



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 140 OF 2014

IN THE MATTER OF THE ESTATE OF KABIARU KABUNGU - DECEASED

GRACE WANJIKU NDURU.....APPLICANT

VERSUS

SIMON KAMAU KABIARU.....1ST RESPONDENT

AGNES WANJIRU KABIARU.....2ND RESPONDENT

ESTATE OF PETER KABUNGU KABIARU (DECEASED)....RD RESPONDENT

RULING

1. The substantive prayer in the application dated 17th December 2019 by the applicant Grace Wanjiku Nduru against the respondents Simon Kamau Kabiari, Agnes Wanjiru Kabiari and the estate of Peter Kabungu Kabiari (deceased) was that –

“5. This Honourable Court do order that Kabete/Gikuni/ T.227 to be sold and the proceeds thereof be shared equally among the beneficiaries, that is to say, the applicant, the 1st, 2nd and 3rd respondents.”

2. It was claimed in the grounds and supporting affidavit that the 1st respondent, as a co-administrator with the applicant, had completely refused to cooperate to distribute the property in accordance with the certificate of confirmation; that the respondents were intermeddling with the estate of the deceased; that the court had in its judgment dated 18th February 2019 ordered that if there was no proof that the construction on Kabete/Gikuni/T.227 had been done by the late Peter Kabungu Kabiari the property should be shared equally; that, now that Peter Kabungu Kabiari had died, there was no realistic chance that there would be evidence to show he did the constructions on the property.

3. The replying affidavit was sworn by Elizabeth Wairimu Mburiri, the widow of the late Peter Kabungu Kabiari. According to her the judgment delivered on 18th February 2019 finally settled the dispute over Kabete/Gikuni/T.227, and that if the applicant was aggrieved by the judgment she ought to have appealed against it. She stated that if the court were to grant the prayers, it would be going against the judgment.

4. The applicant swore a further affidavit to say that the dispute was who between the deceased and the late Peter Kabungu Kabiari had erected the structures on Kabete/Gikuni/T.227. Her case was that the late Peter Kabungu Kabiari was a peasant farmer, a man of straw, who could not have made the developments. Further that at the time of his death he was an undischarged bankrupt following Commercial and Tax Division **Bankruptcy Case No. BC 57 of 2008**.

5. The history of this case was that the deceased Kabiari Kabungu died intestate on 4th July 2021. He was survived by the applicant, the late Peter Kabungu Kabiari, Simon Kamau Kabiari, Agnes Wanjiru Kabiari and the late Ann Wanjiku Kabiari. His estate comprised –

a. Nairobi/Eastleigh Plot No. 36/Vii/596;

b. Plot No. 14 Ruku Shopping Centre;

c. Kabete/Gikuni/227;

d. Kabete/Nyathuna/735;

e. Kabete/Nyathuna/739; and

f. Kabete/Kibichiku/605.

6. A grant of letters of administration intestate was on 10th January 2014 issued to Peter Kabungu Kabiari, Simon Kamau Kabiari and Agnes Wanjiru Kabiari. Grace Wanjiku Nduru (the applicant) sought the revocation of the grant on the basis that her consent had not been sought or obtained during the petition, that she had not been included in the list of beneficiaries and that some of the assets of the deceased had been excluded. On 8th May 2015 the court revoked the grant and a fresh joint grant issued in her name and that of Simon Kamau Kabiari.

7. Subsequently, the court heard the parties orally on the issue of the distribution of the estate. A judgment was delivered on 18th February 2019 sharing the estate.

8. The instant application relates to Kabete/Gikuni/T.227. There was no dispute that the plot belonged to the deceased. Subsequently, a bar, restaurant and 4 single rooms were built on it. The late Peter Kabungu Kabiari claimed to have done the developments, but his siblings said they had been done by the deceased. It was under those circumstances that the court delivered itself as follows-

“5. Kabete/Gikuni/T.227 a commercial property with a bar, restaurant and 4 single rooms constructed by the deceased’s late son Peter Kabiari. It is alleged that the structures were built by the Peter Kabiari while the protester states that the same were built by their late father. This matter was not conclusively determined as no evidence was produced to confirm the same one way or another. Apart from the buildings constructed/developed by the deceased’s son Peter Kabiari if proved, the rest be shared amongst the 4 beneficiaries excluding Peter Kabiari’s family as she shall benefit from the development structures built by their late father. Alternatively, the suit property be shared by all beneficiaries equally.”

9. When the certificate of confirmation was issued on 18th February 2019, Kabete/Gikuni/T.227 was ordered to be shared equally by all the beneficiaries. No beneficiary raised any issue, and the certificate obtains to date.

10. It follows that when the applicant now seeks that Kabete/Gikuni/T. 227 be sold and the proceeds shared equally among the beneficiaries, that is a departure from what is contained in the certificate of confirmation. Unless the beneficiaries consent to a different arrangement, the property shall be registered in their joint names, each having an equal share.

11. In other words, the application has no merits and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER, 2021

A.O. MUCHELULE

JUDGE