treated the 1st applicant's husband as her own son, paid for all his school fees, and lived with him. She had trusted him with all her property and he, in turn, collected rents on behalf of the deceased and accounted for it during her lifetime. Even when the deceased died, it was her husband who single handedly arranged for her funeral. While the Respondent always lived in Njoro in the Rift Valley Province, doing nothing and not getting involved in the deceased's life.

Mr Kamaara submitted that, it is true the deceased was buried at Langata Cemetery in Nairobi and the husband of 1st applicant was buried at GITHIGA but this did not affect the mode of distribution of the deceased's estate. He submitted that the Respondent concealed this fact of dependency from his application.

Mr Kamaara then submitted that the other fact which the Respondent concealed was that three of the properties listed by the Respondent in the schedule of properties belonged to the applicants. There was a House No.C9274A Dandora, which belonged to the late Igomba Nzibu had sold it to the 1st applicant's husband who then continued to pay all dues to the Nairobi City Council, including servicing the Tenant - purchase loan. Exhibited and marked "PI" is a copy of the Tenant - Purchase scheme account book together with a sample of the receipts. The 1st Applicant's husband rented out that house and collected rents from tenants on his own accounts even during the deceased's lifetime. Then there is plot No.321 NGEI, which the 1st applicant's husband bought from its original allottee one KEFA ANAUME OLUNYANYE. An agreement of sale was drawn, the original tenant purchase account card handed over and produced marked "PII". This property, Mr Kamara submitted, never belonged to the deceased. Then there is plot No.534 NGEI which 1st applicant's husband bought from ISABELLA NJERI MWENJE. A copy of the sale agreement and copy of sample receipts are all produced and marked "PIII".

It is in this respect, and to safeguard their interests, that the applicants have requested to be made joint co-administrators of the deceased's estate.

Mr Kinuthia, acting for the Respondent, has strongly opposed this application. He first submitted that the grant was issued on 27.6.1990 and confirmed on 25.7.98. Application for its revocation was dismissed. Therefore the applicants cannot bring this matter all over again.

I will deal with this point straight away. The record shows that the application for revocation of the grant dated 16.10.92 was dismissed on 19.3.1998 by Hon. Mr Justice Ole Keiwa because the applicant's advocate Mr Thuo could not prosecute it for non availability of her file. That application was never heard and determined on merit. It would appear to me that the present application is not barred by the operation of the doctrine of Res Judicata under section 7 of the Civil Procedure Act Cap 21 Laws of Kenya. The present application is properly before court.

Mr Knuthia then submitted on the issue of alleged adoption of PETER JOHN KAMAU GITHINJI by the deceased and said that there was no proof of the same. This begs the question whether or not PETER JOHN KAMAU GITHINJI can be said to have been the deceased's dependant on the recorded evidence before me.

A dependant, under Section 29(b) of the Law of Succession Act includes such of the deceased children whom the deceased had taken into his family as his own and were being maintained by the deceased immediately prior to his death. The 1st applicant in her supporting affidavit filed on the 28th August, 1998 paragraph 5 and 6 thereof, and in a further affidavit filed on 13th July, 1999 paragraphs 5 thereof, has sufficiently demonstrated that the deceased had taken PETER JOHN KAMAU GITHINJI as her son and had maintained him during her lifetime as her son and was doing so immediately prior to her death. I therefore hold him to have been the deceased's dependant, notwithstanding what the Respondent deponed to in paragraph 4 of his Replying affidavit filed on 17th May, 1999.

Mr Kinuthia submitted that upon the deceased's death she was buried at Langata Cemetery and the son of late PETER JOHN KAMAU GITHINJI was buried in Githiga on his father's ancestral land. Nothing turns on this. A site of burial does not invest property into anybody. It is only an area of interment or disposal of dead bodies, nothing more.

Mr Kinuthia then addressed me on the issue of the properties which the applicants are claiming. As for house NO.C9274A at Dandora, he submitted that it belongs to the Respondent because he is the one collecting rent and the applicant had leased it to him as part of the deceased's property. It was in the hands of the applicant even before it came to the Respondent but it was given back to the Respondent out of good will.

I do not see how the applicants could have given this property back to the Respondent out of good will and then demand the court to declare that it belonged to them, without first putting the request to the Respondent himself and then coming to court upon his refusal.

As for house No.321 Ngei Estate, Mr Kinuthia submitted that the Respondent pays water and Electricity Bills (which he produced) and they bear the deceased's names and not the applicant's. But against payment, these bills did not prove ownership of the properties at all.

Mr Kinuthia submitted that, as for distribution of the properties, this application has been overtaken by events as the grant has already been confirmed. But the answer to this lies in section 76 of the Law of Succession Act which provides that a grant of Representation, whether or not confirmed, may at any time be revoked or annulled if the court so decides.

In the final analysis I hold that the applicants have made out a strong case for amendment of the grant of letters of administration issued on 27th June, 1990 and confirmed on 25th May, 1998. The confirmed grant is hereby amended to include the names of MRS PIAS NUGNARI KAMAU and ERNEST MWAURA KAMAU as co administrators and beneficiaries of the deceased's estate.

I shall now proceed to receive submissions on the mode of distribution of the estate of the deceased.

It is so ordered. Dated and delivered this 23rd September, 1999.

A.G.A. ETYANG'

JUDGE

In the presence of Mr Kamaara for the applicant, Mr Kinuthia for the Respondent. In attendance are PIAS NUNGARI KAMAU (1st applicant) Ernest Mwaura Kamau (2nd applicant). N/A by Josphat Kariuki Kamau (Respondent). Helen Wanja - Court clerk.

A.G.A. ETYANG'

JUDGE

Mr Kamaara: I will require some time to take instructions. I will require two weeks.

Mr Kinuthia: I will also require two weeks.

Court: Submissions on the distribution of the deceased's
properties to be heard on the 13.10.99 at 11.00 a.m.

A.G.A. ETYANG'

JUDGE

23.9.99