



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO 8 OF 2017

IN THE MATTER OF THE ESTATE OF PETER GATHOGO (DECEASED)

RUTH WANGARI GATHOGO.....APPLICANT

VERSUS

JOSEPH GATHUNA GATHOGO.....PROTESTOR

JUDGMENT

1. For determination is the Summons for Confirmation of Grant filed on 21st September, 2016 and brought under Section 71 of the Law of Succession Act and Rule 40(1) of the Probate and Administration Rules. The Applicant desires that the grant of letters of administration intestate made to herself, RUTH WANGARI GATHOGO and to JOSEPH GATHUNA GATHOGO on 1st September 2015 be confirmed. Her Co-administrator, JOSEPH GATHUNA GATHOGO filed an affidavit of protest against confirmation of grant on 27th October 2016. He deposed that an asset described as **Kikuyu/Kikuyu Block 1/ 287** does not form part of the deceased's estate hence is not available for distribution and that not all the properties of the deceased have been disclosed in the application. In that regard, he deposed that the deceased herein is also a beneficiary in the estate of his own late father GATHUNA KIBE whose probate process is still ongoing, and therefore this court should postpone the confirmation of the grant herein.

2. RUTH WANGARI GATHOGO in her replying affidavit asserted that **Kikuyu/Kikuyu Block 1/287** forms part of the deceased's estate *vide* pursuant to the judgment in Nairobi Civil Case No. 2270 of 2007 (OS) where it was held that the Protestor holds the said property in trust for himself and his siblings. She contended that the Protestor enjoys the said property exclusively to the detriment of the other beneficiaries and that he is confrontational and uncooperative.

3. JOSEPH GATHUNA GATHOGO filed a further affidavit. He denied the allegation that he is confrontational. He confirmed that he holds the parcel **No. Kikuyu/Kikuyu Block1/ 287** on his own behalf and on behalf of his siblings. He contended that he is not opposed to distribution of the suit property as long as the same is fair and just bearing in mind that he contributed in the purchase of the asset and to its development and that in any case, he resides on the property with his family and the co-administrator. His witness, NGUGI AGOSTINO swore an affidavit asserting to be the mason who undertook the developments.

4. Subsequently, RUTH WANGARI GATHOGO filed a further replying affidavit. She denied that the Protestor participated in purchasing the suit property and asserted that he had irregularly transferred the same to himself exclusively. She asserted that the developments on the said property were done by her late mother.

5. Prior to the hearing, the parties recorded a consent in terms that the sole property of the estate i.e. **LR No. Kikuyu/Kikuyu Block 1/287** is held by the Protestor in trust for himself and his siblings as such, the sole issue for determination would be the share due to each beneficiary. The Summons and protest were heard by way of *viva voce* evidence. RUTH WANGARI GATHOGO (**PW1**) testified that she represents her sisters and brothers and proposes that the estate to be sold and proceeds be distributed equally. She relied on her replying affidavits filed herein. She contended that the houses on the plot were developed by her late mother and the Protestor's improvement was the installation of water and electricity.

6. JOSEPH GATHUNA GATHOGO (**RW1**) adopted his affidavits as his evidence. He testified that in 1988 he was invited by her mother to pay the balance of 1800/= towards the part purchase price of the plot as she had no income and that in 1992, he built shops and a residential home using his savings. He demanded appropriate compensation if the plot is to be sold. AGOSTINO NGUGI (**RW2**) adopted his affidavit. He contended that he was employed by **RW1** as a *fundi* in 1993 and was involved in the construction of the buildings on the suit property.

7. The parties subsequently filed their written submissions. The Applicant submitted that the receipts produced by the Protestor as proof that he cleared the balance of the purchase price are in respect of transfer of the asset to his names and are payments done in bad faith and for personal benefit. Counsel for the Applicant contended that the Protestor did not prove by way of receipts that he is the one who constructed the buildings on the land hence there is no basis for compensation of the Protestor; that in any event, his actions pursuant to an irregular transmission amounted to intermeddling and was therefore *void ab initio* as held in HC Civil Case No. 2270 of 2007. The evidence by the mason, **RW2** was described as devoid of probative value. It was submitted that due to the animosity between the beneficiaries, the only

choice left is for the suit land be sold and shared among the lawful beneficiaries. The court was urged to confirm the grant and dismiss the protest.

8. The Protestor equally filed his written submissions. He submitted that the Applicant has failed to prove that her late mother built the house. In that regard, reliance was placed on the case of **The Estate of Joseph Masila Mutiso (Deceased) (2017) eKLR** and the court invited to make an adverse inference against the Applicant. Counsel for the Protestor urged the court to find that the Protestor built the bungalows on the suit property and as such ought to be compensated in terms of valuation report which placed the value of the buildings at Kshs. 5,800,000/=. To support this proposition, counsel relied on the case in **Re Estate of Aggrey Otieno Ambala (Deceased) (2011) eKLR**. Further, it was contended that the Protestor will be hugely prejudiced if an order for sale is made, and he therefore urged the court to order that the property remains as undivided with all beneficiaries holding a life interest in equal shares.

9. The court has considered the evidence led by the parties, and their submissions in respect of the summons for confirmation of grant and protest. There is no dispute that the deceased herein, **Peter Gathogo** died intestate on the 1st March 1980. A petition for grant of letters of administration was filed on 18th September 2013 jointly by a daughter **Ruth Wangari Gathogo** (the Applicant) and a son **Joseph Gathuna Gathogo** (now Protester). According to the affidavit sworn by the Petitioners in support of the Petition, the deceased was survived by six children as follows:

- a) Joseph Gathuna Gathogo - Protestor
- b) Ruth Wangari Gathogo (Applicant)
- c) Samuel Njuguna Gathogo
- d) John Kibe
- e) Margaret Nyokabi Gathogo
- f) Nancy Wanjiku Wambui

10. The estate comprised of one asset namely, land parcel **LR No. Kikuyu/Kikuyu Block 1/287** (hereinafter the suit property). This property had in May 1992 been registered in the name of the Protestor, prompting four of his siblings including the Applicant to file **High Court Civil Case (ELC) No. 2270 of 2007 (OS)** against the Protestor seeking *inter alia* the determination of the question whether the Protestor was registered as the proprietor of the suit property in trust for himself and the Applicants in the case. On 5th March 2011 the court (**Mbogholi J**) determined that the suit property was held by the Protestor in trust for himself and on behalf of the Applicants. Thus, in this cause, a consent was recorded by the parties, prior to the hearing of the summons for confirmation and protest to the effect that

“By consent, it is agreed that the sole property of the estate is held by the Protestor in trust for himself and his siblings as per the decision of Mbogholi J. in (O.S) Civil Case No.2270/07. The issue to be determined is the share to go to each party.”

11. Before this court, the Protestor has claimed that he contributed money to complete payment of shares in KIKUYU Division Farmers and marketing Co. Ltd (KIDFARMACO), a land-buying company the membership through which the deceased had become entitled to the suit property; that he (Protestor) subsequently developed the property at a cost of about KShs.5,800,000/= and made other improvements thereon; and that all these ought to be considered in his favour so that his share in the property would larger than that of his siblings and/or that he deserves to be compensated for his investments.

12. For their part, his siblings led by the Applicant assert that the developments on the property were done by their late mother after the death of the deceased herein; that whereas the Protestor may have installed electricity and water, he has constructively ensured that other siblings are not able to occupy the suit property and that the property ought to be sold and the proceeds shared equally among the beneficiaries.

13. Two questions fall for determination, namely, the law applicable to the distribution of the estate of the deceased and secondly, the shares due to the beneficiaries.

14. The parties' advocates did not address the court on the first question and the legal basis of their distribution proposals was not explicitly stated by them. The deceased herein died before the 1st of July 1981, the date of the commencement of the Law of Succession Act, which had been passed in 1972. Section 2(2) of the Law of Succession Act provides that:

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless, the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

15. Thus, whereas this cause was filed under the Law of Succession Act and the procedure therein applies thereto, the distribution of the estate of the deceased herein is not governed by the Law of Succession Act of 1972 but by written laws and customs applying at the time of the death of the deceased. As observed by **Musyoka J. in Re Nduati Mbutia (Deceased) (2015) e KLR:**

“Section 2(2) of the Law of Succession Act defines the application of the Law of Succession Act with respect to persons who died before the said Act commenced on 1st July 1981. The provision is categorical that the substantive provisions of the said Act are not applicable to the estates of persons who died before the said Act commenced. The substantive provisions of the

Act are those governing devolution or distribution of the estate of the dead person, whether such person died testate or intestate. These provisions are to be found in Parts II, III, IV, V and VI of the Law of Succession Act. The substantive law of Succession for estates of persons who died before 1st July 1981 is not found in Parts II, III, IV, V and VI of the Law of Succession Act, but in the written laws and customs that applied at the date of the death of the person in question.”

16. The deceased herein was evidently a man of Kikuyu ethnic extraction; hence the distribution of his estate would be governed by Kikuyu customary law as tempered or moderated by the Constitution and Section 3(2) of the Judicature Act which provides that:

“The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

17. . The parties herein did not attempt prove the Kikuyu customary inheritance law but such is documented, and is notorious for the fact, in **Eugene Cotran’s Restatement of African law, Kenya Volume 2: The Law of Succession 1969 (London, Sweet & Maxwell)**. The Kikuyu customary law of inheritance provided that only sons of the deceased person could inherit his land. However, if a daughter remained unmarried past the marriage age, the **“Muramati”**, usually the eldest son of the deceased, could allocate a piece of land for her use during her lifetime. Thus, succession was based on the patriarchal system and favoured male beneficiaries over females. This is patently discriminatory and, in a period, post the promulgation of the 2010 Constitution cannot be upheld. For Article 10(2)b) of the Constitution includes among national values and principles the values and principles of human dignity, equity, social justice, inclusivity, equality, human rights, protection of the marginalized and non-discrimination.

18. Under Article 27 discriminatory practices are outlawed as all persons are declared equal before the law. Both men and women are entitled to equal treatment and equal benefit of the law and their right to equal opportunities in political, economic cultural and social spheres is guaranteed. Indeed, any customary practice or law that is inconsistent with these provisions is void to the extent of the inconsistency, by dint of Article 2(4) of the Constitution.

19. In the case of **The Estate of Seth Namiba Ashuma (Deceased) [2020] eKLR. Musyoka J.** juxtaposed the application of Luhya customary law *visa- vis* the Law of Succession Act, the Constitution of Kenya 2010 and international instruments in a case where a step brother to the deceased person who died in 1965, had sought to revoke the grant issued to the daughter of the deceased on the basis that, his clan had appointed him guardian of the estate pursuant to customary law.

20. The court, having set out the provisions of Article 27 of the Constitution, asserted that:

“This is not just a matter of municipal law. International law also applies to the matter, and has imposed universal standards when it comes to how women are to be treated, generally. Article 2 of the Constitution states that international law is part of Kenyan law and any treaty or convention ratified by the Kenyan State forms part of the Kenyan law, including treaties and conventions ... whether domesticated or not ... Among the conventions that the Kenyan state has ratified is the convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in 1984. By appending its signature to that convention Kenya condemned discrimination against women in all forms, and committed itself to eliminate the vice”

21. The learned Judge then set out some of the Articles of the convention (CEDAW) before concluding that:

“33. The standards that are set by the Law Succession Act, the Constitution of Kenya 2010 and the Convention on the Elimination of All Forms of Discrimination against Women requires that women be treated equally with men in all spheres of life, including succession. They frown upon women being treated as lesser beings. With respect to succession, it would be discriminatory and unfair for the daughter of the deceased, who is the surviving immediate blood relative of the deceased, to be overlooked, so that the deceased’s estate devolved upon the deceased’s stepbrother instead of the deceased’s own daughter. To sanction such a development or devolution would be to go contrary to the law as stated in the Law of Succession Act, the Constitution of Kenya 2010 and the Convention on the Elimination of All Forms of Discrimination against Women.”

22. . I associate myself entirely with these sentiments, and for the purposes of this case, have no difficulty in finding that all the children who survived the deceased in this case ought to be treated equally in considering distribution. Indeed, the two rival sides to this dispute appeared to premise their claims on that basis. The Protector has however claimed that he is entitled to a lion’s share of the estate as compensation for contribution he made to its acquisition and development, a claim contested by his siblings. Section 107 of the Evidence Act provides that:

“1). Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2). When a person is bound to prove the existence of any fact it is said that the burden or proof has on that person.”

23. Section 108 of the Evidence Act states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. In this instance, the burden of proof lay with the Protector to prove his claims. The protector tendered before the

court and principally relied on two receipts, dated 4th August 1980 and 4th August 1988 (annexures **JGG 4 & 5** to the affidavit filed on 27.11.18 respectively) and a valuation report in respect of the suit property as **Exhibit 1**. With regard to the receipts, the narration therein indicates that payments were made in respect of title deed and transfer fees, and not the purchase of shares as asserted by the Protestor. He was also unable to tender any evidence of expenditure incurred in the alleged construction of the house on the suit property. The Applicant asserted that the building on the suit land was developed by the mother after the death of the deceased herein and she denied that there was any arrangement between the mother and the Protestor for the latter to invest on the suit property, on the understanding that he would get a larger share of the inheritance.

24. No evidence of this so-called understanding was tendered beyond plain assertions by the Protestor. Such an agreement at any rate, would have amounted to intermeddling with the estate of the deceased. As was the fact that, the Protestor procured his own registration as proprietor of the suit property without the authority of the Succession court. That notwithstanding, the Protestor continues to purvey the receipts used in that tainted process to stake a higher claim on the estate.

25. As regards the developments, neither the Protestor nor his witness (**RW2**) were able to furnish any documentary support that the Protestor financed it. Yet the valuation report places the value of the development at Shs.5.8 million. This is by no means a small sum of money. One would have expected that a person who funded such a development would maintain some sort of records by way of building plans, contracts, purchase receipts, and the like.

26. In my view, the Protestor has failed to establish his claims on a balance of probabilities. It seems to me that, the allegations were, like the claims that the extent of the father's estate was unknown, a red herring intended to deflect the distribution of the estate which has been outstanding for almost four decades since the death of the deceased. The court finds that the Protestor and his siblings are entitled to an equal share of the suit property including the land and developments thereon.

27. The suit property measures 0.0598 ha. From the material placed before the court, the Protestor and his siblings do not see eye to eye. The Protestor had in the past unlawfully transferred the suit property to his name, and according to the Applicant, has made it impossible for the other siblings to occupy the property. Indeed, it appeared to me that the Protestor was determined by hook or crook to defeat the distribution of the estate or at least delay it as much as possible. It does not appear that the beneficiaries can co-exist peacefully on the suit property. Nor can it be parceled out due to its size.

28. In the circumstances, it appears that the most prudent way to share the estate between the beneficiaries would be to sell the said asset and thereafter share the proceeds equally. I am persuaded that this is the best direction to make in this instance, and for that purpose, each side to the dispute is to procure a recent valuation of the asset (both the land and buildings thereon) by their preferred licensed valuer within 60 days of today's date. The valuation reports are to be filed into court within the stated period alongside a list of two names by each side to the dispute, of their preferred licensed auctioneers to undertake the sale of the suit property as will be directed by the court.

29. The grant is therefore confirmed on terms that the beneficiaries will share equally, the sole asset of the estate, which is to be sold and proceeds shared equally by all beneficiaries.

30. Parties will bear own costs.

SIGNED ON THIS 12TH DAY OF JUNE 2020 AND DELIVERED VIA eMAIL TO THE PARTIES ON 12TH DAY OF JUNE 2020.

C. MEOLI

JUDGE