



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CAUSE NO. 30 OF 2016

IN THE MATTER OF ESTATE OF GITAU WATHIKA (DECEASED)

RULING

1. Before me is the Summons for Confirmation of Grant filed on 28th March, 2018. The main order sought is that the Grant of Letters of administration intestate made to **PETER MBUGUA MBOUHO, VIRGINIA WANGECHI GITAU, WATHIKA KAMAU** and **MARGARET WANJIKU KIHAI** on 28th day of February, 2017 be confirmed.

2. The Petitioners swore an affidavit in support of the Summons for confirmation and proposed mode of distribution as follows:-

<u>3. PROPERTY</u>	<u>HEIR</u>	<u>ACRES</u>
a. Komothai/Kibichoi/261	Peter Mbugua Mboho	2.825 acres
	(To hold in trust for himself and his family)	
b. “	Virginia Wangechi Gitau	2.825 acres
	(To hold in trust for herself and her family)	
c. “	Wathika Kamau	2.825 acres
	(To hold in trust for himself and his family)	
d. “	Margaret Wanjiku Kihoi	2.825 acres
	(To hold in trust for herself and her family)	

4. **Virginiah Wangechi Gitau** one of the co-administrator filed an affidavit in protest against proposed confirmation of grant. She stated that the proposed mode of distribution by her co-administrators is unjust and inequitable. She proposed distribution as follows:-

KOMOTHAI/KIBICHOI/261-11.3 ACRES

VIRGINIA WANGECHI 1.75 ACRES

NANCY WAMBUI GITAU 0.86 ACRES

PAUL KINYANJUI NJENGA 0.86 ACRES

PETER MBUGUA MBOUHO

WATHIKA KAMAU

MARGARET WANJIKU KIHOI..... TO SHARE THE REMAINDER EQUALLY

5. The Summons was canvassed by way of oral arguments. Mr. Nganga for the Petitioners submitted that **Peter Mbugua Mbotho** one of the administrators who is very advanced in age had granted a Power of Attorney in favour of **Francis Ndichu**. Counsel reiterated that he sought to confirm the grant and have the estate distributed among the four households in equal parts. He stated that consent was signed by three administrators, and only **Virginia Wangechi** one of the administrators, and the Protestor herein did not sign. He urged the court to order distribution of the estate in equal parts.

6. Mr. Gikandi, counsel for the Protestor, contended that the **Gitau Wathika** the deceased herein left behind his wife **Virginia Wangechi** and their daughter **Nancy Wambui**. He claimed that the other beneficiaries are creditors and/or relatives. Counsel further argued that the grant ought not to be confirmed so that the question of existence of implied trust can be litigated while the purchasers established their claims in a civil suit and thereafter. That thereafter distribution could follow.

7. Counsel for the protestor argued that only the family of the deceased herein matter and any claims regarding a trust must go to a separate forum. He asserted that the protestor while conceding existence of a trust was disputing the extent thereof, while the purchasers must establish their claims through civil litigation. He pointed out that several named beneficiaries including **John Kagiri Kamau** and **Mary Muthoni Mbothu** had not signed the consent to confirm the grant.

8. In a quick response counsel for the Petitioners pointed out that the beneficiaries and right to the estate were not disputed and that the only question was the extent of the alleged trust which the protestor had failed to establish. That only one family was disputing the proposed mode of distribution. He submitted that the parties had shared the land over the years and that the only equitable distribution was in equal shares.

9. The court has considered the material canvassed. At the outset, the court notes the dearth of material placed before it by the parties but nevertheless must proceed to make a determination based on what was placed before it. So far as the beneficiaries of the estate are concerned, there is no dispute on the material on record, and submissions that the deceased's family included his wife **Virginia Wangechi Gitau** and daughter **Nancy Wambui Gitau** and a daughter-in-law **Mary Muthoni Mbothu**. The Petition had been filed by **Peter Mbugua Mbotho** (brother of deceased) **Virginiah Wangechi Gitau** (wife) **Wathika Kamau** (nephew) and **Margaret Wanjiku Kihoi** (niece).

10. According to the Form P & A5 in the Petition these persons were all beneficiaries to the estate, together with **Mary Muthoni Mbothu** (daughter-in-law), **Esther Njeri Njuguna** (niece) **Naomi Nduta Kariuki** (niece), **John Kagiri Kamau** (nephew) and **Nahashon Kimani Kamau** (nephew). Some two persons listed as beneficiaries by virtue of purchase from **Mary Muthoni Mbothu** (**Paul Kinyanjui Njenga**) and from **Naomi Nduta Kariuki** (**Stephen Kinyanjui E. Kimotho**) appear to have been included on that basis, and not as members of the family of the deceased.

11. It appears from the material contained in the Petition, affidavits (albeit scanty) and submissions before the court, that the Petitioners were representatives of the deceased's immediate family and the families of his siblings including **Peter Mbugua Mbotho** the only surviving brother. The protestor does not dispute that the three other families were entitled to a share of the deceased's property in her affidavit of protest. Indeed her only issue is the share to go to her own family.

12. While proposing that she and her daughter and the purchaser from her apparent daughter-in-law ought to get the lion's share of the estate, she nevertheless goes on to include her co-petitioners, proposing that they should share the balance of the estate. There are no reasons given for this proposal which on the face of it appears inequitable. On the other hand, the co-petitioners to the Protestor have proposed that the family of the deceased and his admitted siblings' families ought to share equally with the apparent representative administrators holding the respective family shares in trust.

13. In my view, it is too late for the Protestor to disown the beneficiaries who were included in the Petition and her protest affidavit does not explain exactly why the other admitted beneficiaries should get less. It is also too late in the day for the protestor to allege that the beneficiaries included in the Petition should file a separate claim based on trust while all along she has treated them as equal petitioners/beneficiaries.

14. By her conduct, and through the Petition the Protestor has conceded the full rights of the deceased's siblings and their respective families to inherit the property registered in the name of the deceased. This is a clear manifestation of her recognition of the existence of some form of trust and/or family arrangement through which the relatives of the deceased were also in the same standing as beneficiaries as the Protestor's own family.

15. In the circumstances, this court is persuaded that the mode of distribution proposed in the summons to confirm grant is both equitable and reasonable, and will cater for the family of the deceased and the families of his siblings.

16. Regarding the alleged purchasers from the daughter in-law and niece of the deceased, the court takes the position that the said vendors had no good title to pass at the time of the alleged sale as the court had not confirmed the grant. Section 55(1) of the Law of Succession Act provides that:

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any decision of property, unless and until the grant has been confirmed as provided in Section 71”

17. It appears that **Mary Muthoni Mbothu** and **Naomi Nduta Kariuki** had purported to sell their respective shares even before the issuance of the grant herein and identification of the said shares. Yet, since 1958 the subject land making up the estate of the deceased has remained registered in the name of the deceased. The vendors therefore could not have passed a good title to the purchasers and they cannot be included herein as beneficiaries. It is upon them to pursue the vendors as they may deem appropriate.

18. In the result, this court does confirm the grant herein in the terms proposed in the mode of distribution in the summons. The protest has no merit and is accordingly dismissed. Parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 14TH DAY OF MARCH 2019

.....

C. MEOLI

JUDGE

In the Presence of:-

Mr. Ng'ang'a for Petitioners

Protestor – Absent

Court Clerk - Kevin