



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 789 OF 2015**

**IN MATTER OF THE ESTATE OF THE LATE NGATIA MUKUMBU WAIBOCHI**

**alias NGATIA MUKUMBU alias GATIYA MOKOMBO WAIBOCHI (DECEASED)**

**CHARLES MUKUMBI NGATIA..... 1<sup>ST</sup> APPLICANT/BENEFICIARY**

**EUTYCHUS MWANIKI NGATIA.....2<sup>ND</sup> APPLICANT/BENEFICIARY**

**JOSEPH KARIUKI NGATIA.....3<sup>RD</sup> APPLICANT/BENEFICIARY**

**VERSUS**

**PETERSON MUKUA NGATIA..... RESPONDENT/PETITIONER**

**RULING**

1. The applicants herein have filed the application dated the 9/01/2019 under a Certificate of Urgency premised under the provisions of Rules 63 and 73 of the Probate and Administration Rules; they state that they are beneficiaries of the estate of the deceased; to support their claim the applicants rely on the grounds on the face of the application and on the Supporting Affidavit sworn by the three applicants on the 9/01/2019; the applicants are seeking for the following orders against the respondent;

(i) Spent

(ii) That this court be pleased to issue preservative orders for land parcel numbers KIRIMUKUYU/KARIA/587 and MWEIGA BLK/3/KIMENJU/11 and all resultant parcels of land pending hearing and determination of this application;

(iii) That this court be pleased to issue a restriction on land parcel numbers KIRIMUKUYU/KARIA/587 and MWEIGA BLK/3/KIMENJU/11 and all resultant parcels of land pending hearing and determination of this application;

(iv) The respondent do bear the costs of this application.

2. The respondents filed his response to the application on the 19/02/2019; hereunder is a summary of the applicant's case and the respondents/petitioner's response;

3. A brief overview of the facts is as follows; the estate relates to Ngatia Mukumbu Waibochi alias Ngatia Mukumbu alias Gatiya Mokombo Waibochi who died on the 4/08/1997; the estate comprises of two (2) parcels of land known as Mweiga Blk.3/Kimenju/11 and Kirimukuy/Kiria/587; the applicants and the respondent are all siblings and appear on the list of the 12 persons identified as being beneficially entitled to the estate of the deceased; the respondent was issued with a Grant of Letters of Administration on the 15<sup>th</sup> April, 2016 and he then proceeded to confirmation on the 21/11/2016 and subsequent thereto a Certificate of Confirmation was issued on the 28/02/2017; the respondent in pursuance to the confirmed Grant proceeded to sub-divide the property known as Mweiga Blk.3/Kimenju/11 (herein the subject property); and the applicants are aggrieved with the manner the respondent distributed the sub-divisions; which is the genesis of this instant application; hereunder are the respective parties' submissions;

**APPLICANT'S CASE**

4. Counsel Miss Maina appearing for the applicants stated that the respondent who is the administrator of the estate has failed to involve the applicants during the subdivision; the 1<sup>st</sup> and 3<sup>rd</sup> applicants are at verge of being evicted; there are discrepancies between the mutation form

and the title deeds issued; whereas the mutation was presented on 27<sup>th</sup> November 2017 the title deeds were issued two months prior on 7<sup>th</sup> September 2017 which denotes fraud;

5. The applicants sought to lodge a caution upon realizing the suspicious activities of the respondent; the Land Registrar advised them to obtain an injunction from court hence the instant application;

6. The applicant administrator subdivided the land and gave it to beneficiaries who sold to 3<sup>rd</sup> parties; this fact is acknowledged by the respondent at paragraph 24 of his affidavit; parcel no.601 was given to one Jackson Gitonga Ngatia who has felled trees planted by the 1<sup>st</sup> applicant; the 1<sup>st</sup> applicant reported the incident to the police and was issued OB No.16/30/07/2018; an assessment of damage was done by the sub-county forest officer and a report given to the police; the 1<sup>st</sup> applicant is yet to be compensated;

7. Although the family had a meeting together with the respondent and agreed on the mode of distribution, the respondent did not comply with the resolutions of the meeting and excluded the applicants in the final process of distribution; counsel urged the court to cancel the subdivision and revoke the resultant title deeds for a fresh subdivision to be done by a government surveyor;

#### **RESPONDENT's CASE**

8. In reply the respondent stated that the averments by the applicants were lies; the subdivision was as agreed by all beneficiaries and the mutation forms were signed by all the parties; the forms were properly presented to the land registry and titles were issued; none of the beneficiary was displaced;

9. The Kieni Forest Officer did not go to the shamba; he instead summoned the respondent who went and proved through a search document that the shamba was not the applicants';

10. He properly carried out his duties as an administrator of the estate of the deceased to the satisfaction of all beneficiaries except the three vexatious applicants; he urged the court to dismiss the application;

#### **REJOINDER**

11. In a brief rejoinder counsel stated that the applicants were not involved in the subdivision yet the administrator had sold all his share of the estate and had nothing to lose; the beneficiaries who are not complaining have been given their share; the applicants have been allocated bushes; the forest officer indeed went to the ground and prepared a report; no compensation has been done for the destroyed trees; counsel prayed for a scene visit at the expense of the parties which the court allowed;

#### **ISSUES FOR DETERMINATION**

12. After reading the affidavits and taking into consideration the submissions of both parties this court has framed the following issues for determination;

(i) Whether this court has the mandate to grant the orders sought by the applicants;

#### **ANALYSIS**

13. The duty of this court as one of probate is to ensure that the deceased's assets are distributed to the right beneficiaries; in this instance the number of the beneficiaries and the properties comprising the estate are not in dispute; it is also not disputed that the respondent had been given consent by all the beneficiaries that he be appointed as the administrator of the deceased's estate; the respondent was then issued with the Grant on the 1/04/2015; he then applied for confirmation of the Grant and the Certificate was issued on the 28/02/2017; before the Grant was confirmed the court record reflects that all the beneficiaries agreed and signed the Consent to the mode of distribution; and the court adopted the mode consented to and issued the Certificate;

14. The respondent proceeded to subdivide the contentious property known as Mweiga Blk.3/Kimenju/11 into nine (9) parcels of land; the record reflects that the applicants also signed the mutation form which indicates the parcels they were to receive;

15. Before the court made any determination it directed that the Deputy Registrar conduct a site visit to the contentious property and to file a report; the Deputy Registrar indeed visited the site and duly filed a report on the claims raised by the 1<sup>st</sup> and 3<sup>rd</sup> respondents; the 2<sup>nd</sup> respondent was found to have no issues at all;

16. Starting with the 1<sup>st</sup> applicant in this application he contends that the respondent had failed in his duty and had misused his powers and had proceeded to subdivide the subject property in a manner that was not satisfactory; that he was shortchanged by the respondent and not given his rightful sub-division upon which he claimed to have made substantial developments; the sub-division he ought to have been allocated was located where parcel nos.601, 602 and 603 are situated which had been given to third parties who were strangers to the estate; that the occupants of 601, 602 and 603 ought to have occupied parcel no.606 instead of where they had been allocated; his complaint being that on his rightful sub-division he had made substantive developments;

17. The Deputy Registrar (DR) filed a Report and took photographs of the parcels 601, 602 and 603 and noted no substantial developments thereon; on parcel 601 which had been allocated to Eustus Mwangi Ngatia there were cattle found grazing and a *mabati* structure was on one portion of the parcel and the other portion had tree stumps with visible young trees sprouting there from; the 1<sup>st</sup> applicant claimed to have

planted the trees which had been felled whereas this was controverted by the respondent who contended that the trees were planted by their late father;

18. The 1<sup>st</sup> applicant also claimed to have planted hay on the sub-division but what was sighted by the DR was regular grass; as for the purported fish pond the 1<sup>st</sup> applicant is said to have pointed out to the DR this was described by the Respondent as a water pan that had been sunk by their late father;

19. As for the 3<sup>rd</sup> applicant he stakes a claim on the parcel no 599 and that he should have been allocated this parcel instead of 607; his contention was that he had invested heavily on the parcel that had wrongfully been given out by the respondent and that he had planted many trees thereon;

20. Again from the DR's report this portion had been allocated to one Christopher Kimaru Ngatia; the DR noted that one portion was under construction whereas the other portion was bare and had a temporary timber structure, a water tank and five trees along the fence;

21. This court reiterates that going by the DR's Report there is no evidence of what amounted to substantial developments made on the disputed parcels of land; which then means that the claims of the 1<sup>st</sup> applicant and 3<sup>rd</sup> applicants of having made substantial developments on their alleged rightful parcels are unsupported by any evidence on the ground;

22. This court has also had occasion to peruse the court record and notes that the Mutation Form clearly indicates the name of each beneficiary on their respective portion which also clearly indicates the positioning of their respective portions;

23. It is also noted that each beneficiary appended their name and respective signatures on the Form; the Form bears the 1<sup>st</sup> and 3<sup>rd</sup> applicants' names and signatures; by appending their signatures thereon this is an indication that they were aware of their respective portions and consented thereto; the allegation that their signatures were forged is found to be an afterthought as there is no evidence of any report or complaint being made to any authority; as for the 2<sup>nd</sup> applicant this court finds that he has absolutely no valid complaint; and can only be deemed as a rabble-rouser;

24. This court reiterates that its mandate as a Probate Court is to ensure that the deceased's assets are distributed to the rightful beneficiaries; and upon issuance of the Certificate of Confirmation this court had performed its duty of distribution and an order was granted;

25. In essence the applicants are seeking for an order for the re-distribution of the property; and in this regard this court is '*functus officio*' as it has no mandate and cannot purport to revisit the issue on distribution under the guise of the orders sought by the applicants;

#### **FINDINGS AND DETERMINATION**

26. For the forgoing reasons this court makes the following findings and determination;

- (i) This court finds that it is '*functus officio*';
- (ii) The application is found lacking in merit and it is hereby dismissed;
- (iii) This being a family matter and to bring closure to this matter, each party shall bear their own costs.
- (iv) Preservatory order lifted

**Orders Accordingly.**

**Dated, Signed and Delivered at Nyeri this 18<sup>th</sup> day of December, 2020**

**HON. A. MSHILA**

**JUDGE**