



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Succession Cause 391 of 2011

IN THE MATTER OF THE ESTATE OF THE LATE EPHANSON KARANJA KIRIONGI (DECEASED)

JOHN KINUTHIA KARANJA

SAMUEL PETER GITAU KARANJA.....ADMINISTRATORS/RESPONDENTS

VERSUS

JAMES KIMANI KARANJA.....PROTESTOR/APPLICANT

RULING

1. Ephanson Karanja Kiriongi died intestate on 11/5/2007.

2. He was survived by his widow and 9 children including James Kimani Karanja the applicant herein. In the form P & A his assets were listed thus:-

Ø Bahati/Wendo Block 3/16 (RIMUKO)

Ø Gilgil/Gilgil Block 1/6578 (KEKOPEY)

Ø Kiganjo/Mundoro 112

Ø Kiganjo/Mundoro 108

Ø Dundori/Lanet Block 5/456 (KIAMUNYEKI "A")

Ø Nakuru Municipality Block 3/252

Ø Money deposit with Equity Bank A/C No 0130100234

Ø CDSC Account No B17/B-000000193623/LI-0

Ø Merssey Ferguson Tractor No KLZ 823

His beneficiaries:

i. Esther Wanjiru Karanja.....82 years

ii. John Kinuthia Karanja.....57 years

iii. Samuel Peter Gitau.....54 years

iv. Ruth Waithira.....52 years

- v. Charles Kimani Karanja.....50 years
- vi. Joseph Njenga Karanja.....48 years
- vii. Jemima Wambui Karanja.....46 years
- viii. Margaret Wangui Karanja..... 43 years
- ix. Mary Wambui Karanja.....41 years
- x. James Kimani Karanja.....39 years

3. Grant of Letters of administration of Estate intestate were made to John Kinuthia and Peter Gitau Karanja on 8/11/2011.

4. They filed Summons for confirmation of Grant on 12/7/2017 seeking to distribute the Estate.

5. On 7/5/2018 James Kimani Karanja filed an affidavit of protest with regard to one property of the Estate **Ndundori/Lanet Block 5/456 (Kiamunyeki A)**. The administrators had proposed in their initial distribution to hive off $\frac{1}{4}$ of an acre out of the said parcel of land for **“Family Grave Yard and Homestead”** leaving him only with $2 \frac{3}{4}$ acres. He was claiming that before his demise the deceased had bequeathed the said parcel to him and the rest of the beneficiaries were aware of that fact.

6. That this this hiving off was not the wish of his father.

7. He also wondered why the administrators wanted to hive off $\frac{1}{4}$ of an acre while the graves occupied a very small portion of land.

8. That in addition the said property was omitted in the Summon for confirmation of grant filed on 12/7/2017.

9. He also protested the proposed that the Account No 013010023412 Equity Bank be operated by the Administrator on behalf of all the beneficiaries, instead proposing that the funds be shared equally among the beneficiaries.

10. On 9/10/2018 the court (Hon A.K Ndung’u J) allowed an application for partial confirmation and issued a certificate of confirmation of grant where all the properties, save **Ndundori/Lanet Block 5/456 (Kiamunyeki A)** were distributed. The money in the Equity Bank Account was also shared out equally as per the protest.

In granting the partial confirmation, it was pointed out in the proceedings that this was to leave out the property that had a protest so that the issues related to it would be dealt with separately.

11. The protester filed summons dated 16/1/2019 brought under section 47 of Laws of Succession Act Rules 49 & 63 of the P & A Rules seeking orders:-

- a. *THAT the confirmation of grant and distribution orders issued on 9th October, 2018 be reviewed and/or rectified, and/or altered, and/or amended to accommodate and include parcel No Ndundori/Lanet Block 5/456 (Kiamunyeki A).*
- b. *THAT the parcel No. Ndundori/Lanet block 5/456 (Kiamunyeki A) which is part of the estate of the deceased be registered in the name of James Kimani Karanja.*
- c. *THAT a fresh certificate of confirmation of grant be issued including the said Parcel No Ndundori/Lanet Block 5/456 (Kiamunyeki A) and the said parcel to be wholly registered in the name of JAMES KIMANI KARANJA.*
- d. *Costs be provided for.*

On the grounds:-

- a. *THAT the Applicant herein is a beneficiary of the estate of Ephanson Karanja Kiriongi (deceased) who died on 11th May,2007*
- b. *THAT Parcel No. Ndundori/Lanet block 5/456 (Kiamunyeki A)forms part of the estate of the deceased; Ephanson Karanja Kiriongi.*
- c. *THAT the deceased had allocated the said parcel of land to the applicant well before the deceased’s demise and the applicant has settled his family on the said land.*
- d. *THAT the Applicant learnt that Parcel No Ndundori/Lanet Block 5/456 (Kiamunyeki) had been omitted in the document filed in court in relation to the mode of distribution even though the same appeared in the list of assets of the deceased in the petition.*

12. He also swore an affidavit on 16/1/2019 where he deponed inter alia: -

i. **THAT sometimes in August, 2017 I was shown through WhatsApp a document allegedly filed in court on the mode of distribution and Parcel No Ndundori/Lanet Block 5/456 (Kiamunyeki A) was included however I was surprised to note that ¾ acre of the said parcel of land was proposed to be set aside for graveyard and homestead.**

ii. **THAT on 9th October, 2018 the Honourable Court confirmed the mode of distribution of the other properties of the estate of the deceased as proposed by the administrators save for the said parcel of land as I had raised an objection to part of it being hived off.**

iii. **THAT both my deceased parents are buried on Parcel No Ndundori/Lanet Block 5/456 (Kiamunyeki A) and I participated and attended both funerals**

iv. **THAT each of the other beneficiaries have their own parcels of the land out of the estate of the deceased and there is absolutely no basis of hiving off part of Parcel No Ndundori/Lanet Block 5/456 (Kiamunyeki A).**

v. **THAT I was not involved in the process of distribution and I have never been involved in this succession matter as a beneficiary despite my efforts to do so.**

vi. **THAT I therefore have never been and I am not aware as to why Parcel No Ndundori/Lanet Block 5/456 (Kiamunyeki A) was omitted from the schedule of assets of the deceased when the application for confirmation of the grant (with mode of distribution attached) were made.**

vii. **THAT my wife and five young children stay in Parcel No Ndundori/Lanet block 5/456 (Kiamunyeki A) where my wife does subsistence farming.**

13. In their Replying Affidavit sworn on 14/9/2019 the 2 administrators confirmed that the partial confirmation of the grant was because of the protest by the applicant, that the applicant was indeed entitled to the said property, save for the area that carried their parents homestead and graves which they proposed to hold in trust for all the beneficiaries. That if the whole property was registered in his name, there was risk of the applicant denying the other beneficiaries access to the parent's grave site yet the intention was to retain the same to preserve the memories of their parents and in the interest of future generations. That in any event the applicant was also a beneficiary of the other properties of the estate.

14. Parties filed written submissions.

15. The applicant argued that the administrators, by omitting the subject property from the Summons for Confirmation of Grant had conducted themselves in such a manner as to demonstrate that they and the other beneficiaries had no interest and had waived any right, to a share in the said property. He relied on **John Mburu vs Consolidated Bank of Kenya [2018] eKLR** where the Court of Appeal held; -

“A person who is entitled to rely on a stipulation existing for his benefit in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. In the case of Sita Steel Rolling Mills Ltd Vs Jubilee Insurance Company Ltd [2007] eKLR, Maraga, J. (now Chief Justice) stated:

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.”

16. It was also submitted for the applicant that no evidence was tendered to demonstrate that he had denied any of the other beneficiary's access to the said grave site.

17. The Administrators on their part relied on the **Re Estate of George Waiyaki Wambaa (Deceased) [2020] eKLR** where the court declared 0.27 acres as common areas the grave yard and borehole. **Stephen Njoroge Kariuki and 3 others vs James Gichuki Kariuki & 2 others [2016] eKLR** where the court allowed a portion of land to remain as the family burial grave yard, with the Administrators being in charge on behalf of the rest of the beneficiaries.

18. From the foregoing issue for determination is whether the prayers sought are tenable.

19. Let us begin with the issue of waiver. It is not correct that the administrators left out the property because neither themselves nor the other beneficiaries had no interest in it. It is clear that it was in their initial proposal that led to the protest that led to the property being left out.

20. The applicant has come under section 47 of the Law of Succession Act which states: Effect of impossibility supervening

(1) Where a gift is made upon a condition subsequent which was valid ab initio, but which has, for any reason, become impossible before being performed, the gift shall be absolute.

(2) Where a gift is made upon a condition precedent which was valid ab initio, but which has, for any reason other than the act or default of the testator or an act of any court, become impossible before being performed, the gift shall be void

21. With due respect, I did not find the relevance of this provision as there was no evidence that this parcel of land was gifted to the applicant

neither was any effort made in the affidavit in support of the summons to demonstrate the applicability of this provision of the law to this matter.

22. Rule 63 provides for the application of the Civil Procedure Rules to matters succession, to cover for the application for review, and 49 for applications otherwise not provided for.

23. With regard to rectification of grant the applicable law is Section 74 of the Law of Succession Act which provides for Errors that may be rectified by court in the following terms;

Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.

24. The record will show that there was no error in the Certificate of Confirmation of grant made on 9/10/2018. It speaks for itself – partial certificate for confirmation of grant. The basis for that being that when parties appeared through counsel on 9/10/2018 the court was requested, in view of the applicant's protest, to issue a partial confirmation in respect of the uncontested properties. The court did just that, and at the same time addressed the issue of the money in the Equity Bank account as raised by the applicant. There is no error to be rectified.

25. In line with that I find that it is not entirely correct that the applicant was not involved in this matter. He admitted to receiving information via WhatsApp from the administrators, which prompted the protest. He filed a protest on 2 issues, and one was addressed in the partial certificate of confirmation of grant and the other left out so that parties could deal with its issues.

26. On the 2nd and 3rd prayers, the administrators are not disinheriting the applicant of the whole portion. Their issue is that the parents homestead and the parents' graves lie in that parcel of land. This part of the estate belongs to, and ought to be available to all the beneficiaries, including the applicant, and the future generations of the deceased. In many communities –traditionally the last born son occupies the portion of land where the homestead is, and it usually where the parents' graves are situate. There is no evidence that the deceased bequeathed the property to the applicant before he died. With the concept of absolute proprietorship, the administrator's fears are not far-fetched, that the only way to secure the specific portion for the purpose intended is to hive it off, and having it registered not in the names of specific beneficiaries but in trust for the whole family.

27. The issue is whether the ¾ of an acre is on the higher side?. It is evident that the parties chose to come to court instead of talking about it as a family. The applicant indicated that he tried to speak to his big brothers in vain. Hence it falls upon this court to determine how much land should be left of for the homestead and the grave site. The applicant in the summons is totally opposed to any portion being cut off, however in the circumstances of the case, it is inevitable. That is not too much to ask. The moment the property becomes the absolute property of the applicant, the rest of the family will only be able to access the same with his permission or that of his representatives, otherwise, there will be issues of trespass. The administrators' fear is not without reason even though currently the applicant has not been accused of denying anyone access. He needs to see to the future when the current actors will be gone, and others may see the land only for its monetary value.

28. Having said the foregoing, I find that the application is merited to the extent that a certificate of confirmation of grant needs to issue so that the applicant can get title to the property. However, the homestead and the family graveyard will have to be hived off the same. The following orders abide:

1. That the certificate of confirmation of grant do issue for the remaining asset of the estate LR no. ***Ndundori/Lanet block 5/456 (Kiamunyeki A)***
2. That the same be distributed as follows
 - a. 3 acres to the applicant **JAMES KIMANI KARANJA**
 - b. ½ an acre consisting of the homestead and parents' graves to '**Family Graveyard and Homestead**' in the names of all the beneficiaries held in trust for themselves and their children.
3. Costs in the cause
4. Orders accordingly

Delivered, Dated and Signed at Nakuru this 16th Day of October 2020

Mumbua T Matheka

Judge

In the Presence of: VIA ZOOM

Edna CA

For Applicant: N/A for Macharia Waiganjo Adv

For Administrators: Mwangi for the admins respondents