



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 280 OF 2001

IN THE MATTER OF THE ESTATE OF THE LATE GAKUBIA GITHINJI NDEGWA ALIAS GAKUBIA GITHINJI (DECEASED)

REGINA WANJIKU KARIITHI.....1ST PROTESTOR

RICHARD KARWENJI KIMARI.....2ND PROTESTOR

VERSUS

JANE WAMBURA GAKUBIA.....PETITIONER

RULING

1. The estate relates to the late **GAKUBIA GITHINJI NDEGWA alias GAKUBIA GITHINJI (DECEASED)** who died on the 18th May, 1980 at Githi Location in Mukuruweini in Nyeri County. There is one (1) identifiable parcel of land that is the subject matter of this cause and it is known as Parcel No. **Githi/Muthambi/680** measuring 6.4 acres.

2. The Deceased died intestate and left the following surviving him namely;

- i. Jane Wambura Gakubia - widow/ petitioner
- ii. James Kamotho Gakubia - son
- iii. Agnes Gathoni Muriithi - daughter
- iv. Timothy Githinji Gakubia - son
- v. David Mwangi Gakubia - son
- vi. Lucy Wangari Mwangi - daughter
- vii. Charles Kariithi Gakubia - son

3. The Grant was issued to Jane Wambura Gakubia and Regina Wanjiku Kariithi on the 28/10/2011; and on the 28/05/2012 Jane Wambura Gakubia (who shall hereinafter be referred to as '**Jane**') being one of the Petitioners' filed a Summons for Confirmation of Grant; her contention was that the subject property comprised the estate of the deceased and therein proposed the distribution of the property; her proposed mode of distribution was opposed by her co-petitioner who is the 1st protestor; and there was a third person that is the 2nd protestor who claims a share in the land and also opposes Jane's mode of distribution;

4. The 1st protestor who is a co-petitioner filed her Affidavit of Protest on the 19th July, 2012 and gave her reasons for protesting and included her proposed mode of distribution of the subject property; the 2nd protestor filed his protest on 28th September, 2012;

5. Directions were taken on the 28/09/2012 that the matter proceed for hearing by way of '**viva voce**' evidence; there was also an order made for a site visit by the deputy registrar and a report was duly filed;

6. The parties gave oral evidence and hereunder is a summary of the two protestors cases and the petitioner's response;

1st PROTESTORS CASE

7. The protestor is a co-administrator to the estate; her husband Joseph Kariithi who is also deceased was a brother to the deceased; she has come to court seeking the distribution of the estate as she contends that Jane's proposed mode of distribution is not correct as Jane together with her children have taken the bulk of the estate;

8. She did not dispute the fact that the whole of the subject property was registered in the deceased's name; but notwithstanding that fact her evidence was that she was entitled to more than the 0.9 acres and was entitled to a larger portion that ought to measure 2.7 acres; reasons being that her late husband contributed to the purchase of the subject property; that the land bought was initially three (3) acres and later more was added; the land was un-surveyed but the deceased had shown them their boundaries before his demise;

9. That there was also the 2nd protestor who was entitled to a share of the subject property; whom she stated ought to be given one (acre);

10. Her proposed mode of distribution was as follows;

i. Jane Wambura Gakubia – 2.7 acres

ii. 1st protestor - 2.7 acres

iii. 2nd protestor -1 acre

11. Her prayer was that the land be distributed equally and according to the above proposed mode of distribution;

2nd PROTESTORS CASE

12. The 2nd protestor made his affidavit of protest on the 27/09/2012 and is seeking the distribution of 3.4 acres from the subject property; his evidence was that he had bought the portion of 3.4 acres from the vendor during his lifetime; and to support his claim he annexed to his Affidavit of Protest a copy of the duly executed but undated Agreement for Sale made between the vendor and himself;

13. In 1964 the vendor had only sold 3 acres to the deceased for the sum of Kshs.1200/-; that the deceased had been given the Original Title for safe-keeping but had proceeded to register the whole of the subject property into his sole name; he acknowledged the existence of a dispute as between the vendor and Jane and that the matter was determined on appeal in favor of the vendor;

14. The vendor passed on in 2007 and that it was the intention of the vendor that the 2nd protestor be given the portion that was determined by the Land Appeals Committee as belonging to the vendor; but on cross-examination conceded that the vendor's entitlement as per the award was one (1) acre; that this was despite the fact that he had nothing to show that he was an administrator of the vendors estate; that his entitlement was clearly stated in the Agreement for Sale;

15. The 2nd protestor prayed that the vendors portion was his entitlement and that it be distributed to him;

PETITIONERS CASE

16. Her evidence was that the deceased was her husband and he passed on in 1980; he had bought the land known as Githi/Muthumbi/680 from the vendor; he had paid the vendor the sum of Kshs2400/- on the 3/11/1964 and in 1965 the deceased had paid a further sum of Kshs.2400/-; that he had not bought the land together with his brother; that all the 6.4 acres was purchased by and belonged to her late husband and that out of affection he had given the brother a portion to cultivate and build on;

17. When cross-examined she confirmed that the vendor filed a claim against her because it was his contention that he had never transferred the whole 6.4 acres to the deceased; in her testimony she confirmed that there was a portion that was left for the vendor to utilize and that she had never taken any steps to remove him from the said land;

18. As for the 2nd protestor she stated he was not entitled to any part of the land that belonged to the deceased; that she could not recall which year the vendor died nor when the 2nd protestor took possession and settled on the vendors portion; she confirmed that he was living on the land with his family and had built thereon and that she had never taken any steps to remove him; but despite all this he was still not entitled to any part of the land;

19. Her evidence was that the Grant was issued to herself and the 1st Protestor on the 28/10/2011 she thereafter filed Summons for Confirmation on the 31/05/2012 and therein proposed the mode of distribution for the property that constituted the estate of the deceased; it was her contention that her proposed mode of distribution as set out in her affidavit was in accordance with the deceased's wishes; which was that it be divided as set out hereunder;

i. Jane Wambura Gakubia – the respondent - One (1) acre

ii. James Kamotho Gakubia - 1.8 acres

iii. Timothy Githinji Gakubia - 0.9 acres

iv. David Mwangi Gakubia - 0.9 acres

v. Charles Kariithi Gakubia - 0.9 acres

vi. Regina Wanjiku Gakubia – the 1st protestor – 0.9 acres

20. Her prayer was that the land be distributed as per the deceased's wishes.

ISSUES FOR DETERMINATION

21. After hearing the evidence of the parties this court has framed the following issues for determination;

- i. Whether the 1st protestor is entitled to a share in the subject property;
- ii. Whether the estate of Weru is entitled to a share in the subject property;
- iii. Distribution of Title No.Githii/Mithambi/280;

ANALYSIS

Whether the 1st protestor is entitled to a share in the subject property;

22. This case has a long history which needs to be enumerated first before embarking on the analysis of the evidence; initially Jane herein had petitioned for the Letters of Administration by herself; her brother-in-law who was the husband of the 1st protestor was alive by then and he filed an Objection thereto;

23. The objection and the succession cause were not the only ongoing matters touching on the subject property there was also in existence a dispute between Jane and the person named Weru Ngairu Weru (who has hereinafter been referred to as '**the vendor**') and was the initial owner of the subject land and that he had sold a portion of the land to the deceased herein;

24. The dispute pertaining to the purchase of the subject land was first heard and determined by the Area Chief; thereafter it was agreed '**By Consent**' that the dispute be referred for arbitration before the District Officer Mukuruweini assisted by four (4) elders for hearing and determination; the vendor and Jane were to appoint two elders each; the award was to be filed in court within sixty (60) days;

25. A Tribunal Case No.6 of 2002 was subsequently filed as between Jane and the vendor; therein the vendor was the known plaintiff and Jane was the defendant; the matter was heard by the Tribunal and the Land Appeals Committee and the award which was in favor of the vendor was read to both parties on the 17th October, 2002 and it was filed in court on the 10th December, 2002;

26. The findings of the Land Disputes Appeals Committee was that the vendor had not sold the whole parcel of land to the deceased herein but had only sold 5.4 acres to him and that one acre rightfully still belonged to the vendor; and Jane was ordered to return the same to vendor;

27. Before the conclusion of the abovementioned dispute the Objector passed on and the 1st protestor successfully applied to court for Limited Letters of Administration and substitution to enable her to continue pursuing the objection proceedings; the Objection Proceedings were later compromised and Jane and the 1st Protestor agreed to become joint administrators to the estate of the deceased herein; and the Grant was issued to both of them on the 28th October, 2011.

28. Jane then filed an application for Confirmation of the Grant on the 28/05/2012 in which she proposed the distribution of the property comprising the estate of the deceased; her proposed mode of distribution was that the 1st protestor to get 0.9 of an acre and that the remaining acreage was to go to herself and her children; the 2nd protestor was not catered for and was allocated nothing; and this proposed mode of distribution was opposed by her co-petitioner and the 2nd protestor;

29. The Protestor who is also a co-petitioner filed her Affidavit of Protest on the 19th July, 2012 and gave her reasons for protesting and included her proposed mode of distribution of the suit property; which was that one (1) acre be hived off and be given to the 2nd protestor and the balance of 5.4 acres be shared equally between herself and Jane; with each getting 2.7 acres each; the 2nd protestor had his claim of and his mode of distribution;

30. After all the parties had tendered their evidence and had closed their respective cases this court directed the Deputy Registrar to conduct a site visit of the subject property before a determination was made; the visit was conducted and a report filed in court and it established the physical occupation of the land by the parties;

31. From the evidence adduced it is not in dispute that the subject land was not family land and that the same had been purchased from the vendor; the 1st protestor contends that her late husband together with his late brother bought the land and lived there in harmony; each

brother had built on their portion and cultivated their respective parcels; the deceased died intestate leaving behind his widow Jane;

32. That the demise of the deceased herein was the beginning of the disputes on the portions that the brothers were entitled to; the first dispute was as between Jane and the vendor; then as between Jane and her brother in law; and upon the demise of the brother in law the dispute was as between the two widows of the two deceased brothers;

33. Jane's contention was that she was entitled to the larger portion as it was her husband the deceased who had purchased the subject property; whereas the other widow the 1st protestor claimed half share of the net of the subject property as her late husband had also contributed towards the purchase of the land;

34. The 1st protestor told the court that the suit property was bought before the deceased married Jane; this fact was not controverted by Jane; it also follows that Jane was not yet a member of the family and may not have been privy to the genesis and details of the land transaction relating to its purchase;

35. In her evidence the 1st protestor stated that her late husband contributed towards the purchase of the land and that the two brothers lived in reasonable harmony together on the suit property until the demise of the deceased; that each brother had built on their respective portions and also cultivated these respective portions;

36. None of them produced any receipts or any Agreement for Sale or any form of documentary evidence to support their husbands respective claims; but a cursory look at the Green Card that forms part of the court record reflects that the vendor was the first registered owner and that he indeed sold the property to the deceased;

37. It is clear from the assessment of the evidence of the protestors and the respondent that Jane's brother-in law resided and had physical possession of half on the property; the report of the deputy registrar also included a sketch that confirmed this status; Jane also confirmed that out of love and affection the deceased had given the brother land to build and to farm; but she did not go on to elaborate the acreage that had been gifted;

38. This court has noted that there is no evidence by Jane that the so called gift even though in its incomplete form was ever revoked by the deceased prior to his demise; there is evidence that the deceased had even put his brother in occupation of the land prior to registration of the title to the land; it is therefore this court's considered view that by putting him in possession an overriding interest was thus created in favor of the brother that is protected and enforceable in law;

39. The record shows that Jane had petitioned for Letters of Administration before the Resident Magistrate's Court in Nyeri and that the 1st Protestor's late husband objected as he had not been included; upon an application being made the matter was transferred to the High Court;

40. It is also noted that upon losing out on the Tribunal case that Jane and the 1st protestor resolved their differences and it was agreed that the 1st protestor becomes a co-administrator to the estate;

41. This concession by Jane demonstrates that she was at all times aware of her late brother in law's interest in the deceased's estate despite having left him out when she filed the petition; by making her a co-administrator the presumption is that she acknowledged the 1st protestor to be an equal partner and placed her on equal footing;

42. In her mode of distribution Jane gave the 1st protestor a share equivalent to that of the other dependants which was 0.9 of an acre; yet there was no evidence adduced by her that the 1st protestor's husband was supported by the deceased and was therefore a dependant of the deceased as provided under Section 29(1) of the Law of Succession Act;

43. None of the parties adduced evidence of an acrimonious relationship between the brothers during their lifetime; it is on record that there was a cordial relationship in existence as between the two brothers; from the evidence and the circumstances of case this court is satisfied that the deceased having accommodated his brother on half of the subject land without any interference this can be deemed to be that the 1st protestor's late husband's share was in accordance with his physical occupation of the land; and this was the arrangement the brothers had agreed to;

44. This court is satisfied that the Jane's brother in law who is the 1st protestor's husband was entitled to the portion he occupied in the estate of the deceased;

45. There are crucial evidence arising from the facts and material in the Tribunal Case that has been placed before this court in the form of the proceedings and the award that goes to show that the deceased registered the whole portion of the subject property to himself to the extent and of excluding the rightful owner;

46. The award clearly indicates that the deceased's entitlement to the subject property; and this court is satisfied that the deceased's portion measured 5.4 acres;

47. Therefore the 5.4 acres shall be distributed as between Jane and the 1st protestor in equal shares;

Whether the estate of Vendor (Weru -deceased) is entitled to a share in the estate of the deceased.

48. It is not disputed that all the parties hereto that is Jane, the 1st protestor and the 2nd protestor all live on the subject property; the report that this court directed be made by the deputy registrar upon a site visit also confirmed this position;

49. It is also not in dispute that the deceased registered himself as the registered owner of the whole parcel of land; much later when the vendor discovered what had been done this led him to then raise his objection which he canvassed at the Land Disputes Tribunal and was followed by an appeal; the ensuing appeal was determined in favor of the vendor and the findings was that the vendor had not sold the entire parcel of land to the deceased and that he was entitled to one (1) acre;

50. From all the litigation that arose it is this courts considered view that it was well within Jane's knowledge that the deceased did not own the whole parcel of subject land; the Appeals Committee rendered its award in favor of the vendor on his entitlement to one (1) acre which award to date has not been set aside and is therefore binding on her;

51. Even in the absence of the Tribunals award there is the evidence adduced by the 1st protestor which was corroborated by the 2nd protestor that the vendor had occupied part of the subject land and had always cultivated it; the deputy registrars report lends credence to their evidence and confirmed that as of now it was the 2nd protestor who was in occupation and was also cultivating the land; the prevailing circumstances clearly demonstrates that the vendor had rights stemming from possession and occupation of the portion occupied of the subject property which amounts to an overriding interest protected and enforceable in law;

52. It is trite law that the registration of the land by the deceased this did not extinguish the vendors overriding interests nor relieve the deceased of his duties and obligations to the vendor;

53. This court reiterates that the award to date has not been set aside and is therefore binding on Jane;

54. This court is satisfied that the estate of Weru (deceased) is entitled to a one (1) acre share in the estate of the deceased herein;

Distribution of Parcel No

55. After making the findings that both the 1st protestor and the vendors estate are entitled to a share of the subject parcel of land; this court is then tasked with the duty of distributing the said land;

56. This court reiterates that it is satisfied that there was sufficient evidence to demonstrate that the deceased did not buy the whole parcel of land from Weru and is further satisfied that the vendors estate is entitled to his portion of one (1) acre;

57. It was Jane's contention that since the vendor was now deceased the 2nd protestor was not properly before the court as he had no authority to deal with any part of the estate of the vendor;

58. On this issue of the 2nd protestor's *locus standi*; this court has perused the court record at length and states that even though there is evidence that the 2nd protestor entered into a Sale Arrangement with the vendor this court cannot ignore the fact that the vendor is now deceased; and that it is this courts considered view that the arrangement is not a suitable one under these proceedings;

59. The 2nd protestor has not demonstrated to the court that he has the legal mandate to represent the estate of the vendor as the administrator; but considering the age of these proceedings and the time taken to conclude; it would be draconian to strike out his protest on this ground as prayed by Jane;

60. Therefore in order to do justice this court will invoke the inherent powers donated by Rule 73 of the Probate and Administration Rules that empowers this court to do justice; this court directs the 2nd protestor to legitimize his status within one (1) from the date hereof; in default any persons appointed as the administrators of the vendors estate shall be at liberty to apply for distribution of one (1) acre;

FINDINGS & DETERMINATION

61. The protests are found to have merit and are hereby allowed;

62. The petitioner named Jane's mode of distribution is found to be unfair;

63. The Grant is hereby confirmed jointly and shall be distributed as follows;

i. The vendors estate is entitled to his portion of one (1) acre;

ii. The remainder of the property known as is land parcel number **Githii/Muthambi/680** measuring 5.4 acres shall be divided equally as between the 1st protestor and Jane; with each getting 2.7acres.

64. Parties shall be at liberty to apply for further directions;

65. Each party shall bear their own costs.

It is so ordered accordingly.

Dated, Signed and Delivered at Nyeri this 19th day of April, 2018.

HON. A. MSHILA

JUDGE