REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 1106 OF 2010

JOSEPH WACHIRA GITAU.....1ST PETITIONER

MUTERIA GITAU.....2ND PETITIONER

JOHANA THINJI GITAU.....3RD PETITIONER

VERSUS

RICHARD GITAU MUTIRIA.....PROTESTOR

JUDGMENT

The grant of letters of administration intestate to the estate of Gitau s/o Thinji (the deceased) was made to the petitioners on 9 December, 2010. According to the affidavit sworn in support of the petition for grant of these letters, the deceased died in 1944; he was then domiciled in Kenya and his last known place of residence was Kiruga village, Itemeini sublocation in Nyeri County. The only asset that comprised his estate was land parcel Title No. Othaya/Itemeini/153 measuring approximately 2.2 acres.

The petitioners who were the deceased's children were listed as the deceased's only survivors.

Although the petition was made in the Nyeri magistrates' court as Succession Cause No. 136 of 1995, the grant was made by this Honourable Court in the joint names of the petitioners in the present cause; how the cause made its way to this court is not, however, of concern at the moment.

By a summons for confirmation of grant dated 19 December, 2013 Joseph Wachira Gitau (Gitau), the first administrator sought to have the grant confirmed; as of this date, his two brothers had died and therefore he was the only surviving administrator. In the affidavit in support of the summons for confirmation of grant, Gitau sought to have the deceased's estate shared equally amongst himself and his two brothers notwithstanding that the latter were, as noted, deceased. Nonetheless, he named their respective survivors whom I suppose are the rightful heirs.

The protestor was not satisfied with the scheme of distribution of the estate proposed by Gitau and so he filed an affidavit of protest in that regard. In his affidavit he deposed that he was the son of the Muteria Gitau (Muteria), the previous 2nd administrator and apart from himself, his mother, Margaret Wangari Muteria also survived him. He proposed to have the estate shared equally between his father's house and Johana Thinji Gitau's (the previous 3rd administrator's) house. As for Gitau, he deposed that he, Gitau, had sold his share of the estate to the protestor's father and therefore he was not entitled to any share.

Gitau died on 10 April, 2014 while his summons was pending for determination and on 18 April, 2016, he was substituted in this cause by his wife Helen Wambui Mwangi.

When the protest came up for hearing the protestor produced what he regarded as a sale agreement allegedly executed between the Gitau and Muteria on 11 September, 1992. In that agreement, Gitau is alleged to have ceded his share of the estate to Muteria after the latter paid him the sum of Kshs 20,000/=.

As much as the agreement is stated to have been executed on 11 September, 1992, the protestor admitted that his father died on 3 September, 1992.

Inevitably, Gitau's widow disputed the authenticity of agreement purportedly executed by her late husband. She urged that the agreement was not executed by her husband as suggested by the protestor and, in any event, it could not have been executed by Muteria posthumously.

I agree with the 1st administrator's widow that the agreement purportedly executed by her late husband is legally flawed in every respect and

does not carry any weight. Of its many deficiencies, the most prominent one is that it was purportedly executed by a deceased person. The protestor had the guts to tell the court that his father resurrected from the dead and signed the agreement; with due respect to him, I found this part of his testimony to be ridiculous, to say the least.

Again, there is also no evidence that it was ever signed by the 1st Petitioner who is alleged to have sold his share of the deceased's estate to the protestor's father. Even then, it is not possible that the beneficiaries of the estate could have alienated the estate in any manner whatsoever before the confirmation of the grant or without any other authority of the court (see section 55 of the Law of Succession Act, cap. 160).

Since the protestor's protest turned entirely on the purported agreement which I have found to be baseless in law, the protest is equally baseless and it is hereby dismissed.

One more thing I have to say; the distribution of the deceased's estate as proposed by the applicant is consistent with section 38 of the Law of Succession Act which simply provides for devolution of the estate on the surviving child or, where there are more than one, upon each one of them in equal shares; it states as follows:

> ***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.***

The deceased, as noted died in 1944, long before the Law of Succession Act came into force and going by the provisions of section 2 of the Act, its application to the present circumstances is restricted though not completely ousted; I say so because as much as the Act applies to succession and administration of those estates of persons who died after the commencement date, its application is still open to *administration* of estates of persons who died prior to the commencement of the Act notwithstanding that such estates would be subject to the written laws and customs applicable at the time of the death; in its pertinent part, this provision of the law states as follows:

> ***2. Application of Act***
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> ***(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.***
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> ***(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.***
>
> ***(3) …***
>
> ***(4) …***

Nothing turned on whether there were any written laws or customs to which the deceased's estate was subject at the time of his death. However, since the deceased predeceased the Act, there is need for justification of the application of the Act to his estate.

In the absence of any evidence that the distribution of deceased's estate should be guided by particular written laws or customs that may have applied at the time of his death, the Law of Succession Act remains the fallback law that this court can look up to in the distribution of the deceased's estate.

As I mentioned elsewhere (in **Nyeri Succession Cause No. 196 of 1996 Grace Wanjiku Wahome & Another versus Hezron Ndungu Muthui**) the application of this law has not been completely excluded from the estates of persons who died prior to the Act's commencement date; section 2(2), as noted, is a window for the application of the Act to the estates of persons who predeceased it though it limits the application to *administration* of those estates only. My position on this question has been that, in the absence of proof of any written law or customs that applied to an intestate's estate who died before the Act came into force, or that even if they existed, that they are consistent with the Constitution, it is in order to extend the application of the Act to succession to the intestate's estate as well.

If, for some reason, the Legislature found that it was plausible for the Act to apply to administration of the estates of persons who died prior to the commencement of the Act in certain circumstances, it follows that, for that very reason, the application of the Act can be extended to succession of those estates if circumstances so require.

Against this background, I would agree with the applicant that there would be nothing wrong if the deceased's estate is distributed equally amongst his children or their respective survivors in the spirit of section 38 of the Act.

Before I proceed in that direction, however, I cannot fail to note that the joint administrators of the grant which is the subject of the applicant's summons for confirmation of grant are all deceased and, for all intents and purposes, upon the death of the surviving administrator, the grant made in their joint names became useless and inoperative through subsequent circumstances. (See section 76(e) of the Act).

As much as Helen Wambui Mwangi was substituted in these proceedings in place of the last surviving administrator, she cannot be assumed to be the administrator of the deceased's estate until the court declares her to be the legally appointed representative of the deceased's estate. Ordinarily, an application for revocation of the previous grant and for an appointment of a new administrator or administratrix ought to have been made in the wake of the death of the surviving administrator. This was not done and I would have been entitled to ask the parties to go

back to the drawing board and make the necessary application.

I note, however, that the petition for grant of letters of administration was made in 1985 meaning that this cause has been pending in the courts for the last 34 years. It will not serve the ends of justice to ask the parties to go back to the drawing board to make the application they ought to have made in the first place when, at the end of the day, the ultimate determination of this cause would, in all likelihood, not be different. For completeness of record therefore, I would invoke section 47 of the Act as read with Rule 73 of the Probate and Administration Rules, which clothe this court with power to pronounce such decrees and make such orders therein as may be expedient and as may be necessary for the ends of justice or to prevent abuse of the process of the court and appoint Helen Wambui Mwangi as the administratrix of the estate of the late Gitau Thinji alias Gitau s/o Thinji.

As noted, if the deceased three children were alive, the estate would have been distributed amongst them equally; but though deceased, they are survived by their respective houses. It came out in evidence, and it is not in dispute, that Joseph Gachira Gitau was survived by his widow Helen Wambui. Johana Thinji Gitau was survived by his children named as:

1. Richard Ndegwa Thinji
2. Stephen Gitau Thinji
3. James Magi Thinji
4. Gerald King'ori Thinji
5. Susan wangui Thinji
6. Winnie Wanjiru Thinji

Last but not least, Mutiria Gitau was survived by his wife Margaret Wangari Muteria and the protestor.

For the reasons I have given the deceased's estate comprising Title No. Othaya/Itemeini/153 shall be divided into three equal shares and each of these shares shall be transferred and registered as follows:

1. The first share due to the house of Joseph Gachira Gitau shall be registered in the name of his widow Helen Wambui Mwangi subject to life interest.
2. The second share due to the house of Johana Thinji Gitau shall be registered in the names of his children as owners in common as follows:

(i) Richard Ndegwa Thinji

(ii) Stephen Gitau Thinji

(iii) James Magi Thinji

(iv) Gerald King'ori Thinji

(v) Susan wangui Thinji

(vi) Winnie Wanjiru Thinji

3. The third share shall be registered in the name of Margaret Wangari Muteria subject to life interest.

The grant I have made to Helen Wambui Mwangi is confirmed in the foregoing terms. Parties shall bear their respective costs, this being a family dispute. It is so ordered.

Signed, dated and delivered in open court this 26th day of April, 2019

Ngaah Jairus

JUDGE