



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CASE NO. 104 OF 2017

IN THE MATTER OF THE ESTATE OF JONAH THUMBI KARIMI (DECEASED)

ESTHER NJERI KAGUNDA.....APPLICANT

AND

MARY WAIRIMU KARANJA

EUNICE WANJIKU MWARIA

GLADYS NYAMUHU MWARIA

GEORGE MBUTHIA THUMBI

PETER MUIGAI THUMBI

KAREN WANJIKU THUMBI.....RESPONDENTS

JUDGMENT

1. Before me is a Summons for Confirmation of Grant filed on 31st October, 2018 and brought under Section 71 of the Law of Succession Act and Rule 49 & 73 of the Probate and Administration Rules. The Application seeks that the grant of letters of administration intestate issued to ESTHER NJERI KAGUNDA, EUNICE WANJIRU MWARIA and GEORGE MBUTHIA THUMBI on 25th October, 2018 be confirmed notwithstanding that 6 months have not lapsed, pursuant to leave granted by the Court on 25th October, 2018 owing to the age of this matter. The Applicant also seeks that the court does adopt the Applicant's ESTHER NJERI KAGUNDA'S preferred mode of distribution as proposed in her attached and to hear and determine the applications dated 17th July, 2015 and 31st March, 2017 only in as far as the issue of taking of accounts is concerned the issue is still outstanding.

2. The Application is based on the grounds that the Administrators herein have competing interests hence could not apply jointly and that the matter herein has been in court for more than 28 years. The application is further supported by the affidavit of ESTHER NJERI KAGUNDA one of the Administrators herein. She outlined the identities of beneficiaries for purposes of distribution of the deceased's estate. She contended that the identification of beneficiaries and shares of all persons beneficially entitled to the said estate have been ascertained and determined in accordance with the decision of this court of 27th July, 2018. She further proposed a mode of distribution and urged the court to confirm its grant issued on 25th October, 2018 based on her preferred mode of distribution.

3. **GEORGE MBUTHIA THUMBI** filed his affidavit in reply to the summons for Confirmation of Grant on 21st November, 2018. He deposed that he objects to the summons for confirmation of grant as it is only partial, and yet this court revoked the grant in respect of the whole of the deceased's. He proposed that all properties be re-distributed afresh as ordered by the court.

4. **EUNICE WANJIRU MWARIA** filed her affidavit of protest on 5th December, 2018. She deposed that she is in support of the summons for confirmation of grant save for the proposed mode of distribution by Esther Njeri Kagunda. She proffered her proposed mode of distribution to the effect that LR. No. Komothai/Kiambururu/89 and Komothai/Kiambururu/T.161/18 be shared equally amongst the 6 beneficiaries and that Ruiru Plot No. 70 be sold and its proceeds shared equally after the estate of Joyce Wambui, her late mother has been paid its due share (of profits therefrom) since 1991.

5. When the Summons for Confirmation of Grant came up for hearing, parties had already filed their written submissions. The Applicant submits that the beneficiaries are agreed that the deceased's estate be distributed equally among all the 6 beneficiaries, save for LR. No.

Ruiru Town T/70 which has shops, and which she proposes be shared by the beneficiaries. She opposes the proposal by Eunice Wanjiku Mwaria and Gladys Nyamuhu Mwaria that the same be valued, sold and that the two get their income since 1991. It was her view that selling LR. No. Ruiru Town Plot /70 is not the best way to distribute the asset and that her proposal is more reasonable.

6. Subsequently, the 4th, 5th & 6th Respondents filed their submissions where they outlined their proposed mode of distribution. It was their submission that all the Respondents were agreeable to the said mode of distribution save for the Applicant and as such the majority rule should be applied so as to bring this dispute to an end.

7. In oral highlighting, Mr. Makumi for the Applicant indicated that the beneficiaries were in agreement that LR. No. Komothai/Kiambururu/89 and Komothai/Kiambururu/T.161/18 be shared equally amongst the 6 beneficiaries. He further stated that the sticking point is whether the asset Ruiru Plot No. 70 should be sold and/or distributed among the beneficiaries. In his opinion, Section 35 of the Law of Succession Act refers to distribution and not sale. He proposed that the same can be sold if sharing of the asset proves impossible.

8. Mr. Ndegwa for the 2nd and 3rd Respondents submitted that he is agreeable to the proposed mode of distribution for the Komothai Properties but in regard to the Ruiru Plot, distribution can only be effected through disposal by way of a sale. He stated that the relations in the family are not conducive for joint management or use of the plot. He was at a loss as to who would be the proprietor of Ruiru Plot 70 as the initial ownership stood nullified with the revocation of the initial grant. He urged the court to bring the old dispute to an end. The court was invited to supervise the sale and distribution of proceeds in respect of Ruiru Plot 70. George Mbuthia Thumbi seemed to adopt his affidavit in his subsequent submissions but was not unequivocal concerning the sale of Ruiru Plot 70.

9. The history of this matter is adequately captured in the ruling of this court delivered on 27th July 2018. What is before the court for determination is the summons for confirmation of grant, filed on 31st October 2018. The court has considered the affidavits and submissions of the parties regarding the said application. Despite the erroneous omission of the Komothai properties in assets listed in the summons, there is no doubt that the estate of the deceased comprised the following assets. Land parcels, namely, LR No. Komothai/Kambururu/89 (subsequently subdivided into subdivisions No 822 to 825); Komothai/Kambururu/T.161/18 and LR Ruiru Town/70.

10. It is apparent from previous proceedings and current filings that the beneficiaries of the house of the deceased are split and feuding, principally over the latter asset which, though small in size (0.0465 ha), is developed with rental units and has a relatively high value and income. Considering the age of this dispute and the frosty relationship between the surviving beneficiaries, the proposal by the beneficiaries **Esther Njeri Kagunda** and **Mary Wairimu Karanja** that the rental units on the said parcel be shared between beneficiaries does not appear viable or prudent at all. It seems more prudent, as urged by the majority of the other beneficiaries, to have the said asset valued, sold under the supervision of the court and proceeds shared by the beneficiaries. Regarding the two assets in Komothai there is no dispute as to the mode of distribution that ensures that each beneficiary gets a portion. However, the subdivisions of Komothai Kambururu/89 will not be the basis of such sharing as the beneficiary George Mbuthia Thumbi appears to believe. The said parcel will be re-consolidated before being shared.

11. The applicable law is found in Section 35(5) of the Law of Succession Act which states that:

“Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”.

12. The surviving beneficiaries to the estate of Jonah Karimi Thumbi are admittedly the following:

1. George Mbuthia Thumbi
2. Esther Njeri Kagunda widow of Samuel Kamakiru Thumbi (deceased son of the intestate)
3. Mary Warimu Karanja widow of Daniel Karanja widow of Daniel Karanja Thumbi (intestate's deceased son)
4. Peter Muigai Thumbi
5. Karen Wanjiku Thumbi aka Karen Wanjiku Mureithi
6. Gladys Nyambura Mwaria and Eunice Wanjiku Mwaria both daughters of Joyce Wambui Thumbi (intestate's deceased daughter).

13. The court directs that the assets identified as Komothai/Kambururu/T161/18 and Komothai/Kambururu/89 be divided into six equal portions. Each share will devolve upon the identified beneficiary or beneficiaries in the case of the daughters of Joyce Wambui Thumbi. With regard to the Ruiru plot, the only viable option is to have it sold so that the beneficiaries can similarly share the proceeds thereof. The grant issued by this court on 25th October 2018 is confirmed in the above terms.

14. In the circumstances, the court directs that within 45 days of today's date, each beneficiary or set of beneficiaries jointly in agreement, obtain the services of their preferred and licensed valuer to undertake valuation of the Ruiru plot and to file a report into court. Also to be filed into court within the same period by the said beneficiaries shall be profiles of the said beneficiaries' preferred licensed estate agents or auctioneers to be appointed by the court for purposes of handling the sale of the Ruiru asset, under the court's supervision. In this regard, the matter will be mentioned on 28th May 2020 to confirm compliance and to give necessary further directions on any other relevant issues. Parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 5TH DAY OF MARCH 2020

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C. MEOLI

JUDGE

In the presence of:

Mr. Makumi for Applicant

Mr. Mwangi for Mr. G. Mbuthia, Karen Wanjiru and Peter Muigai Thumbi

Court Assistant – Nancy/Ndege