

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 265 OF 2009

IN THE MATTER OF THE ESTATE OF GITERE KAHURA (DECEASED)

SAMUEL MBURU GITERE.....1ST APPLICANT

ANNE WANJIRU GITERE.....2ND APPLICANT

VERSUS

KENNETH KIMARI GITERE.....1ST RESPONDENT

DAVID WAKANGU GITERE.....2ND RESPONDENT

RULING

1. This protracted litigation culminated in the confirmation of grant on 20th September 2018 whereby the estate of Gitere Kahura the deceased herein was distributed equally to his twelve (12) beneficiaries. Since then, the administrators of the estate namely David Wakangu Gitere, Samuel Mburu Gitere and Anne Wanjiru Gitere have litigated on various issues pertaining to the distribution of the estate to the beneficiaries leading to the current impasse.

2. This Court, having confirmed the grant with a specific mode of distribution as stated therein has once again been called upon to consider fresh proposals from the parties herein on distribution. On 3rd June 2020, the court directed the parties to file written submissions on their proposals on distribution.

3. The applicants through the firm of Gacheru Ng'ang'a and Company Advocates submitted that despite the existence of several rulings issued by this Honourable Court, the respondents have been unwilling to distribute the estate including the rental income collected therein. They proposed that the property known as L.R No 7097/4 measuring approximately 20 acres and which contains the matrimonial home of the deceased should be distributed equally to the beneficiaries after 5 acres have been excised for the homestead and cemetery.

4. On the property known as L.R No. 150/25, they submitted that it should be distributed equally as per the certificate of confirmation of grant. They however claimed that the respondents purported to sub-divide the property illegally before the confirmation of grant. Further, they proposed that the properties known as L.R No. 209/64/30 (Diplomatic flats), L.R No. 209/64/29(Muthithi road flats) and L.R No. 209/2729/2 (Mogitio Road flats) which provide rental income, should be distributed and the rental income distributed equitably among the beneficiaries. Additionally, they submitted that the respondents should account for the rental income earned from the date they took up administration of the estate and distribute the same to the beneficiaries equitably.

5. The applicants further proposed that Githunguri/Ikinu/203 be distributed in accordance with the certificate of confirmation of grant. The applicant also proposed that there is a consensus that the properties known as Mbeti/Kiamuringa/570 and Mbeti/Kiamuringa/573 located in Embu County be sold and the proceeds distributed equally among the beneficiaries. They stated that the other asset available for distribution were Shares held in Gitere Kahura investment limited, which could not be distributed due to a pending suit being **Milimani HCCC No. 119 of 2016**. Lastly, the applicants submitted that the respondents should provide a full and accurate accounts for the rent collected since 2008 to date.

6. The respondents represented by the firm of A.G.N Kamau Advocates submitted that there is substantially no dispute on distribution of the estate. Further that the consent order dated 24th September 2014 which was adopted in court on 18th December, 2014 has not been set aside, appealed or varied in any way. They relied on the case of **Flora Wasike to and Contractors Limited v Margaret Oparanya [2004] eKLR** in support of their position that the applicants had not met the threshold for setting aside the consent order, and should therefore not file any further application without the leave of court. That they should distribute the estate of the deceased as ordered.

7. On the applicants demand for distribution of rental income, the respondents submitted that the applicants who were party to the consent agreed that all their income from their shares of the property from the estate was to be applied strictly for repayment of the loan owing for the construction of 15 Blocks of flats in Loresho estate being part of L.R No. 21070. Further, that no distribution of rental income was considered and ordered by Musyoka J. Consequently, none of the beneficiaries had ever withdrawn their consent to the arrangement to have their share of rental income from the properties of the estate being applied as agreed, in offsetting the liabilities owed to the bank for a property where they are shareholders and directors of the company that owns it.

8. On the appointment of agents for the properties of the estate, they contended that the issue was already determined by the ruling dated 30th May 2017 stating that this is a concept not applicable in succession law. Further, that the application purporting to alter the mode of distribution is brought by only two of the twelve beneficiaries and should therefore be dismissed.

9. Having carefully considered the submissions in the light of the history of this cause and the disputed issue on distribution, it is manifest

that most of the facts are not disputed. The deceased died on 24th August, 2009 leaving behind twelve dependants. The applicants and the 2nd respondent were appointed as the administrators of the deceased's estate. Accordingly, they petitioned for Grant of Letters of Administration Intestate and the record shows that the grant was issued.

10. The parties thereafter agreed on the mode of distribution as shown in the application for Confirmation of Grant, where the assets of the estate were to be shared equally. The Grant was subsequently confirmed and a Certificate of Confirmation of Grant issued herein on 20th September, 2018, listing all the assets and showing that they were to be shared equally amongst the beneficiaries.

11. That being the case, the administrators were expected to comply and undertake the distribution in terms of the Schedule of Distribution as appended to the Certificate of Confirmation of Grant. They were further expected to furnish the Court with accounts within 6 months as required by **Section 83** of the **Law of Succession Act**. That provision states that the duties of the personal representative of a deceased person includes:

“...within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration...”

12. In the premise, a period of over 6 months having gone by since 20th September 2018 when the Grant herein was confirmed, there is no justification for any further delay in the completion of the administration and distribution of the estate. The applicants have continued to raise complaints against the respondents on how the distribution is being mismanaged yet they too are administrators with the responsibility to distribute the assets of the estate as provided for in the confirmation of grant.

13. The issue of whether the consent entered into by the beneficiaries is still in force has been contested by the parties herein. The respondents submitted that the consent order was neither set aside nor appealed or varied in any way and should be strictly adopted. This was the basis upon which the respondents have not distributed rental income from L.R No, 209/64/29, L.R. No. 20964/30 and L.R No.209/2729/2 as the said income has been applied strictly for repayment of the loan owing for the construction of 15 Blocks of flats in Loresho estate being part of L.R No. 21070. The consent order in dispute is dated 24th September 2014 and was adopted in court on 18th December, 2014. Musyoka J. in his decision of 18th May 2018 however, expressed himself at paragraph 17 thus concerning the consent:

“..The consent order of 24th September,2014 is no longer tenable given that it disposed of assets that do not belong to the deceased persons in view of what I have stated in the foregoing paragraphs”

This pronouncement by my learned brother made the consent order inoperative and should not be relied upon as an order of the court.

14. Bearing this in mind, the respondents claim that rental income from the properties known as L.R No. 209/64/30 (Diplomatic flats), L.R No. 209/64/29 (Muthithi road flats) and L.R No. 209/2729/2 (Mogitio Road flats), which are estate properties available for distribution, be applied to the repayment of a loan in respect of 15 Blocks of flats in Loresho estate being part of L.R No. 21070 have no legal basis having found that the consent order on which that decision was founded upon is untenable. Furthermore, from the records before court, L.R No. 21070, is owned by Gitere Kahura Investments Limited and is not estate property available for distribution among the schedule of assets listed in the certificate of confirmation of grant. Therefore, any arrangements reached between the parties on the repayment of a loan pursuant to that property is not subject to this cause. However, rental income from the properties known as L.R No. 209/64/30 (Diplomatic flats), L.R No. 209/64/29(Muthithi road flats) and L.R No. 209/2729/2 (Mogitio Road flats) is part of estate property and available for distribution to the beneficiaries.

15. The applicants proposed the appointment of Tysons Limited as receiver managers and agents of the properties of the estate. However, as rightly pointed out by the respondents in their submissions, Musyoka J in his decision of 30th May, 2017 already pronounced himself on the question of such appointment. Without having to reproduce the sentiments of the Learned Judge, appointment of receiver and managers is a concept of commercial matters, and is alien to succession matters. The duties of such managers is the same as that of administrators in a succession cause. In any case, two agents who have been collecting rental income on behalf of the estate have already been appointment and the applicants have not claimed that they have not been performing their duties as required. The applicants' prayer for appointment of a receiver manager has therefore no legal basis and is declined.

16. From the submissions by the parties, it is unclear whether the estate has been distributed or not, and if it has been distributed, to what extent. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the Administrators must comply or the Court would be compelled to remove them as Administrators. The proposition is that not every dispute over the property of a dead person ought to be pushed to the probate court. The administrators have a duty to the beneficiaries to ensure distribution within the stipulated time.

17. Accordingly, this Court has powers vested within the provisions of Rule 73 of the Probate and Administration rules, which provides that nothing in these rules shall limit, or otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of Justice to be met, or to prevent abuse of the process of the court. The court notes that although the consent order referred to earlier is no longer tenable, this was merely by reason of the parties having included property that is governed by a different law. The beneficiaries had however, during those negotiations agreed on how most of the assets of the estate are to be distributed which this court has taken into consideration. Consequently, I hereby order distribution of the assets of the deceased as follows:

i.

No.	PROPERTY	BENEFICIARY	SHARE
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1.	L.R No. 7097/4 Approximately 20 acres	All the beneficiaries of the estate of the deceased	5 acres be set aside for homestead and cemetery. Distribute the remainder equally.
2.	L.R No.150/25 Approximately 10 acres	All beneficiaries of the estate of the deceased	Equally with each getting approximately 0.83 acres
3.	Githunguri/Ikuni/203	All beneficiaries of the estate of the deceased	Sub-divided equally.
4.	Mbeti/Kiamuringa/573 located in Embu County	All beneficiaries of the estate of the deceased	To be sold and the proceeds divided equally.
5.	L.R No. 209/64/29 Muthithi road flats	All beneficiaries of the estate of the deceased	To get equal number of flats
6.	L.R No. 209/63/30 Diplomatic flats	All beneficiaries of the estate of the deceased	To get equal number of flats
8.	L.R No. 209/2729/2 Mogotio road flats	All beneficiaries of the estate of the deceased	To get equal number of flats
9.	Shares in Kahura Investments Limited	All beneficiaries of the estate of the deceased	Equally

ii. All the administrators of the estate of the deceased to file a joint report of the actual distribution to the beneficiaries of the assets of the estate of the deceased available for distribution within sixty (60) days from the date hereof. Failure to comply with the order above will render their administratorship revoked.

iii. Costs be in the cause.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 6TH DAY OF AUGUST, 2020.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicants

In the presence ofAdvocate for the Respondents