



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1842 OF 1999

IN THE MATTER OF THE ESTATE OF NYAMBIA MUKAYA (DECEASED)

RULING

1. By a Chamber Summons dated 22nd August 2017 filed under rule 49 and 73 of the probate and administration rules Chapter 160 Laws of Kenya, the applicants sought orders as follows:

(a) That application be certified urgent.

(b) That preservative orders to issue restraining one Douglas Gichure Gichuru, Mwangi Ndolo, Livingstone Muniu and Charles Ngoiyo Mwangi whether by themselves, their relatives, families, personal representatives, agents or persons claiming through them from erecting buildings whether permanent or semi-permanent, developing, sub-dividing, leasing, letting, offering for sale, selling, trespassing upon or in any other manner dealing with the parcel of land known as title number Loc.13/Gitugi/803 pending hearing and determination of the suit herein.

(c) That compliance with order 2 above be supervised by the OCS Nyakianga Police Station or such other officer as this court may designate.

(d) That costs of the application be borne by the applicant.

2. Application is based on grounds on the face of it and supporting affidavit jointly sworn by the applicants herein James Kariuki Maina and Florence Wanjiku Maina as joint administrators of the estate herein.

3. Before I embark on evaluating and determining the instant application, a brief background on circumstances surrounding the dispute herein since inception would suffice. I must however from the outset state that both parties in this cause have not adequately helped this court get to the bottom of the underlying intrigues affecting the distribution of the estate herein considering the fact that they all concealed material facts thus leaving the court to wander about searching for information from very old files both from the lower court and before the high court.

4. The genesis of this succession cause dates back as far as 8th August 1994 when Nyambia Mukaya the deceased whose estate these proceedings relate died. Subsequently, her only two adult surviving children (daughters) Mrs. Wangari Maina (married) and Mrs. Wanjiru Mwangi (married) jointly petitioned Murang'a SRM's court vide Succession Cause No. 132/95 on 21st April 1995 for representation of a grant of letters of administration intestate. According to form P and A 5, land L.R. No. Loc.13/Gitugi/803 was listed as the only asset left behind for distribution. The estate was gazetted via gazette notice number 4137 of 21st April 1995 as an intestate estate.

5. On 21st September 1995, a grant of letters of administration intestate was issued to the two applicants. As a consequence, the applicants moved the court via Chamber Summons dated 8th January 1996 seeking confirmation of the grant. Before confirmation, a protest dated 19th September 1996 was filed by Douglas Gichure Gichuru claiming beneficial interest over the estate.

6. In his protest, Douglas claimed he was a son to one Ndolo Josephat alias Gichuru Gakuru who was a step-brother to the deceased's husband. That the deceased's husband who predeceased the deceased (Nyambia Mukaya) sometime 1940s had two surviving step-brothers namely, Josephat Ndolo alias Gichuru Gakuru and Hiram Ngoiyo. That during the colonial era and before land adjudication and demarcation, the deceased who had no son, moved on and started staying with her late husband step-brothers aforesaid (brother-in-laws) on the disputed land. That when the only two daughters to the deceased (petitioners) got married, Josephat Ndolo and Hiram Ngoiyo remained on the said land which they developed and occupied as their family land to date.

7. It was the protestor's contention that since his father had died, and considering that the petitioners were married daughters who under Kikuyu Customary Law were not entitled to inherit their parent's property, the land in question had to be inherited jointly in equal share between himself on behalf of his father's family and his uncle Hiram Ngoiyo.

8. After hearing the protest, the trial magistrate upheld the same and confirmed the grant on 22nd December thus sharing the property between Douglas Gichure Gichuru and Hiram Ngoiyo equally after finding that the petitioners who were old ladies and already married, had no right to inherit their parent's property in accordance with Kikuyu Customary Law.
9. Unfortunately, by the time the grant was being confirmed, Hiram Ngoiyo had long died on the 14th June 1997. Consequently, on 14th June 1999, vide summons for rectification, Douglas (protestor/objector) moved the court for substitution of Hiram Ngoiyo's name (deceased administrator) with that of his son Edmund Mwangi Ngoiyo. The said application was allowed and a rectified certificate of confirmation of grant issued on 12th November 1999.
10. Despite issuance and confirmation of the said grant, the petitioners were adamant and or refused to sign forms for transmission of the property to the said Douglas and Edmund. By an order of the Court issued on 15th November 1999 by Kiambu SRM Court, the Executive Officer was directed to sign all necessary transfer forms in place of the petitioners who had declined to sign. The issuance of this order notwithstanding, the petitioners were again reluctant in surrendering the title deed to the Land Registrar for cancellation culminating to another order of 30th June 2000 directing them to surrender the title deed in default the Land Registrar to dispense with it and proceed with the transfer.
11. Aggrieved by this order, the petitioners were compelled to file civil appeal No. 371/2000 at Nairobi High Court challenging the order of the court directing them to surrender the Title deed. The appeal was however not admitted as the same did not comply with Order XLI rule 1A of the civil procedure rules. The same was abandoned and to date no action has been taken.
12. Meanwhile, on 25th August 1999, the 1st petitioner (Mrs. Wangari Maina) swiftly moved to Nairobi High Court and filed a fresh succession cause No. 1842/1999 (this file) in respect of the same estate seeking a grant of probate with written Will with her as the sole executrix. According to form P & A 5, the dependents listed were the petitioner and her sister Wanjiru. The only asset listed was the same one listed in Succession Cause No. 132/95 Murang'a SRM Court. Unaware that similar succession cause had been filed and dealt with before Murang'a SRM's court, the high court issued the 1st petitioner (Mrs. Wangari) with a grant of probate with written Will on 4th November 1999 and confirmed the same on 14th July 2000.
13. After realizing that Mrs. Wangari Maina had obtained another grant before the high court in respect of the same estate, Douglas Gichure Gichuru and Edmund Mwangi Ngoiyo filed an application to revoke and or annul the confirmed grant through their application dated 29th January 2001 arguing that the grant was obtained fraudulently by making false statement and concealment of material facts. Confronted with this new development, the high court directed on 27th September 2005 for Wangari Maina to be served and Murang'a SRM file No. 132/95 be availed.
14. During the pendency of the application for revocation, the petitioner Mrs. Wangari became senile due to old age hence developed and suffered from dementia necessitating her son James Kariuki Maina and daughter Florence Wanjiku to file summons dated 21st May 2007 but filed on 22nd May 2007 seeking to be enjoined as her next friends to prosecute the case on behalf of their sickly mother. Subsequently, Mrs. Wangari died on 25th February 2010 and her children filed Succession Cause No. 1723/12 in respect of her estate wherein the same land was listed and shared out amongst her beneficialies and the grant confirmed on 7th October 2014. Later, on 14th June 2014, Douglas Gichuru filed summons seeking the court to substitute the late Mrs. Wangari with her son James Kariuki Maina as the respondent (Petitioner).
15. For reasons that are not clear from the court record, similar application was filed again on 14th June 2015 with Douglas Gichuru and Edmund Ngoiyo as the applicants and James Kariuki Maina as the respondents. In reply to the application, Maina James Kariuki and his sister Florence Wanjiku Maina opposed the same claiming that Edmund Mwangi Ngoiyo had since died hence could not have filed the application which they termed as defective together with the affidavit in support. Again, the said application is pending and the same has not been heard.
16. On 3rd February 2017, James Kariuki Maina and Florence Wanjiku jointly filed another application seeking to substitute their deceased mother. A similar application was again filed and the same allowed on 10th March 2017.
17. Subsequently, through application dated 20th April 2017, one Charles Ngoiyo Mwangi a son to Edmund Mwangi having obtained a grant of letters of administration Ad litem sought to substitute his late father(deceased administrator) who allegedly died on 22nd April 2000. Before the application for substitution of Edmund Mwangi by his son Charles could be heard, James Kariuki and Florence filed Chamber Summons dated 27th July 2017 seeking to have Charles deemed as personal representative of Edmund Mwangi Ngoiyo and an order directing Charles Ngoiyo and Douglas Gichuru and their families, relatives or agents to vacate from the said land.
18. Before filing any replying affidavit to the application dated 27th July 2017, James Kariuki and Florence again filed another application dated 22nd August 2017 seeking restraining orders against Douglas and Charles from interfering or disposing the disputed land. This is the application now pending before me for determination.
19. According to the applicants' supporting affidavit sworn on 22nd August 2017 and counsel's submissions, the land in question belongs to them based on the high court certificate of confirmation of grant issued on 14th July 2000 hence referring to the respondents as trespassers. In reply, the respondents Douglas Gichuru and Charles Ngoiyo Mwangi opposed the application claiming that, according to the grant confirmed by Murang'a SRM's court on 22nd December 1999 which is not subject to the pending revocation application, they are the bonafide beneficiaries. Mr. Gacheru Advocate for the respondents filed one paragraph submission adopting the respondent's response.
20. I must state here that, both parties have severely abused and misused the court process with the intention of achieving their desired goals. Before this court considers the instant application, the issue of substitution of deceased administrator should be dealt with first. For instance,

the application dated 20th April 2017 by Charles Ngoiyo to substitute Edmund Mwangi deceased administrator and beneficiary under the grant confirmed by Murang'a SRM's court and a similar one dated 27th July 2017 by James Kariuki and Florence (applicants) should have been determined first before the instant application.

21. In the circumstances, this court cannot determine the application dated 22nd August 2017 before first determining the application for substitution of Edmund Mwangi dated 27th July 2017 and that of the applicants herein dated 20th April 2017. It is after sorting the issue of substitution of one of the deceased administrators to operationalize the grant issued by Murang'a court that the application for revocation can be heard to determine whether the high court confirmed grant was properly issued or not. Obviously, we cannot have two confirmed grants issued separately in the high court and lower court affecting the same estate. One of them must go and die a natural death.

22. Accordingly, it is my finding that the application herein was prematurely filed and the same is dismissed with no order as to costs with directions that the applications dated 20th April 2017 and 27th July 2017 be set down for hearing and thereafter proceed to fix hearing of the application for revocation. Order accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF MARCH, 2018.

J.N. ONYIEGO (JUDGE)

In the presence of

.....Counsel for Applicant

.....Counsel for the Respondents

EdwinCourt Assistant