



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 314 OF 2014

IN THE MATTER OF ESTATE OF ZEPHANIA KARETI M'THARA (DECEASED)

JUSTIN NJERU ZAPHANIA.....1ST PETITIONER/ADMINISTRATOR

VERSUS

ELIZABETH KARUMA KARITI....2ND PETITIONER/ADMINISTRATOR

RULING

1. The genesis of the protracted battle between the parties herein can be traced from way back in 1988. From the court record, it is clear that the 1st petitioner herein petitioned for letters of administration intestate and on 17/02/1988 and the following beneficiaries to wit the 1st petitioner, Peter Nthiga Kariuki (son), Peter Njeru Zephania (son), Jim Muriithi (son), Kariuki Zephania (son), Esther Nduma Zephania (widow), Elizabeth Karuma (widow), Faith Muthoni (daughter), Njiru Zephania (son), Ileri Zephania (Son), Njogu Zephania (son), Madis Njura Zephania (daughter not married), Joyce Wawira (daughter unmarried), Regina Wakina (daughter unmarried) and Njue Zephania (grandchild) appeared in court and the court granted the letters of administration to the 1st petitioner herein.

2. On 6/7/1988, the court noted that there was no objection to the mode of distribution as was stated by the 1st petitioner and proceeded to confirm the grant and the estate of the deceased (at that time being L.R. Kyeni/ Kigumo/ 1776 was distributed as follows: -

- i. Esther Nduma Zephania - 1 acre
- ii. Elizabeth Karuma Zephania - 1acre
- iii. Justin Njeru Zephania - 3 acres
- iv. Kariuki Zephania Kiriti - 1 acre
- v. Njiru Zephania - 1 acre
- vi. Ileri Zephania - 1 acre
- vii. Muriithi Zephania - 1 acre

The court ordered that the land certificates for Njiru Zephania, Ileri Zephania and Muriithi Zephania be deferred until they attain the age of majority.

3. The record further indicates that the 1st petitioner herein made an application dated 3/04/1996 wherein he sought review of the orders of 6/07/1988 and in doing so amend the certificate of confirmation of grant. The basis of the said application was that at the time of confirming the grant, one (1) acre of the estate was left out unadministered. The said application came up for hearing on 5/02/1998, and the record indicate that the following were present in person: -

- i. Petitioner herein
- ii. Elizabeth Karuma

- iii. Esther Nduma
- iv. Peter Nthiga Kiriti
- v. Peter Njeru Zephania
- vi. Njiru Zephania
- vii. Ireri Zephania
- viii. Muriithi Zephania
- ix. Njogu Zephania

4. The effect of the said application was to amend the certificate of confirmation of grant wherein the beneficiaries were to share LR. Kyeni/ Kigumo/ 1776 as follows;-

- i. Esther Nduma Zephania - 1 acre
- ii. Justin Njeru Zephania - 3 acres
- iii. Kariuki Zephania Kiriti - 1.25 acre
- iv. Njiru Zephania - 1.25 acre
- v. Ireri Zephania - 1.25 acre
- vi. Muriithi Zephania - 1.25 acre
- vii. Elizabeth Karuma Zephania- 1acre

5. The said application further sought that LR. Kyeni/ Karurumo/T.32, T33 and LR. Kyeni/Kigumo/2141 be included in the estate of the deceased and LR. Kyeni/Karurumo/T.32, T33 be registered in the names of Kariuki Zephania. For LR. Kyeni/Kigumo/2141, it was to go to David Njogu Zephania. The 1st petitioner prosecuted his application and all the above beneficiaries were not opposed to the same. The said application was subsequently allowed vide the orders of 11/02/1998 and fresh certificates of confirmation of grant were issued.

6. The record further indicate that the 2nd petitioner herein filed two applications both dated 24/07/2014. In the first application, she sought for orders that LR. Kyeni/Kigumo/ 1775 be included in the estate of the deceased herein and in the second application, she sought for revocation of the grant of letters of administration made to the 1st petitioner herein on 17/02/1988 and confirmed on 11/02/1998. The first application was allowed as it was not opposed. However, the application for revocation of grant was prosecuted before J.M Bwonwonga J and in a ruling delivered on 7/06/2016, the Learned Judge allowed the application and did set aside the confirmed grant issued on 11/02/1998.

7. After delivery of the said ruling, the 1st applicant proceeded to file another summons for confirmation of grant dated 8/07/2016 and in the affidavit in support of the said application, the 1st petitioner proposed the following as the mode of distribution: -

- a. LR. Kyeni/Kigumo/1776 - to be shared between Elizabeth Karuma Kariti and Justin Njeru Zaphania in equal shares of 5 acres each.
- b. LR. Kyeni/Kigumo/2141 - to be shared between Elizabeth Karuma 1 and Justin Njeru Zaphania in shares of 1.00 acre each.
- c. LR. Kyeni/Kigumo/1775 - to be shared between Elizabeth Karuma and Justin Njeru Zaphania in shares of 0.0625 acres each.

8. The said application was opposed by the 2nd petitioner vide an affidavit of protest sworn on 15/08/2016. The said protest was heard by F. Muchemi, J. and who delivered a ruling on 16/01/2019. The court in its ruling appointed the 1st and 2nd petitioners as co-administrators of the deceased estate. The court further ordered that either of the administrators or both of them jointly file an application for confirmation of grant within thirty (30) days from the date of that ruling and that any administrator who is not in agreement with the mode of distribution of the co-administrator to file his/her affidavit of protest within 21 days upon service of the application for confirmation.

9. What followed is summons for confirmation of grant filed on 7/02/2019 by the 2nd petitioner/administrator. Four days later on 11/02/2019, another summons for confirmation of grant was filed by the 1st petitioner/administrator. The 1st petitioner proceeded to file an affidavit of protest to the 2nd petitioner's application on 18/02/2019. It is the said protest which is the subject of this ruling.

10. In the said affidavit of protest, the protestor deposed that he is opposed to the mode of distribution of the estate as proposed by the 2nd petitioner on the grounds that the 2nd petitioner in the said application omitted one Charity Muthanje, Peter Nthiga Kariti, Peter Njeru Kariti,

Javerson Njue Kariti and David Njogu as beneficiaries of the estate. Further that LR. Kyeni/Kigumo/1776 is erroneously indicated to be measuring 10 acres whereas the distribution is only for 8½ acres and thus leaving 1¾ not distributed; that the mode of distribution has not included LR. Kyeni/Kigumo/2141 as ordered by court; that the distribution of LR. Kyeni/Kigumo/1775 amounts to 0.125 acres whereas the actual acreage is 0.05 acres; that the mode of distribution omitted a posho mill and a storage house which forms part of the estate of the deceased; and that the mode of distribution is not fair and the applicant has not sought consent from the beneficiaries. As such he prayed that the estate be distributed equally amongst the two houses as indicated in his summons for confirmation of grant which he filed in court.

11. The 2nd petitioner filed an affidavit in opposition to the protest wherein she deposed that one Charity Muthanje is included in her proposed mode of distribution, that Peter Nthiga Kariti and Peter Njeru Kariti were left out in her mode of distribution as they had been given land by the deceased during his lifetime and that's where they live; that Javerson Njue Kariti is the grand child of the deceased and who ought to benefit from his mother's share (Judith Njeri Zaphania); that David Njogu had been given LR Kyeni/Kigumo/2141 by the deceased but which land he sub-divided and sold in 1998. She conceded to paragraph 10 of the affidavit of protest and deposed that the remaining 1¾ acres should be distributed to the beneficiaries of the said land parcel each getting 0.1 Ha and further conceded to the depositions in paragraph 12 of the affidavit of protest and deposed that LR. Kyeni/Kigumo/1775 should be distributed amongst the beneficiaries and each one to get 0.025 acres. Further that the beneficiaries had consented to the mode of distribution.

12. The protest proceeded by way of oral evidence wherein 1st petitioner/protestor gave evidence as PW1 and testified that the whole family of the deceased agreed on the mode of distribution as he has proposed in his summons for confirmation of grant.

13. PW2 (Kariuki Zephania Kariti) testified that they had agreed on how the estate would be distributed and the same is as per the mode of distribution proposed by PW1. That the applicant did not agree to the mode of distribution and that they have been unable to agree because they have already shred the estate and some of their children have already developed their portions. In cross examination by the 2nd petitioner, he testified that one David Njoroge does not come for meetings because he has been given his portion and further that one Njogu was given two acres out of LR Kyeni/Kigumo/2141.

14. PW3 (Peter Nthiga Kariti) testified that they agreed on the mode of distribution and that the applicant did not summon him when she was distributing the estate and neither does he know on what grounds she purports to distribute the estate. He testified that he had been given a portion of land by the clan which is 4 acres (Kyeni/Kigumo/1352) and that Peter Njeru was also given his 4 acres but which was sold by his children after his demise. The protestor proceeded to close his case.

15. The 2nd petitioner (respondent in the protest) on her part testified that before she filed the application for confirmation of grant, she summoned all the beneficiaries so as to agree on the mode of distribution but one Muthanje, Wanjira, Wawira and Njura did not turn up. In cross examination, she testified that she could not remember when she summoned the children of the deceased for the meeting and that she summoned her 5 daughters. That the ones who testified for the applicant did not attend the meeting as they don't talk to her and she did not summon them. That her proposed mode of distribution is the right way and if any of the beneficiaries has developed the land they will pull down the developments. The respondent closed her case.

16. I have considered the protest herein, the response to the same and the evidence tendered at the hearing thereof and it is my view that the main issue for determination is whether the protest is merited.

17. It is not in dispute that the deceased herein had two wives and who survived him. Neither is it in dispute that the deceased died intestate. Further it is not in dispute that the estate of the deceased herein was made up of LR. Kyeni/Kigumo/1775, LR. Kyeni/Kigumo/1776, LR. Kyeni/Kigumo/2141, Kyeni/ Karurumo/T. 32 and Kyeni/Karurumo/T33.

18. It is clear from the pleadings herein that both parties are in agreement as to the distribution of LR. Kyeni/ Kigumo/ 1775 (to the effect that the same should be distributed equally between the 1st petitioner and the 2nd petitioner and each ought to get 0.025 acres). As such, the proposed mode of distribution ought to be left to stand.

19. Further, it is evident from the court record that LR. Kyeni/ Kigumo/ 2141, Kyeni/ Karurumo/T. 32 and Kyeni/ Karurumo/T33 had initially been distributed pursuant to the fresh certificate of confirmation of grant issued by the court upon review of the earlier certificate. However, the said certificate was set aside by the court. The 1st petitioner in his proposed mode of distribution proposed that LR. Kyeni/ Kigumo/2141 be shared between him and the 2nd petitioner in equal share. However, I note that, David Njogu Zephania who was given the said land parcel was never involved in the proceedings herein. It is my view that the same cannot be distributed without the said David Njogu having been heard.

20. In fact, the 1st petitioner was the one who filed an application for review of an earlier certificate of confirmation of grant and wherein he proposed the said land parcel be given to David Njogu. He cannot then take advantage of the orders setting aside the earlier certificate of confirmation of grant and in doing so distribute some properties which another person could have dealt with without that person being heard. Further, despite the 1st applicant having proceeded to file another summons for confirmation of grant dated 8/07/2016 and having proposed, in the affidavit in support of the said application, that the said land parcel Kyeni/Kigumo/2141 be shared equally between him and the 2nd petitioner, DW2 (Kariuki Zephania) testified to the effect that the portion of David Njogu was sold to one Hebert Ndwiga who proceeded to sell the same to a third party.

21. It is my view that the said land parcel cannot be distributed until the said David Njogu is heard on the same. This is more so because the earlier grant was reviewed by the orders of 11/02/1998 and which were set aside by Bwonwonga, J. on 7/06/2016 and wherein he was not involved in the said proceedings. The 1st petitioner ought to have served him with the application herein.

22. As for Kyeni/ Karurumo/T. 32 and Kyeni/ Karurumo/T33, the 1st petitioner herein in the application for review of the earlier certificate of confirmation of grant proposed that the two parcels be registered in the names of Kariuki Zephania. It appears that the said plots do not

form part of the subject matter of the protest before this court. The distribution of the same ought to be left to stand as had been distributed in the fresh certificate of confirmation of grant issued on 11/02/1998. There are no sufficient reasons presented before this court to warrant interference with the same.

23. From the above, it therefore follows that the only land which I am supposed to subject to the law governing succession and determine as to how it ought to be distributed is LR. Kyeni/ Kigumo/1776. However, as I have already noted, the said land parcel was the first parcel of the deceased's estate to be distributed and which distribution was pursuant to the orders of 6/7/1988 and which orders were reviewed on 11/02/1998. In the two occasions, the 1st applicant herein had moved the court and indicated to the court that the family members had agreed on the mode of distribution. Further, the 2nd petitioner herein was present in court on the two occasions and never expressed any objection to the mode of distribution as was proposed by the 1st applicant. The court proceeded to allow the applications based on the same. This in my view amounted to a consent judgment. In **Ismail Sunderji Hirani –vs- Noor Ali Esmail Kassam (1952) EA 131** the court of appeal for Eastern Africa held inter alia that:-

“ The compromise of a disputed claim made bonafide is a god consideration and the court can only interfere with it in circumstances which would afford good ground for varying or rescinding a contract between parties”. Further in the case of Brooke Bond Liebig (T) Limited –vs- Malya (1975) EA 266 the same court of appeal held inter alia that “A consent judgment may only be set aside for fraud , collusion or for any reason which would enable the court set aside an agreement.” (See also Flora N. Wasike Versus Destimo Wamboko (1982-1988) KAR 625).

24. It is my view that both petitioners cannot take advantage of the orders setting aside the certificate of confirmation of grant herein and proceed to propose new modes of distribution whereas they had consented to the earlier mode of distribution when the matter was before court. They both had led the court in confirming the grant on the belief that the mode of distribution proposed therein was the true position of all the beneficiaries. The beneficiaries entitled to benefit from LR. Kyeni/ Kigumo/ 1776 were present in court in both occasions and agreed to the said mode of distribution. It was expected that in any application to alter the same, all the said beneficiaries ought to have been called and/or involved so as to respond to the same. This was not done and the parties herein chose to run the show on their own. It is my view that this court cannot alter or vary a mode of distribution which the beneficiaries had earlier agreed in court without all of them being involved.

25. It appears that the 2nd petitioner's mode of distribution takes into account the daughters of the deceased in her proposed mode of distribution. Further I note that the deceased died 23.08.1984 and which was after the commencement of the Law of Succession Act and which Act provides that all the children of the deceased are entitled to equal share of the estate of the deceased irrespective of the gender (in this case section 40 therein applies). This principle is also incorporated in our Constitution (Article 27).

26. However, that notwithstanding, I note that the said female beneficiaries (daughters) appeared in court on 6/7/1988 when the grant was initially confirmed and they were not opposed to the mode of distribution proposed then. It is my view that if at all the said daughters wished to share the estate of the deceased, they ought to have filed summons for revocation of grant or affidavit of protest on their own. The 2nd petitioner cannot purport to plead on their behalf without their authority and if the same was to happen, the said daughters ought to have appeared in court and argue their case or give authority to the 2nd petitioner to plead on their behalf. As it is now, it is clear from the court record that the said daughters consented to the mode of distribution earlier proposed. They are estopped from avoiding the same and in doing so, use proxies. In fact, no one knows where they are. In the same way, the 1st and the 2nd petitioners are estopped from avoiding a mode of distribution which they confirmed before the court that was the agreed mode of distribution.

27. Considering all the above, it is my view that the specific mode of distribution in relation to LR. Kyeni/Kigumo/1776 as proposed by each of the petitioners herein ought not to be allowed. The said land parcel ought to be distributed as per the mode of distribution that was adopted by the court and as expressed in the certificate of confirmation of grant issued on 11/02/1998. Proceeding otherwise will be tantamount to condemning other beneficiaries while they were not given an opportunity to be heard.

28. It is so ordered.

Delivered, dated and signed at Embu this 24th day of February, 2021.

L. NJUGUNA

JUDGE

.....for the 1st Petitioner

.....for the 2nd Petitioner