



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC SUCCESSION NO. 30 OF 2017

(FORMERLY CM'S COURT AT MERU CIVIL SUIT NO. 134 OF 2007)

IN THE MATTER OF ESTATE OF THE LATE NDERI MUNYI (DECEASED)

PATRICK RUGENDO MBOGO.....APPLICANT

VERSUS

TARTISIUS NGAI SAMUEL.....1ST RESPONDENT

BEATRICE GAAJI NDERI.....2ND RESPONDENT

R U L I N G

I have decided to give a ruling in this matter in view of the matters which I wish to point out.

This matter relates to the estate of Nderi Munyi (deceased) who died intestate on 29th January 2013. A grant of letters of administration was issued to Beatrice Gaaji and Tratisious Ngai Samuel upon being appointed by this court as the administrators of the estate of the deceased on 10th October 2018. The court granted them liberty to apply for confirmation of grant before the expiry of six months but with notice to Patrick Rugendo Mbogo. It was good to mention here that a certificate of confirmation of grant which was issued by the Resident Magistrate Chuka on 3rd July 2017 was revoked by this court under a summons for revocation of grant dated 18th July 2017. The court further directed that the sub-divisions and entries made pursuant to the said grant be reversed and revert back to the name of the deceased.

1. The application pending before me is the summons for confirmation of grant dated 1st July 2019. The applicants who are the administrator and administratrix have listed the beneficiaries and the proposed mode of distribution of the estate. The properties they proposed to distribute are parcel No. LR Muthaambi Lower Karimba/134, 1528, and 1028. Karingani/Muiru/1975, Karingani/Mariani/3639, 3822, 2012, 3443 and 3123. It is proposed that the properties be distributed to the 21 person(s) listed on the application. On 13th July 2020 the court was informed that the only property in dispute is Karingani/Muiru/1975. The court issued orders of *status quo* on the Land Parcel No. Karingani/Muiru/1975.

2. An affidavit in response to the summons for confirmation of grant was filed by Genasia Njoki Nderi on 29th July 2019.

She deponed that she is the daughter to the deceased herein and is opposed to the mode of distribution proposed by the administrators. She stated that her father had 5 wives and many children to whom he had already distributed the estate and nine of the persons listed in the proposed distribution are strangers to the estate herein. She also stated that Patrick Rugendo Mbogo is her cousin and her father had wished that he receives 0.5 acres of the estate.

3. On the other hand Patrick Rugendo Mbogo filed an undated affidavit on 22nd August 2019.

He identified the deceased as his uncle, an elder brother to his father, one Mbogo Munyi, also deceased. He opposes the proposed mode of distribution. His contention is with parcel Karingani/Muiru/1975 which he claims belonged to his father and that his family have lived on that land since before his birth. He states that the deceased herein was registered as a trustee for the said parcel and the beneficiaries of the same are himself, his mother and his 5 siblings. He also takes issue with the inclusion of certain strangers to the estate, naming 11 persons who he cites as purchasers to parts of the estate. He states that the deceased had sought reconciliation between the family and a goat had been exchanged and he had endeavoured to transfer the said land to his brother's children but the process was intentionally delayed until the deceased herein passed away. He rejects the proposal that he receives 0.5 acres of the said property citing that the same is an attempt to disinherit his family of their rightful land. He proposes his own mode of distribution for the property.

He has filed a further affidavit on 19th November 2019 sworn on 18th November 2019.

The protester above filed a further affidavit on 19/11/2019 and it is sworn on 18/11/2019. He states that parcel Karingani/Muiru/1975 was property obtained by the deceased from their father and that their late father's estate was to be shared by his sons with parcel 1975 going to the protester's father but it was registered to his uncle as a trustee. He added that sometime in 1999, he realised the property was in danger of being sold and registered a caution against it on 7/9/1999 and he instituted proceedings over the land before Nduri clan elders and LDT and when he obtained orders in his favour, the deceased herein disobeyed the orders. He claims that the administrators have meddled with estate of the deceased by selling it and the claim that the deceased had sold the land to pay for treatment is untrue. He asserts that himself his mother and his siblings have been in continuous use and occupation of the land parcel 1975 since before he was born. He denies the assertion that he has held on to the land through violence, reiterating that no such complaint has ever been made. He further stated that 3 months before his death, the deceased had summoned the protester and the administrator to a truce and told the administrator to transfer land to the protester but the administrator did not implement the same. He asserts that he and his family has no claim on the other properties and proposes a mode of distribution for parcel 1975.

4. In response to this averments, the administratrix Beatrice Gaaji Nderi has sworn an affidavit.

The administrator named above swore an affidavit on 30/9/2019 and the same was filed on even date. She deponed that she is a widow to the deceased and confirmed that Patrick Mbogo is a nephew to the deceased. She asserted that the said Patrick Mbogo should inherit any properties from his own father's estate. She termed the protester as litigious stating that he had sold all his father's property and further attempted to litigate endlessly to take the land belonging to the deceased herein. She confirmed that the deceased had sold land during his lifetime to raise money for cancer treatment and she lists 9 persons who bought the land and she claims to be honouring those sales. She also urges that the protester is claiming land within a succession cause, which she deems as improper. She also states that the deceased reluctantly told her to give the protester, Mbogo, 0.5 acres only for the sake of his homestead. She even contends that the said protester has held onto the land through threats of violence.

The co-administrator swears an affidavit on 30/9/2019. He stated that the protester Patrick Mbogo is not a beneficiary to the estate herein but should benefit from his father's known land. He confirms that some 9 people purchased land from the deceased which money was used to pay for medication for the deceased. He similarly termed the protester as litigious in nature. He stated that parcel Karingani/Muiru/1975 is part of the estate of the deceased herein and is not available for distribution to the protester who is not an heir to the deceased.

The protester filed his written submissions on 12/5/2020. He reiterated the contents of his affidavits and asserted that parcel Karingani/Muiru/1975 has been litigated over in his favour before different forums and the administrators are well aware that the land belongs to the estate of his late father. He further submitted that the administrators have sold the land to persons who are constructing thereon despite court orders stopping the same. He also urged the court to note that the administrator is untruthful as they claim to have judgments in their favour, which is not the position, that he included purchasers as dependants, which is not the case, intermeddling with the estate and alleging the family was in agreement when that is not the case.

PROTESTER'S FINAL SUBMISSIONS

The Protester filed further submissions on 2/10/2020. He stated that the administrators had informed the court that they were willing to surrender parcel 1975 but they have seemingly backtracked on that. He submits that the grant should only be confirmed after removal of parcel 1975 as he had proven it belongs to his family. He asserts that the contestation about the land is due to the administrators' failure to honour court decisions and due to their intention to wrongfully take his family's land.

PETITIONER/ADMINISTRATOR'S SUBMISSIONS

The Petitioner filed his submissions on 16/7/2020. He reiterates the assertions in his affidavit and says that the protest has no basis in law as the protester is a distant cousin to the administrator. He states that the deceased was polygamous with Beatrice Gaaji being the only surviving spouse and there being many children, some of whom are also deceased. He submits that there is no evidence to support the assertion that parcel 1975 belonged to the protester's father. He further states that the protester was a thorn in the deceased's flesh and does not even deserve the 0.5 acres apportioned to him. He prays for the court to allow the application for confirmation of grant as prayed.

Analysis and Determination:

It has been asserted by the administrators that the deceased was a polygamous man who had married five wives and that Beatrice Gaaji is the only surviving wife. The distribution of his estate should therefore be governed by **Section 40 of the Law of Succession Act**. (to be referred to as the Act). The Section provides:-

Where intestate was polygamous

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

It is not in dispute that the deceased was polygamous and had many children. These children are listed at paragraph 1 of the affidavit in support of the summons for confirmation of grant. Paragraph 2 does not list the dependants although it is averred that the deceased was survived by dependants. The proposed mode of distribution at paragraph 4 of the supporting affidavit shows that the estate is set to be distributed to person who are not on the list of the children of the deceased. The administratrix has listed 21 children while the administrator Taratisious Ngai Samuel at paragraph 2 of this supporting affidavit has listed fourteen (14) children. The list of dependants on the affidavit

of the administrator is blank. Of concern is that the administrator/administratrix have not filed a consent showing the children have consented to the mode of distribution. The one on record is alleged to be signed by some of the children and majority have not signed. Those who have signed have not appended their identity card numbers. Having considered these anomalies, it is my view that there seems to be material none disclosures and misrepresentations which may sooner or later plunge the process in the pool of the provisions of **Section 76 of the Law of Succession Act**. I wish to point out these anomalies;-

1) Section 40 of the Act is no doubt the provision which should govern the distribution of the estate. The administrator/administratrix have not laid before this court the details of the deceased's wives and the children. Under **Section 40 of the Act** the net estate of the deceased should be shared out to the children and the wives form additional units. The wife who survives the deceased is considered as an additional unit during distribution of the estate. When the Judge is distributing the estate, there should be a disclosure on the number of children in each house who are considered as the units and the wife as an additional unit. The affidavits in support of the summons for confirmation of grant have not disclosed the houses and the number of children. The distribution of the estate should be in accordance with the law. The Act defines a 'house' under **Section 3** as, **" a family unit comprising a wife whether alive or dead at the date of the death of her husband and the children of that wife."**

There is ambiguity on the number of houses and the number of children. Any distribution in the mode proposed by the applicant is likely to cause consternation at another stage due to the current ambiguity. Section 71 of the Act gives the court power to postpone the confirmation of grant for such period as it may seem necessary in the circumstances of the case. The proviso to the Section states:-

" Provided that in cases of intestacy the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficiary entitled and when confirmed the grant shall specify all such persons and their respective shares."

See also **Rule 40 of the Probate and Administration Rules**.

2) The second issue is on whether deceased had sold some portions during his lifetime. No evidence has been tendered to proof that the deceased sold portions of his land in his lifetime. The Act makes it an offence for persons to intermeddle with the estate of the deceased. The purchasers who the administrators are distributing land to are not parties. The law is trite that no immovable property shall be sold before confirmation of grant. There was no evidence tendered to proof the sale or when that sale took place. The person(s) who are said to be purchasers can only be deemed as strangers who are not entitled to the estate of the deceased.

In view of the foregoing, I find that the summons for confirmation of grant is pre-mature. The applicants (administrators) are directed to comply with the law in order for this court to be able to determine the summons. The comprehensive list of the children and wives as well as proof that the deceased sold portions of his estate be availed. The application as presented shows that there is more than meets the eye and the court would not be doing justice by dealing with the summons as presented. The law gives the court discretion to postpone the confirmation of grant. I order that the summons for confirmation of grant shall be postponed.

The parties will be given 60 days to comply.

Dated, signed and delivered at Chuka this 11th day of February 2021.

L.W GITARI

JUDGE

11/2/2021

Ruling has been read out in open court.

L.W. GITARI

JUDGE

11/2/2021