



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT KERUGOYA

SUCCESSION CAUSE NO.429 OF 2012

IN THE MATTER OF THE ESTATE OF JEPHITHA MUYU NDINWA (DECEASED)

JOHN MWEA MUYU.....APPLICANT

VERSUS

MARY WANJIKU MUYU.....PROTESTOR

JUDGMENT

1. This matter relates to the estate of JEPHITHA MUYU NDINWA (deceased) who died intestate on 9.2.2005. A grant of Letters of Administration was issued to MICHAEL KABURIA and confirmed on 18.11.2009. The estate of the deceased which was comprised in Plot No.MUTITHI/CHUMBIRI/645 was given to JOHN MWEA MUYU.

2. MARY WANJIKU MUYU filed an application under Section 76 of the Law of Succession Act and Rule 44 Probate and Administration seeking orders that the grant be revoked and/or annulled on the grounds that the proceedings to obtain the grant were defective in substance the grant was obtained fraudulently by making of a false statement by concealment from court of something material to the case. It is also alleged that the grant was obtained by the making of an allegation fact essential in a point of law to justify the grant. That the grant has become useless and inoperative through subsequent circumstances.

3. The application was allowed by Justice H.I. Ong'undi on 16.2.2012. She ordered that the grant issued to MICHAEL KABURIA MUYU be revoked and further that a fresh grant be issued in the joint names of JOHN MWEA MUYU and MARY WANJIKU MUYU. In the same order, a grant issued by Kerugoya Senior Resident Magistrate in succession cause No.12/2009 was ordered revoked. An order was also issued to the effect that the title deeds which had been issued by virtue of the said grants on 7.4.2010 and 1.10.2010 over the property be cancelled. The tile deeds were in respect of Land parcel No.MUTITHI/CHUMBIRI/645. The order was issued on 6.5.2014.

4. Subsequent to that order the parties filed a consent which was filed in Court on 5.6.2014. However, the consent was not adopted as the order of this court as the court directed the parties to move the court for confirmation. Two applications for confirmation of grant were filed by MARY WANJIKU on 9.5.2012 another dated 27.9.2012. The one dated 9.5.2012 was withdrawn and an affidavit of protest was filed by MARY WANJIKU MUYU.

5. The court directed that protest be heard by way of viva voce evidence. The parties proceeded and adduced evidence.

6. The protestor's case is that she is the daughter of the deceased in this case. That the deceased was survived by his wife who has since died. The deceased was survived by the following;

- 1). JOHN MWEA MUYU - SON
- 2). DEBORAH WANGITHI - DAUGHTER
- 3). MARY WANJIKU MUYU - DAUGHTER
- 4). JOYCE WAIRIMU - DAUGHTER (deceased)

She claims that the deceased was initially the owner of the land parcel L.R. MUTITHI/CHUMBIRI/49 measuring 6.0 acres which he subdivided into two portions during his lifetime into L.R. MUTITHI/CHUMBIRI/644, 3.16 acres and MUTITHI/CHUMBIRI/645 284 acres (1.15 Ha).

The deceased during his lifetime bequeathed to the Petitioner JOHN MWEA MUYU L.R. MUTITHI/CHUMBIRI/644 which he transferred to him in 1989. Land parcel No.MUTITHI/CHUMBIRI/645 was meant to be inherited by his wife and the protestor. The deceased was categorical that the petitioner should be content with land parcel No.MUTITHI/CHUMBIRI/644 and should therefore not lay any claim on parcel No.645. The petitioner therefore prays that since the other sibling DEBORAH WANGITHI is not interested in the estate she should get the whole share of land parcel No.MUTITHI/CHUMBIRI/645.

7. The Petitioner's case is that he should inherit land parcel No.645 solely as it was the wish of the deceased that he should inherit it. However, when he testified in court he stated that the parcel be distributed as follows;

- 1). DEBORAH WANGITHI - 0.5 ACRES
- 2). MARY WANJIKU MUYU - 0.5 ACRES
- 3). JOHN MWEA MUYU - 1.88 ACRES

8. DEBORAH WANGITHI testified in this court and stated that she would be contented with a portion of 0.5 acres out of the estate of the deceased that is L.R. MUTITHI/CHUMBIRI/645.

9. The parties agreed to file submissions. However, only the Counsel for the Protestor had filed submissions by the due date.

I have considered the evidence adduced. There are issues which are not in dispute. These are;

- That the Petitioner JOHN MWEA MUYU was given land parcel No.L.R. CHUMBIRI/644 during the lifetime of the deceased.
- The only property in the estate of the deceased is L.R. NO. MUTITHI/CHUMBIRI/645.
- One of the siblings DEBORAH WANGITHI KARIUKI has agreed to get a portion of 0.5 (½ an acre) Act out of the estate.

The only issue for determination is distribution of the estate.

10. The spirit of the **Law of Succession Act (L.S.A)** is that beneficiaries who rank in the same priority to the estate of the deceased get equal shares of the estate. That is why the **Act at Section 38** provides;

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”.

11. The Act does not discriminate as the key word is **child or children**. It does not distinguish between male and female children. It is therefore in bad faith for the petitioner to state he is solely entitled to the estate. However, he did have a change of heart and proposed to get a portion of 1.88 hectares. This is based on assertion that the deceased wanted him to get the entire portion. This is not possibly true. If the deceased had such an intention, nothing prevent him from transferring the entire estate to him during his lifetime.

12. The Law of Succession Act provides for equal distribution of the estate of the deceased to all his children surviving him. This position can be under two considerations;

1. Where a beneficiary relinquishes his claim or accepts to take a small portion than what he is entitled.

2. upon consideration of settlements made during the lifetime of the deceased.

Where a beneficiary relinquishes his/her share

My view is that a beneficiary who is entitled to a share in the estate is at liberty to renounce his or her share. All what the court has to confirm is that the person who renounces his entitlement has done so voluntarily and the person appears in court to confirm it. As such the beneficiary DEBORAH WANGITHI was at liberty to relinquish her right to get an equal share. She confirmed that she will be contented with 0.5 acres.

Consideration of settlements made during the lifetime of the deceased

A person is free to deal with his properties the way he wishes during his lifetime. Where a person has settled properties for a beneficiaries in his lifetime, the court will not normally interfere. This is recognized under the **Law of Succession Act. Section 42 provides;**

Where

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that

property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

The section ensures that the wishes of the deceased are protected, respected and preserved. However, such settlements during the lifetime of the deceased are supposed to be taken into consideration when distributing the net estate of the deceased. This means that those properties which belonged to a deceased and were transferred and are no longer in his name, they will not be included in the succession. Those still in the name of the deceased are subject to succession under Law of Succession Act. The court will then take consideration of the gift inter vivos when distributing the net estate.

In this case there is no dispute that the petitioner was given a parcel of land namely MUTITHI/CHUMBIRI/644 measuring 3.16 acres. The land parcel No.MUTITHI/CHUMBIRI/645 was in the name of the deceased. It measures 2.84 acres. This means that the Petitioner already has a bigger portion than what remained in the estate of the deceased. I find that considering the spirit of Law of Succession on equal distribution the beneficiaries ranking in the same priority, the estate should go to the petitioner and her sister DEBORAH WANGITHI KARIUKI. The share of the Petitioner was settled during his life time of the deceased.

14. On distribution I find that the estate of the deceased comprised of land parcel No.L.R MUTIRA/CHUMBIRI/645 will be distributed as follows;

1. DEBORAH WANGITHI - 0.5 Acres

(approximately 0.2 Ha)

2. MARY WANJIKU MUYU - 2.3 Acres

The grant shall be confirmed and the estate be distributed as stated above.

Each party to bear it's own costs.

Dated at KERUGOYA this 20th day of February 2020.

L.W. GITARI

JUDGE