



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO 151 OF 2017

IN THE ESTATE OF THE LATE JOHN GITHINJI RUGA

MONICA NJERI GITHINJI.....PETITIONER

-VERSUS-

CECILIA WANGUI GITHINJI.....1ST BENEFICIARY/PROTESTOR

ISAAC MACHARIA GITHINJI.....2ND BENEFICIARY/ OBJECTOR

JUDGMENT

BACKGROUND

1. The petitioner petitioned for grant of letters of administration on 20th March 2017 in her capacity as the wife of the deceased the late **John Githinji Ruga** who died intestate on 4th April 2014. Beneficiaries listed are 9 and properties list as left behind by the deceased are LR NO. **Kiambogo/Kiambogo Block 2/Mwariki /1108** and **Bahati Engashura Block 4 (Mwaki Muugi) 198**. Temporary grant of letters of administration intestate were issued on 18th September 2017. Summons for confirmation of grant was filed on 31st May 2018.
2. Upon filing of summons for the confirmation of the grant, the 1st protestor **Isaac Macharia Githinji** filed an affidavit of protest sworn on 22nd January 2019, protesting the confirmation of the grant on the grounds that property no Bahati /Engashura Block 4 Mwaki Muugi 198 does not form part of the deceased estate as the same was sold by the deceased in the December 2013 and attached a sale agreement for the sale.
3. Another affidavit of protest was filed on 29th July 2019 by the 2nd protestor **Cecilia Wangui Githinji**. She averred that the grant was obtained through concealment of material facts as property in Murogi Estate bequeathed to her by the deceased was not included in the list of the deceased assets for distribution.
4. Parties adduced *viva voce* evidence and later filed their submissions in support of their respective arguments.

2ND PROTESTOR'S EVIDENCE

5. The 2nd protestor testified that she is the 2nd born daughter to the deceased and the petitioner is her mother. She said she did not sign the consent for the confirmation of grant as the plot given to her by the deceased through the agreement signed by the deceased, the petitioner and her two brothers was not included as among the properties of the deceased. She said the plot has no title documents and the same was not listed as part of the deceased estate. She said she has lived in the plot since 2014.
6. On cross-examination by **Mrs Mukira** for the petitioner, she confirmed that she has no objection to the **Bahati /Engashura Block 4 (Mwaki Muugi) 198** being given to **Isaac Macharia(1st protestor)** while **Kiambogo Kiambogo Block 2/Mwariki /1108** being given to **Samuel Wanjohi** and the money at Equity bank being given to her mother as per the summons for confirmation of the grant. She said her only issue is failure to include the plot she is living in as one of the assets of the deceased.

1ST PROTESTOR'S CASE

7. **Isaac Githinji Macharia** stated that he objects to the confirmation of the grant since not all properties of the deceased have been listed. He said two plots in Mutaita bought from enterprise developments have not been included. He also said the plot allocated to him by the deceased was sold before the demise of the deceased.

8. On cross-examination by **Mrs Mukira** for the petitioner, he stated that he did not sign the consent for confirmation as **Ndegwa** listed as one of the beneficiaries is not entitled to the estate of the deceased. He however said the name was removed. He confirmed that the names listed in the consent form are his name and those of his siblings. He also confirmed that **LR NO. Bahati /Engashura** was sold in the lifetime of his father to educate his children. He confirmed further that all the siblings signed the consent form except him and the 2nd protestor.

9. He said he has no objection **LR No. Kiambogo Kiambogo Block 2/Mwariki /1108** being given to **Samuel Wanjohi**, and the money at Equity bank going to his mother as per the summons for confirmation of the grant. He argued that 2 plots in Mutaita have not been included among the assets of the deceased and he wants the two plots to be given to him. He however confirmed that there are no title deeds for the plots as the mother title is under succession.

10. The 1st protestor further stated that the Bahati plot was sold to **Damaris Nyambura** by the deceased before his death through agreement dated 10th December 2013 and the transfer was done on 20th December 2016 after the death of the deceased but he did not get the money from sale of his property. He said the proceeds were to educate his children.

PETITIONER'S EVIDENCE

11. The petitioner testified that she is the wife of the deceased and the mother to the protestors. She testified that the deceased died on 4th April 2014 and produced a death certificate marked as DEXB1. She said together with her late husband, they were blessed with 8 children and one of the 8 children is now dead. She stated that the deceased estate comprised of the assets mentioned in the petition for letters of administration.

12. The petitioner further stated that the deceased had bequeathed each son a plot of land before his demise and she was only getting the money in the bank. She further said the plot given to the 2nd protestor **Cecilia** is in her name and this is the reason it is not included in the list of the deceased's estate. She said each son was given a portion of the land before the demise of the deceased.

13. She further stated that Isaac and the deceased sold the Engashura property and the money was given to Isaac. She said the current search certificate dated 27th January 2017, indicates the property is registered in the name of **Damaris Nyambura Karanja** issued on 20 December 2016. The transfer forms were signed after the demise of the deceased.

14. The petitioner said she is not aware of the plot numbers in Oljorai and Kikopey plots but she knows the plots were sold by **Isaac** to **Charles Mathenge** and was paid 300,000/= for Pavi's plot and the Kikopey plot at Kshs 250,000/= and vide a letter dated 23rd May 2017 **Charles Mathenge** promised to re-transfer the property back to her which he did.

15. She stated that she paid school fees of kshs. 75,000 for Isaac's daughter at nursing school and relationship with Isaac is a strained one.

16. On the issue of the Ol Jorai Phase II plots, she wished to distribute them to her daughters who have not received anything.

PETITIONER'S SUBMISSIONS

17. The petitioner submitted that the protestors are legally bound to demonstrate to the satisfaction of the court that their affidavits of protest have merit and they deserve the prayers sought, as per **Section 107 of the Evidence Act**; that the 1st and 2nd protestors are beneficiaries of the estate of the deceased thus they are undeserving of the orders sought.

18. The petitioner further submitted that the 1st protestor has no objection to the mode of distribution of the deceased estate.

2ND PROTESTOR'S SUBMISSIONS

19. In response to the 2nd protestor, submitted that he was allocated parcel **Bahati/Engashura 4/198** by the deceased before his demise, and he sold the same and the administrator considered the said property when distributing the estate of the deceased. **Section 42 of the law of succession** which states "**where an intestate had during his lifetime or by will paid, given or settled any property to or for the benefit of a child that property shall be taken into account in determining the share of the net intestate finally accruing to the child.**"

20. He further submitted that no evidence has been produced showing the monies were put in the administrator's account and failure by the objector to call in any evidence in support of the allegation renders the pleadings to be a mere statement. He cited the case of **Trust Bank Ltd vs Paramount Universal Bank Limited & 2 Others (2009)eKLR** where the court held as follows:-

"where a party fails to call evidence in support of its case, that party's pleading remains a mere statement of fact since in so doing the party fails to substantiate the pleading."

21. The 2nd protestor further submitted that as per **section 26(1) of the Land Registration Act**, the certificate of title issued by the Land Registrar upon registration is the *prima facie* evidence that the person named therein is the absolute and indefeasible owner of the land in question. The receipts adduced by the protestor cannot be taken to be *prima facie* evidence to the deceased ownership of the properties in issue to merit the inclusion into the schedule as demanded by the 2nd protestor; and further, the said properties are not available for distribution as the property does not form part of the free property of the deceased; and as per the directors of Enterprise Development Investments Agency (EDIA) the plots have not been allocated to anyone due to a pending succession cause regarding the mother title.

22. The 2nd respondent submitted that that the property cited by the 2nd protestor will be available for distribution only when the case regarding the mother title is fully heard and determined and the petitioner has no objection moving the court as appropriate when the succession is finalized and thus the 2nd protestors affidavit of protest is pre-mature and devoid of merit and ought to be dismissed.

23. The 2nd respondent submitted that having settled the issue of the two Plots Oljorai Phase II/962, he has no objection to the distribution of the estate of the deceased in the manner proposed by the beneficiaries and urged this court to allow costs as per **Section 27 of the Civil Procedure Act**.

1ST PROTESTOR'S SUBMISSIONS

24. Counsel for 1st protestor submitted that the protestors are the blood children of the deceased and are therefore entitled to the estate of the deceased as per **Section 29 (a) of the Law of Succession Act**.

25. He further submitted that that to demonstrate the deceased had purchased 2 plots known as Oljorai Phase 2/922, he produced a letter from the Enterprise Development Investments Agency (EDIA) and submitted that the two properties have been excluded from the schedule of distribution.

26. The 1st respondent further submitted that **Bahati/Engashura Block4/198 (Mwaki Muugi)** does not form part of the deceased estate as the same was sold by the deceased during his lifetime and at the time of the deceased death, his interest in the property had terminated it, therefore, did not form part of the free estate of the deceased and cited the case of **Mpatinga Ole Kamuye vs MeliyoTipango & 2 others (2017) eKLR where the court opined**

“ this court’s view before distribution of the estate of the deceased under section 71 of the Law of Succession Act Cap 160, the court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate: that there are assets that comprise of the deceased’s estate and are available for distribution after settling all liabilities and having the net estate for distribution. ”

27. The 1st respondent further submitted that no evidence has been adduced as proof that the money was deposited in the 1st protestors account and he squandered the proceeds and added that the 1st protestor has proved the two plots belong to the deceased and the same ought to be included as forming part of the estate of the deceased. One of the plots should be distributed to the deceased as a fair and equitable distribution.

ANALYSIS AND DETERMINATION

28. I have considered evidence adduced and submissions filed by parties herein and wish to consider the protestors have demonstrate reason to revoke grant issue and if so what form assets of the deceased and their mode of distribution.

29. On revocation of grant, **section 76 of Laws of Succession Act** provides as follows:-

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion

(a)That the proceedings to obtain the grant were defective in substance;

(b)That the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case;

(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

30. Any party seeking the revocation of the grant must establish to the court that any of the ground established above was present when the grant was being obtained.

31. In the case of **Jamleck Maina Njoroge v Mary Wanjiru Mwangi (2015) eKLR** the court discussed circumstances when a grant can be revoked. The court observed as follows:-

“11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

32. The 1st protestor contends the grant was obtained by concealment of material facts that property No. **Bahati/Engashura Block4/198 (Mwaki Muugi)** was sold by the deceased during his lifetime and two plots known as Oljorai Phase 2/922 have not been included in the schedule of distribution as forming part of the deceased estate. While the 2nd protestor contends she failed to sign the consent as the property bequeathed to her by the deceased was not listed for distribution. The petitioner contends the property bequeathed to the 2nd protestor does

not form part of the deceased estate as the same belongs to her; that property does not form part of the deceased estate and is not available for distribution. The 2nd protestor does not dispute how the estate has been distributed. The 2nd protestor has not therefore made up any case to warrant revocation of grant.

33. On perusal of the pleadings, I note that the protestors were included in the petition and they annexed their signatures. The issues raised herein arose when the petitioner applied for the confirmation of grant. They declined to sign the consent for reasons they have stated. The petitioner distributed **Kiambogo/Kiambogo Block 2/ 11108 (Mwariki)** to **Samwel Wanjohi Githinji**, **Bahati/Engashura Block 4/198 (Mwaki Muugi)** to **Isaac Macharia Githinji**, and money held in **Equity Bank Ol Jororok A/C 0130100245879** to **Monica Njeri Githinji**. None of the protestors have opposed the proposed distribution.

34. The 1st respondent's argument is that **Oljorai Phase 2/922** and **Bahati/Engashura Block 4/198 (Mwaki Muugi)** form part of the deceased estate.

35. The petitioner's justification for allocating the 1st objector **Bahati/Engashura Block 4/198 (Mwaki Muugi)** is that he benefited from the proceeds of the sale. The petitioner alleges the 1st objector sold the property and benefited from the proceeds of the sale and that she was not aware of the existing plots known as Oljorai Phase 2/922 and since the same is under succession and not registered in the name of the deceased they are not free property that forms part of the deceased estate.

36. The grounds upon which this application has been brought is the concealment of material factors. The 1st protestor argues that properties known as Oljorai Phase 2/922 have not been included as the estate of the deceased. The petitioner's explanation is that the two lots are not in the deceased's name; they are still subject to succession and therefore not available for distribution as part of deceased's estate. The 1st protestor has admitted that **Bahati /Engashura Block 4(Mwaki Muugi) 198** was sold for purposes of educating his children and his mother was right is allocating to him to be transferred to the purchaser after confirmation.

37. In respect to the alleged two plots known as Oljorai Phase 2/922, I note from the letter from Enterprise Development Investment Agency that the deceased purchased two plots out of title Oljorai Phase 2/922 but the same have no title deed as they are under succession.

38. The two plots have no title deeds but there is confirmation that they were purchased by the deceased. They are his assets and they should have been part of his assets to be distributed as soon as the titles become available.

39. FINAL ORDERS

- 1) Bahati /Engashura Block 4(Mwaki Muugi) 198 allocated to 1st respondent as proposed; to be transferred to the purchaser.**
- 2) LR No. Kiambogo Kiambogo Block 2/Mwariki /1108 being given to Samuel Wanjohi.**
- 3) Two plots in Oljorai Phase 2/922 to be added to list of deceased's asset. The plots to be shared equally among the deceased's four daughters who have not been allocated any other asset once the two title deeds become available.**
- 4) Money in Equity Bank Account number 0130100245879 to go the petitioner.**

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF MARCH, 2022

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RACHEL NGETICH

JUDGE

In the presence of:

Lepikas - Court Assistant

No appearance for parties