



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 224 OF 2014

IN THE MATTER OF THE ESTATE OF JAMES KAGURU MWATHI (DECEASED)

RULING

1. The grant of letters of administration intestate in respect of the estate of James Kaguru Mwathi to Joyce Wanjiku Nzimbi on 17/6/2014 was confirmed on 22/7/2015. The distribution was as set hereunder;

SCHEDULE

NAME DESCRIPTION OF PROPERTY SHARE

DAVID KAMAU KAGURU NJORO/NJORO BLOCK 1/214(KIKAPU) 5.5 ACRES

MARY WANGUI MWATHI NJORO/NJORO BLOCK 1/214(KIKAPU) 1.0 ACRE

DAVID KAMAU KAGURU NJORO/NJORO BLOCK 1/214(KIKAPU) 1 ACRE (TO HOLD

IN TRUST FOR J K K (MINOR)

2. Vide a summons dated 5/9/2017, the administrator has moved the court for orders that;

1. The Certificate of Confirmation of grant issued by this Honourable Court on 22.7.2015 be reviewed and set aside as regards distribution of land parcel number NJORO/NJORO BLOCK 1/214 (KIKAPU) for being unfair to the applicant and the other two (2) female dependants and it be substituted with amended Certificate of confirmation of grant as follows;

SCHEDULE OF PROPERTY BENEFICIARY SHARE

NJORO/NJORO/ 1. David Kamau Kaguru (son) 2 acres

BLOCK 1/214 KIKAPU 2. JKK (grandson) 1 acre

3. Mary Wangui Mwathi (daughter) 1 acre

4. Susan Nyambura Muguchia (daughter) 1 acre

5. Joyce Wanjiku Nzimbi (daughter) 1 acre

6. Rebecca Wangoi Mwathi (daughter) 1 acre

7. Homestead and grave yard 0.5 acre to be

Registered names of all the beneficiaries

2. The title deed which is still registered in the name of James Kaguru Mwathi be returned to the District Land Registrar for

cancellation and issue of new titles as per the proposed amended Certificate of Confirmation of Grant.

3. Costs of this application be provided for.

3. The application is premised on grounds that;

(a) The distribution offends both Section 38 Cap 160 of the Constitution and it is anti-gender.

(b) The distribution is unfair to the other dependants.

(c) David Kamau has been trying to sell the land and that is where the parties have buried our parents.

4. The position taken by the administrator is that at the time the beneficiaries allowed David Kamau Kaguru to inherit 5.5 acres out of 7.5 acres, they believed that as the only son he would preserve the land for use by his family and also preserve the grave site where the deceased parents are buried and also to allow other beneficiaries to cultivate.

5. It is urged that the said David has now offered the land for sale and in the meantime he has leased out the land to other people.

6. It is contended that the distribution of the estate was anti gender and contrary to **Section 38 of the Law of Succession Act (Cap 160 Laws of Kenya)**.

7. It is sought that the distribution be reviewed and the estate be redistributed equitably.

8. That position is supported by one of the beneficiaries, Rebecca Wangoi Mwathi in her affidavit filed on 3/3/2018.;

9. The application is opposed. William Wainaina, the advocate on record for David Kamau Kaguru has sworn a replying affidavit and averred *inter alia* that the application is an attempt to arm twist David to share his entitlement of the estate with the applicant.

10. It is urged that a review of distribution can only be done before the confirmation of grant and that equal distribution occurs only when the estate is intact and the beneficiaries consist of children of the deceased only. In this case James Kaguru Mwangi, a grandson, is a beneficiary.

11. It is denied that the said David has sold or intends to sell his share.

12. David Kamau Kaguru has also sworn a replying affidavit. He states that the application at hand was fueled by his (David's) resistance to demands by his sisters that they cultivate the land in question.

13. The application was canvassed by way of written submissions.

14. I have had occasion to consider the application, the affidavit evidence and learned submission by counsel.

15. Of determination is whether the orders confirming the grant herein should be reviewed and set aside and the estate be redistributed.

16. All the beneficiaries to the estate of James Kaguru Mwathi (deceased) are children of the said James save for JKK, a grandson, who was included in the distribution.

17. **Section 38 of the Law of Succession Act** provides;

“S.38 Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

18. Thus the beneficiaries in this estate ought to have shared out the estate equally in accordance with **Section 38**.

19. This was not to be as in a summons for confirmation of grant dated 26/2/2015, the administrator of the estate herein, and who is also the applicant in the present application, proposed the distribution of the estate as hereunder;

SCHEDULE

DESCRIPTION OF PROPERTY NAME SHARE OF HEIR

NJORO/NJORO BLOCK 1/214(KIKAPU) DAVID KAMAU KAGURU 5.5 ACRES

NJORO/NJORO BLOCK 1/214(KIKAPU) MARY WANGUI MWATHI 1.0 ACRE

NJORO/NJORO BLOCK 1/214(KIKAPU) DAVID KAMAU KAGURU 1 ACRE (TO HOLD

IN TRUST FOR JKK (MINOR)

ACC. NO. [xxxx] EQUITY BANK DAVID KAMAU KAGURU

MARY WANGUI MWATHI

SUSAN NYAMBURA MUGUCHIA TO BE SHARED

JOYCE WANJIKU NZIMBI EQUALLY

REBECCA WANGUI MWATHI

ACC. NO. [xxxx] POST BANK DAVID KAMAU KAGURU

MARY WANGUI MWATHI

SUSAN NYAMBURA MUGUCHIA TO BE SHARED

JOYCE WANJIKU NZIMBI EQUALLY

REBECCA WANGUI MWATHI

SHARES IN FOUNTAIN ENTERPRISES SUSAN NYAMBURA MUGUCHIA WHOLE SHARE

PROGRAMME (FEP)

20. That mode of distribution was consented to by all the beneficiaries vide the consent to confirmation of grant General Form filed in court on 5/3/2015 and attested to by Elias Ngugi Ng'ang'a Advocate.

21. Prima facie, that distribution was heavily skewed in favour of David Kamau Kaguru who was to get 5.5 acres of land out of the total acreage of 7.5 acres.

22. The record shows that on the 22/7/2015, the parties appeared before court and the learned Judge (*Kiarie J*) pronounced himself in the following terms;

“Court: The beneficiaries appeared before me and confirmed the distribution as per the affidavit in support of confirmation. These are:

1. Susan Nyambura Muguchia – ID [xxxx]
2. Joyce Wanjiku Nzimbi - ID [xxxx]
3. David Kamau Kaguru – ID [xxxx] .
4. Rebecca Wangoi Mwathi – ID [xxxx]
5. Mary Wangui Mwathi – ID [xxxx]

Order: The grant is confirmed.”

23. The confirmation of grant was thus regular and faultless.

24. The court rightly adopted the consent of the parties and distributed the estate as per their wishes. The *Court of Appeal* in **JUSTUS THIORA KIUGU AND 4 OTHERS VS. JOYCE NKATHA KIUGU & ANOTHER [2015] eKLR** held that the court is duty bound by **Article 159(c)** of the **Constitution** to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Therefore, where parties agree on a mode of distribution, notwithstanding that there are statutory provisions that provide for the same, the parties have no choice but to adopt that consent and make it an order of the court. Short of a written consent on the mode of distribution, then the court must follow the law.

25. In our instant suit, there is a clear written consent on the mode of distribution. There is no allegation of fraud or coercion in the securing of the consent.

26. This court has powers of review as provided for under **Rule 63(1)** of the **Probate and Administration Rules**.

Rule 63 (1) provides;

“Rule 63. (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders 5, 10, 11, 15, 18, 25, 45 and 49, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.”

27. The threshold to be achieved in an application for review under **Order 45** of the **Civil Procedure Act** requires a party to establish that;

a) There is discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him when the decree was passed or the order made.

b) There exists a mistake or error apparent on the face of the record.

c) There exists any other sufficient.

d) That the application is made without undue delay.

28. I have painstakingly gone through the instant application. I see no basis raised either in the grounds in support or the affidavit to warrant a review of the regular orders of court made on 22.7.2015. There is no discovery of new and important matter or evidence, neither is there a mistake or error apparent on the face of the record nor has any other sufficient reason been given to justify a review of the orders of court. The application is brought 2 years after the orders were made. The same has not been filed without undue delay.

29. From the foregoing, I reach the inevitable conclusion that the summons dated 5/9/2017 fails. The same is dismissed. In view of the relationship between the parties, each party to bear its own costs.

Dated and Delivered at Nakuru this 30th day of January, 2019.

A. K. NDUNG’U

JUDGE