



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Succession Cause 363 of 1987

IN THE MATTER OF THE ESTATE OF MBUGUA MTHUKIA (DECEASED)

RULING

This is an application by Mohamed Waweru Mwithukia for the main orders that the Arbitration Award filed in this cause he declared a nullity, that the Awards be set down for hearing. He complains in the supporting affidavit inter alia that although the award filed earlier had been remitted to the elders for clarification, the respondents influenced the elders and two extra elders were specifically brought to influence the voting. The Grant of letters of Administration to the estate of the deceased was given to the applicant on 13.8.87. It was confirmed before the expiry of the statutory six months on the application of the applicant on 11.12.87. By the confirmed Grant, the applicant was solely to inherit land title No. Muguga/Jet Scheme/587.

On 4.1.888, the respondent Patrick Mwahuki Karanja filed an application for an order inter alia that the Grant be revoked and time for filing objection be extended. He claimed in the supporting affidavit among other things that deceased had taken him as his own son and in that deceased subdivided the land into two portions and gave him one portion on which he has constructed a stone house. The applicant filed a replying affidavit denying the claim by Patrick Muchuki Karanja as its beneficiary and stating that deceased left a son called David Kamwcti.

On 7.7.88, Osiemo Ag. J (as he then was) with the consent of the parties referred the dispute to Kennedy Mbugua Wakori - Chief of Kikuyu location with some elders to be appointed by both parties to ascertain whether Peter Mwahuki Karanja is entitled to a share of deceased's estate.

The Chief sat with 10 elders, 4 from each party and two appointed by

the Chief. They decided that Patrick Mwahuri Karanja was just given a place to build a house by the deceased and had to stay on the land as he was left for the land by the deceased (his uncle)

Patrick Mwahukia Karanja then filed an application seeking an order that the Award be modified or corrected for lacking certainty.

On 9.10.92, in the absence of the counsel for the petitioner, Shields J. made an order resulting the award to the same arbitrators with the direction that

"Upon the findings of facts they have made they determine what is the applicants interest in the said land of the deceased"

The arbitrators filed that award on 9.2.92. In the new award, the Arbitration was presided over by the new award, the Arbitration was presided over by Ag. Chief one of the four elders for the applicant Fred Mbugua Mbugu who sat in the previous proceedings did not sit one Kungu Waichua who was the

petitioners elders in the previous proceedings and who was also the petitioners elders in the proceedings subject of this application has sworn a supporting affidavit. According to his affidavit, the elders in a manner made a fresh award and gave the respondent two acres of land which was not an issue in the previous proceedings. He states that he refused to endorse the award for that reason. The deceased's land is 5 acres. The elders gave the applicant 3 acres and the respondent 2 acres.

It has been argued on behalf of the respondent that the elders did not make a fresh award and that as the chief had died, the Ag. Chief chaired the meeting. It has also been argued that the absence of one of the applicants elders could not have influenced the decision because the majority of the elders gave the respondent 2 acres.

The court apparently remitted the award under Order XLV Rule 14(1) of the Civil Procedure Rules under that Rule the award is remitted to same arbitrators or unoiere. The order made on 9.10.92 specifically remitted the award to same arbitrators. In the order referring the dispute to arbitration the parties had consented and the court had ordered that the arbitration be presided over by Kennedy Mbogua Wakori Chief of Kikuyu location. The letter dated 24.11.88 which was addressed to Mr. Keneth Mbogua Wakori by the Deputy Registrar of the court authorised him to have a casting vote in case of a tie.

It appears to me that the order dated 7.7.88 which appointed Kennedy Mbogua Wakori as the person to preside over the arbitration appointed him as an umpire. It is not the office of the Chief which was appointed but a particular holder of that office. In my view, upon his death another umpire had to be appointed by court pursuant to order XLV rule 5(1) (b) of the Civil Procedure Rules. The Ag. Chief had no jurisdiction to act as an umpire without being so appointed by the court.

For that reason, the arbitration proceedings were a nullity. Secondly, the Ag. Chief was not in the original panel Fred Mbogua Mbagu who was in the original panel did not sit in the second panel. That means that the Ag.

Chief was not a party to the making of the findings of fact in the original panel. It also means that Fred Mbogua Mbagu who was a party to the findings of fact in the first panel was not a party to the determination of the respondent's interest in the land in dispute. In those circumstances it cannot be said that the award has been made by the same arbitrators.

Thirdly, it is clear from the award that more findings of facts which were not in the original award were made. The new findings of fact are apparent on the second award. The main finding of fact in the first award number 1 in the award is that the respondent was just given a place to build a house by the deceased and he built a permanent house."

The second major finding of fact into the original award is that the respondent "had to stay there as he was left there by his uncle (deceased)"

It appears from those findings that the original award gave the respondent just the place where he had built. The second award gives the respondent 2/3 of the land - that is 2 acres. Is 2 acres just a place to build? It appears to me that the elder's infact made a fresh award contrary to the order of the court. There is another matter which is of interest to the court. The applicant is a brother of the deceased. The respondent is the nephew of the deceased. The applicant stated in paragraph 7 the replying affidavit sworn to

oppose the application for revocation of the Grant that deceased left a son called David Kamoeti. David Kamweti has not been named by either party or by the elders as a beneficiary who is not named as a beneficiary? For those reasons I find that the second award dated 29.1.93 and filed in court on 5.2.93 is a nullity. It is set aside with costs in the cause.

The application to revoke the Grant dated 7.1.88 and filed by court on 4.1.88 to be heard and determined by the court after directions are given

E. M. Githinji

Judge

29.7.96

Mrs Ndawa for Mwiti present Mr. Chebii present parties 8 present Order: Mention for direction on 17.9.96 at 2.30 p.m.

E. M. Githinji

Judge

17.9.96

Githinji J.

Mr. Mwiti present

Mr. Chebii present Order: By consent

1. The application for the revocation of the Grant dated 4.1.88 and filed on 4.1.88 to be heard by Viva voce evidence to determine (I) Whether or not the applicant was a dependant of the deceased

(ii) Whether or not deceased left a portion of his land to him.

(iii) And whether or not the applicant is entitled to inherit part of the land

2. Mention before Kuloba J. on 8.10.96 for fixing a hearing dated

E. M. Gilhinji

Judge

8.10.96

Coram: Kulob J. Mr. Chebii for applicant Mr. Mwiti for Respondent

Mr. Andanje c/c in attendance Order:

The oral evidence be taken on a date to be fixed at the registry and pursuance of Githinji J's Order.

R. Kuloba Judge 8.10.96 7.3.97

Mr. Mwaura for Maosa & CO., 10th July 1997

Signed

Executive

Hearing Notice to issue

10.7.97

Coram: R. Kuloba J.

Mr. Chebii for applicant

No appearance for respondent

Court clerk Mulinge in attendance

Order Stood over to 24.9.97

R. Kuloba

Judge

10.7.97

24.9.97

Coram: R. Kuloba J.

No appearance for applicant

Mr. Mwiti for respondent

Court clerk

Mulinge in attendance

Order: Stood over generally

R. Kuloba Judge 24.9.97 30.10.97

Mr. Mwaura for Maosa Advocate for plaintiff advocate for the other party called, Defendant, but not present ex-parte hearing/mention date fixed for 22nd January, 1998

Signed

Executive Office

Notice to issue 22.1.98

Coram: S. Amin J. Judy/Kalii cc

Mr. Ojuni for Maosa - Applicant

Mr. Opini - This matter is to be heard by the court - 1 day Mr Mugo

This matter has already been heard by Githinji J. We want him to carry on with this case

Order by Consent Mention before Githinji J on 16.2.98

S. Amin

Judge

16.2.98 Githinji J.

Miss Kamuyu holding brief for Mr. Mwiti for Defendant present Miss Kamuyu also holding brief for Mr.

Maosa Mr. Maosa Kamuyu

Mr. Maosa says that the application can be fixed for hearing on date he has suggested Mr. Mwiti has no objection

RULING

I am now assigned to criminal appeals. There is a judge assigned to Probate and Administration cases. This matter is not part heard before me. What is pending for hearing is the application to revoke the Grant. I have not dealtwith that application So, the matter should be heard by the Judge nowdealing with Probate and Adminstration cases.Order: Application for revocation of Grant to be fixed for hearing

before the Judge dealing with Probate and Administration cases.

E. M. Githinji Judge

17.6.98

Mr. Mwaura for Maosa & Co., Advocate for petitioner

8th October 1998

Signed Executive Officer

Hearing notice to issue.

June 2003