



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 92 OF 2002

IN THE MATTER OF THE ESTATE OF M'MUGAMBI MUTINDI (DECEASED)

ANGELO KINOTI

GERALD M'NGARUTI MBATIA.....PETITIONERS

-VERSUS-

D M M (Suing as Guardian Ad Litem for K G & P M G)...OBJECTOR

-AND-

GIBSON WAMBUGU NYAGA (DCD).....1ST PROTESTOR

JOHNSTONE MBAYA.....2ND PROTESTOR

JOSEPH KIRUMBI M'MBUI (DCD).....3RD PROTESTOR

TABITHA MUKIRI.....4TH PROTESTOR

LUCY NKOROI.....5TH PROTESTOR

JULIA KANGAL.....6TH PROTESTOR

M'MBOGORI M'MUGAMBI (DCD).....7TH PROTESTOR

JOHN MWITI M'MARETE (DCD).....8TH PROTESTOR

MARTHA KITHUKU M'MUTHAMIA.....9TH PROTESTOR

R U L I N G

1. This is a ruling on various applications that have been pending in this matter for sometime now. Before dealing with those applications, I need to examine the background to this matter. **M'Mugambi Mutindi** (“**the deceased**”) is said to have died sometimes in 1934.

2. In the Chief's letter of introduction and **Form P. & A. 5**, the deceased was shown to have left behind 4 survivors, **Gerald M'Ngaruti M'Mugambi, M'Mbui M'Mugambi, Geoffrey Muuna M'Marete and Festus Koome**. He left **L. R. No. Ntika/Ntakira/985**, measuring approximately 7.42 acres, as the only asset of his estate.

3. On 10th April, 2002, **Angelo Kinoti Mbatia and Gerald M'Ngaruti M'Mugambi** (“**the petitioners**”) applied for letters of administration intestate. On 10th June, 2002, **Daniel Murungi M'Muthamia** (“**the objector**”) filed an Objection to the petition as *guardian ad litem* of **Koome Gituma and Purity Makena Gituma** (minors). The grounds were that the consent of the minors had not been sought and that the 1st petitioner was a mere purchaser who was not entitled to apply for the administration of the estate.

4. On 15th December, 2003, a consent dated 8th December, 2003 was filed in court. According to that consent, which was executed by all the aforesaid survivors of the deceased, the estate property was supposed to be distributed between the estate of **M'Marete M'Mugambi** (whose children were identified as Geoffrey Muuna Marete, John Mwiti and Gituma Marete (deceased but had a son Festus Koome), **M'Mugambi M'Ngaruthi and M'Mbui M'Mugambi**.

5. On 5th April, 2004, the objector lodged an application to set aside that consent on the alleged ground of fraud. On 28th June, 2004, Onyancha J delivered a judgment whereby he distributed the estate equally between the survivors whom he found to be the beneficiaries of the estate. That judgment was however, set aside by Emukule J on 30th June, 2008 on the basis that no grant had been issued and he proceeded to forthwith issue the grant to the petitioners. The court also gave leave to the petitioners to apply for confirmation before expiry of 6 months.

6. Against this background, the petitioners applied for the confirmation of the grant on 12th February, 2009 and identified the respective shares of the beneficiaries as follows:-

a) M'Ngaruthi M'Mugambi – 1.74ha

b) M'Mbui M'Mugambi – 1.74ha

c) Godfrey Muuna – 1.79ha

d) Festus Koome – 1.79ha

7. They also gave a proposal on how the estate should be shared this was followed by a flurry of applications and protests which have dogged this matter for over 10 years now. In addition to the application for confirmation, the applications on record which are for determination therefore are as follows: -

a) objection dated 10th June, 2002 by **Daniel Murungi M'Muthamia**;

b) the protest dated 2nd April, 2009 by **Daniel Murungi M'Muthamia**;

c) the protest dated 22nd April, 2009 by **Johnstone Mbaya**;

d) the protest dated 23rd April, 2009 by **Gibson Wambugu Nyaga**;

e) the protest dated 26th May, 2009 by **Joseph Kirumbi M'Mbui**;

f) an application dated 4th July, 2011 by **Joseph Kirumbi** for the revocation of grant on the ground that the 1st administrator is not a son of the deceased;

g) an application dated 19th October, 2012 by **Martha Kithuku M'Muthamia for the revocation of the grant** on the grounds that the two daughters of the deceased were not disclosed in the petition;

h) an application dated 2nd December, 2013 by **Daniel Murungi M'Muthamia** for him to be substituted in the stead of his mother **Martha Kithuku M'Muthamia**;

i) an application dated 2nd May, 2017 by **Daniel Murungi M'Muthamia** for the court to declare **Angelo Kinoti Mbatia** an impersonator/impostor;

j) an application dated 15th May, 2018 by **Rogers Koome Murangiri and Philomena Gaceri Geoffrey** for the revocation of grant and for the two to be appointed the administrators on the grounds, *inter alia*, that the estate has taken too long to be administered.

8. On 28th May, 2018, the court directed that the applications for confirmation, the protests thereto and the applications for revocation be consolidated and heard together. However, when the matter came up for hearing on 24th September, 2018 the court decided to entertain every application on record and hear every party who was present at the hearing in order to bring to an end the circus that has been this Succession Cause.

9. I have considered all the applications on record and the submissions of every concerned party who attended the hearing and wished to be heard. The issues for determination are; ***whether the grant issued to the petitioners should be revoked; who should be appointed the administrator(s) of the estate of the deceased and finally, how the estate should be distributed.*** Answering these issues one way or another will dispose off all the applications that are pending in this matter.

10. The deceased died in 1934 which is approximately 84 years ago. None of his children is alive. This matter which was meant to succeed his estate was lodged in 2002 but has remained unconcluded for 16 years now. As a result, the direct beneficiaries of the deceased have all died. Those who have remained are grandchildren and great grandchildren of the deceased.

11. Over time, either the direct beneficiaries or their children have sold portions of the estate property to 3rd parties who are said to have entered the property, taken possession thereof and have developed their portions. Those 3rd parties have also joined the fray in either throwing this matter in disarray or having it determined expeditiously depending on their respective claims and interest.

12. The issue of land in this country is emotive. In this region however, it is exceedingly emotive and explosive. It is the one single cause of the many criminal matters that are pending in the courts in this region. These range from assault to murder.

13. For the foregoing reason, delay in concluding disputes such as this one not only leads to injustice, but leads to other cases that end up clogging the wheels of justice in the courts in this region. It is for that reason that in the interests of justice, such disputes require speedy and decisive action with a view to concluding them with an eye on fairness and justice.

14. Having in mind the foregoing and firmly recalling the dictates of **Article 159(2) (b) of the Constitution** that justice should not be delayed, this court will proceed and determine all the foregoing applications which have been pending for far too long in order to bring to an end the circus that has been this matter.

15. From the record, the deceased had four sons and two daughters as follows:-

- a) M'Mbogori M'Mugambi
- b) M'Mbui M'Mugambi
- c) M'Marete M'Mugambi
- d) M'Ngaruti M'Mugambi
- e) Martha Kithuku
- f) Marion Kinene M'Itonga

16. All of the above children are now deceased. The record shows that, **M'Mbogori M'Mugambi** was not to be included in the estate of the deceased as he had a separate land. This left the estate for distribution to the rest of the children of the deceased.

17. It is on the basis of the foregoing that I propose to determine the issues set out above. The first issue is whether the grant issued to the petitioners in this cause should be revoked.

18. The grant was issued by Emukule J to the petitioners on 30th June, 2008. The parties told the court that Gerald M'Ngaruthi M'Mugambi, the 2nd administrator died sometimes in 2013 or thereabouts. That left the 1st administrator alone. **In the Matter of the Estate of Edward Kanyiri Kunyihya (deceased) [2013] eKLR** Musyoka J, had this to say on similar circumstances: -

"Regarding the death of the co-administrator, the position is that the grant...has become inoperative. The grant was made jointly to the applicant and his mother, who has now died. It was intended that the two act together in the administration of the estate. A grant is a certificate. It is issued to a particular person or persons. If the holder of the grant dies the grant becomes useless, as it cannot be transferred to another person. If it was made to two persons and one dies it becomes inoperative. Under section 76 of the Law of Succession Act such grant is liable to revocation. It should be revoked and another grant made."

19. A similar opinion was expressed in the **Estate of Simon Ngugi Nganga (Deceased) [2013] eKLR:-**

"The matter of the death of a co-administrator cannot be dealt with as a rectification or review of the certificate of confirmation of grant. It is more fundamental. It touches on appointment of administrators. The grant.....was made to two persons. It is expected that the two are to act jointly at all times with respect to the administration of the estate. With the death of one of them, the grant becomes useless as the surviving sole administrator cannot act on the basis of a grant which still bears the name of a dead administrator. Since the grant has become useless and inoperative, it ought to be revoked and fresh appointments of administrators be made. The surviving administrators cannot even use the grant, as it is useless, to seek the orders that the applicant now seeks in this application."

20. Further, in the case of **Andrea Ruithibu R. Kanyiri v Teresia Njoki Mbugu [2016] eKLR** the court held that once a joint administrator dies, the grant becomes ineffective. That the remaining administrator cannot act alone.

21. In the present case, not only did the co-administrator die, but the 1st administrator is a purchaser. It was contended that he was appointed courtesy of the co-administrator from whom he had purchased the entire share due to that beneficiary. He could not have had priority to apply for the grant over the other beneficiaries of the estate. There was no citation upon which he was appointed the administrator. In addition, the administrators have taken too long to administer the estate. Taking the foregoing into consideration, the grant cannot stand. It is hereby revoked.

22. Having revoked the grant, who should then be appointed administrator of the estate? Under the law, it is those closest to the deceased starting with the surviving spouse or spouses, other beneficiaries entitled on intestacy with priority according to their respective beneficial interests. (See **Nyaga Cottolengo Francis v. Pius Mwaniki Karani [2017] eKLR**).

23. On record is an application dated 15th May, 2018 by **Rogers Koome Murangiri and Philomena Gaceri Geoffrey** seeking to be appointed administrators. Koome is a grandchild of the deceased while Philomena is the widow of Geoffrey Muuna, also a grandchild of the deceased. Of all those now surviving in the family of the deceased, the two run in priority according to the degree of consanguinity. In this regard, I appoint the two as the administrators of the estate of the deceased.

24. With the determination of the two issues, I now propose to comment on each of the aforesaid applications and protests. The objection by **Daniel M'Muthamia Murungi** dated 10th June, 2002 cannot stand. There is nothing on record to show that he had been appointed the *guardian ad litem* of the two minors. In any event, the two minors are now of age and can appear by themselves. Indeed, Festus Koome aka Rogers Koome Murangiri has been appointed the administrator of the estate. That application is therefore dismissed with no order as to costs.

25. On the basis that the said **Daniel M'Muthamia Murungi** did not have a court order appointing him the *guardian ad litem* for both **Festus Koome and Purity Makena Gituma**, all documents and applications filed by him had no legal basis and were but an abuse of the court process. Accordingly, all documents and applications, including and not limited to the application dated 2nd May, 2017, which he filed as *guardian ad litem* of the two minors are hereby struck out and dismissed.

26. The next pleadings to examine are the protests by **Johnstone Mbaya** dated 22nd April, 2009, **Gibson Wambugu Nyaga** dated 23rd April, 2009 and **Joseph Kirumbi M'Mbui** dated 26th May, 2009, respectively.

27. **Joseph Kirumbi M'Mbui** was said to have died in 2017. He had not been substituted by the time the matter was being heard on 24th September, 2018. The Counsels invited the court to declare that his protest had abated.

28. This, court cannot declare it to have abated for two reasons. Firstly, it was not shown under what provisions of the law the court could do so. This is so because **Order 24 of the Civil Procedure Rules**, which provides for abatement of proceedings, is not one of the provisions in the **Civil Procedure Rules** that have been imported to succession matters under **Rule 63 of the Probate and Administration Rules**. Secondly, even if the principle of abatement was applicable, it was not shown that one (1) year had lapsed since that protestor died. I reject the invitation to declare that protest as having abated.

29. However, that protest has been pending for nine (9) years without being prosecuted. The protestor had not been substituted after his demise. The order that commends itself to the court is to strike out and dismiss the same for want of prosecution. The same fate befalls the application dated 4th July, 2011 by the same applicant. In any event, vide his affidavits sworn on 20th and 21st September, 2012, he disclaimed the affidavits he had sworn against the application for confirmation.

30. As regards the protests by **Johnstone Nyaga and Gibson Wambugu Nyaga** dated 22nd and 23rd April, 2009, respectively, these are protests by father and son over ½ an acre sold to them by **M'Mbui M'Mugambi**. To my mind, theirs is a claim to be directed at the estate of the said **M'Mbui M'Mugambi** and not the estate of the deceased. Those protests are hereby dismissed for want of merit.

31. The next application for consideration is the Summons dated 19th October, 2012 by one **Martha Kithuku M'Muthamia**. The application sought the revocation of the grant on the grounds that the daughters of the deceased had not been considered in the distribution.

32. That application must fail for two reasons. Firstly, the applicant died without having prosecuted the same. Secondly, no competent person had been appointed to substitute her. The attempt to substitute her vide the application dated 2nd December, 2013 could not stand because **Daniel Murungi M'Muthamia** admitted that he had not been appointed as the administrator of the estate of the late **Martha Kithuku M'Muthamia**. Accordingly, the applications dated 19th October, 2012 and 2nd December, 2013, respectively are without merit and are hereby dismissed.

33. As regards the application dated 15th May, 2018, I have already appointed the applicants therein, **Rogers Koome Murangiri and Philomena Gaceri Geoffrey** as the administrators of the estate of the deceased. For that reason, I see no reason to consider the other prayers in that Summons. The other prayers are hereby dismissed, save for prayer numbers 4, 5, 6 and 8 which are merited and are hereby allowed.

34. This now leaves the court with the issue of how the estate should be distributed. From the record, it is clear that the children of deceased were **M'Mbogori M'Mugambi, M'Mbui M'Mugambi, M'Marete M'Mugambi and M'Ngaruni M'Mugambi**. Of these, **M'Mbogori M'Mugambi** was said not to be entitled as he had been given his own. Those entitled were the three remaining or their survivors who vide the consent that was filed in court by the parties on 15th December, 2003, were identified as follows:-

- a) M'M'bui M'Mugambi
- b) M'Ngaruthi M'Mugambi
- c) Geoffrey Muuna M'Marete
- d) Festus Koome Gituma (now known as Roogers Koome Murangiri)

35. As regards the daughters, I will deal with their interest after execution of the orders I propose to make. A Court of law does not make orders in abstract. It is important to establish what the state of affairs are on the ground. 84 years is long time to disrupt any social fabric that has been in existence.

36. One thing that has brought a lot of problems to this estate and has made the dispute to be protracted, is the involvement of purchasers in the matter. They have either been involved directly or have in one way or the other fueled the dispute to their advantage. Due to passage of time, all the original beneficiaries are now dead and those left are their survivors whose full details was not disclosed to the court by the parties.

37. It would seem that with the passage of time, either the beneficiaries their survivors have sold out portions of the estate land to 3rd parties who have taken possession and developed the same. There are people on the estate land who have been in occupation for long. All that has been outstanding is the confirmation of grant for them to get titles for their respective portions. In order not to distribute the estate blindly, which might be a recipe for chaos on the ground, I will make the following orders: -

- a) the objection dated 10th June, 2002 and all the protests against the Summons for confirmation of grant dated 12th February, 2009 are hereby dismissed;
- b) the applications dated 19th October, 2012, 2nd December, 2013 and 2nd May, 2017 are hereby dismissed;
- c) the application dated 15th May, 2018 is allowed to the extent that:
 - i) the grant issued on 30th June, 2008 to **Angelo Kinoti and Gerald M'Ngaruti M'Mugambi** is hereby revoked and the registration of **Ntima/Igoki/985** in the names of **Angelo Kinoti and Gerald M'Ngaruti M'Mugambi** is hereby cancelled and the same reverts back to the title of the deceased, **M'Mugambi Mutindi**.
 - ii) a fresh grant hereby issues to **Rogers Koome Murangiri** and **Philomena Gaceri Geoffrey** as joint administrators of the estate of the deceased.
- d) the District Surveyor, Meru is directed to visit the property known as **Ntima/Igoki/985** within 30 days of this ruling and with the help of the Assistant County Commissioner of the area, do identify those on the ground and the respective portions or areas which they occupy.
- e) the District Surveyor is to prepare and file his report within 45 days of the date of this ruling.
- f) any costs of the exercise is to be borne by the estate and is to be divided pro-rata among all involved.
- g) Mention on 5th December, 2018 for directions on confirmation.
- h) I will not make any orders as to costs this being a family matter.

Signed at Meru

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 25th day of October, 2018

A. ONGI'NJO

JUDGE