



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 743 OF 1990

PETER MWAI MUTUGI.....ADMINISTRATOR/APPLICANT

VERUS

LABANSON MAINA MUTUGI.....ADMINISTRATOR/ RESPONDENT

JUDGMENT

1. The deceased died on 26th July 1985. He was survived by the following:

1st house

- a) Monicah Wambui Mutugi (1st wife) (deceased);
- b) Labanson Maina Mutugi – son (the respondent) ;
- c) Teresa Wanjiru Mburi - daughter; and

2nd house

- a) Lucy Wairimu Mutugi (2nd wife) (deceased);
- b) Polly Wanjiru Mutugi –daughter;
- c) Francis Mwangi Mutugi - son;
- d) Catherine Wanjiku Mutugi - daughter;
- e) Peter Mwai Mutugi – son (the applicant);
- f) Mary Wanjiru Mutugi - daughter;
- g) Elizabeth Nyambura - daughter;
- h) Charles Mwarari Mutugi - son;
- i) Margaret Kagendo Mutugi - daughter; and
- j) Eunice Wangari - daughter.

A grant of letters of administration intestate was issued to Monica Wambui Mutugi and the respondent on 14th February 1991 and confirmed on 4th October 1991. Through the judgment dated 16th November 2016, the court revoked the grant made to Monica Wambui Mutugi and the respondent on the grounds that the petition for the grant was substantially defective. The court ordered that a fresh grant of letters of

administration intestate be issued to the applicant and the respondent. A fresh grant of letters of administration intestate was made to the applicant and the respondent on 16th November 2016. Each administrator filed an application for confirmation proposing how the estate of the deceased should be distributed. Each opposed the other's application.

2. The first application was dated 5th January 2017 and filed on 9th January 2017. The application was brought by the applicant and supported by his affidavit dated 5th January 2017. In the affidavit the applicant stated that the respondent was the first born son in the deceased's first house while Francis Mwangi Mutugi was the first born son in the deceased's second house; that the two first born sons were given their inheritance by the deceased before he died; that the respondent was given Kiine/Ruiru/366 in 1958 (later registered on 16th June 1960) while Francis Mwangi Mutugi was given Kiine/Nyangio/238 on 7th October 1964; that the two were warned not to interfere with parcel of land known as LR/Nyeri/Waraza/37 which was to be shared by all the other children from both houses of the deceased; that at his death bed at Karatina Hospital, and in the presence of his long term friend and local County Council Councillor Francis Mwangi Karuri, the deceased called every child and repeated the same warning that the two first born sons should not interfere with or claim any portion whatsoever from LR/Nyeri/Waraza/37; and that all the other children had consented to have the estate distributed in the following terms: Teresia Wanjiru -2 acres, Polly Wanjiru – 2 acres, Catherine Wanjiru – 2 acres, Elizabeth Nyambura-6 acres, Peter Mwai -7 acres, Mary Wanjira – 2 acres, Margaret Kagendo – 2 acres, Charles Mwarari -7 acres and Eunice Wangari – 2 acres.

3. Francis Mwangi Mutugi swore affidavits dated 23rd December 2016 and 14th September 2017 confirming that he, together with the respondent, had already received their share from the deceased's estate. He confirmed that on 7th October 1964, the deceased transferred Kiine/Nyangio/238 to him as a gift; that LR/Nyeri/Waraza/37 was the only property forming part of the estate of the deceased since it was in the deceased's name at the time of his death; and that the deceased had at his death bed warned them not to interfere with LR/Nyeri/Waraza/37 which was to be shared among the rest of the children.

4. Francis Mwangi Karuri filed his statement confirming the applicant's assertions that the deceased had already given the respondent 7 acres of Kiine/Ruiru/366 in 1960 while he had given Francis Mwangi Mutugi 4.9 acres of land known as Kiine/Nyangio/238. He confirmed that he was indeed present at the deceased's death bed at Karatina in 1985 when the deceased asked him to look after his children as he was apprehensive one or all of the first born sons may distribute LR/Nyeri/Waraza/37 which belonged to the other children of the deceased. It is, however, notable that this witness did not testify, and his statement was not sworn.

5. The application was opposed by the respondent through his affidavit dated 5th July 2017. He emphasized that the only property available for distribution was Kiine/Nyangio/238 as Nyeri/Waraza/37 was currently registered in the names of Lucy Wairimu Mutugi (deceased) and his name.

6. The second application was dated 8th February 2017 and filed on 10th February 2017. The application was brought by the respondent and supported by his affidavit dated 8th February 2017. The summary of his case was that upon the demise of his father, their clan elders met and directed that the estate of the deceased be distributed equally between the two houses; that subsequently the estate has been distributed among the two houses and the only asset remaining was L.R. Kiine/Nyangio/238 measuring 1.62 acres and it was only fair that the property be distributed equally between the two houses of the deceased; that L.R. Kiine/Nyangio/238 was still registered in the name of the deceased though there are fraudulent entries made on the face of the record; that LR/Nyeri/Waraza/37 was currently registered in the names of Lucy Wairimu Mutugi (deceased) and himself after the court in **Kerugoya Civil Case No. 59 of 1986** issued orders as per the grant; that the orders were still in force and had not been set aside or appealed against; that Francis Mwangi Mutugi had already been allocated parcel No. L.R. Kiine/Nyangio/259 which he transferred to Muthee Kamwethi and the share should be factored in the proposed distribution; that LR/Nyeri/Waraza/37 had already been sub-divided and registered into two parcels for the two houses and it was only the titles that were pending issuance; that this court's ruling dated 16th November 2016 did not affect the validity of the titles for L.R. Nyeri/Waraza/37 as it had been subdivided and the half portion for the second house of Lucy Wairimu Mutugi (deceased) is in her name; and that without the letters of administration for the estate of Lucy Wairimu Mutugi (deceased) for L.R. Nyeri/Waraza/37 could not be re-distributed.

7. Maina Macharia filed an affidavit dated 8th February 2017 in support of the summons dated 8th February 2017. He stated that he was a friend of the deceased and a neighbour of the respondent; that upon the demise of the deceased, the clan had sat down and resolved to have the estate shared equally among the two widows and their families; and that a grant of letters of administration had been obtained and the estate divided and shared equally save for L.R. Kiine/Nyangio/238.

8. Muriuki Njui also filed an affidavit dated 8th February 2017 in support of the summons by the respondent. He stated that upon the demise of the deceased the clan had sat down and distributed the state of the deceased equally among the two houses, and that the estate had been divided as they had agreed.

9. The applicant filed an affidavit dated 29th May 2017 to oppose the summons for confirmation of the grant dated 8th February 2017. It was his case that the distribution of the deceased's property before 16th November 2016 was rendered null and void by the orders which revoked the certificate of confirmation of grant dated 4th October 1991; and that the summons had introduced Kiine/Nyangio/238 which was not a property of the deceased but belonged to Francis Mwangi Mutugi.

10. The matter proceeded by oral evidence on 13th March 2018 and 11th June 2016. The respondent, Maina Macharia Muchiri, Muriuki Muchiri and the applicant gave their evidence adopting the contents of their affidavits. Each was cross examined. I have considered their respective testimonies.

11. The respective parties filed written submissions which I have considered.

12. There was no dispute that land parcel Kiine/Nyangio/238 is the subject of pending litigation between Francis Mwangi Mutugi and the respondent in **Kerugoya SRMCC No. 59 of 1986** and High Court at **Nairobi Civil Case No. 407 of 1993**. The respondent's case is that this was the deceased's property that was registered in the name of Francis Mwangi Mutugi to hold in trust for the family. Francis Mwangi

Mutugi and the applicant, on the other side, contend that this was the deceased's property which he gifted to Francis Mwangi Mutugi. There is no dispute that it is registered in the name of Francis Mwangi Mutugi. I find that, until the above courts have decided on the issue, this property shall not be available for distribution to the beneficiaries of the estate of the deceased as the same was not registered in the name of the deceased at the time of his death on 26th July 1985.

13. Land parcel Nyeri/Waraza/37 was in the name of the deceased at the time of his death. It measured 13Ha (about 37 acres). The grant that was issued jointly to the deceased's first wife Monica Wambui Mutugi (now deceased) and the respondent, and confirmed on 4th October 1991, was revoked by this court on 16th November 2016. Following that certificate of confirmation, Lucy Wairimu Mutugi (deceased) and the respondent had equally shared the parcel; and got the same registered in their names. The effect of that revocation, I find, was the nullification of that sharing and cancellation of any letters issued following the certificate of confirmation. The respondent cannot argue that he and Lucy acquired good titles which could not be impugned. The court found that the proceedings leading to the grant and certificate of confirmation were substantially defective. The finding has not been reviewed or set aside. It follows that land parcel Nyeri/Waraza/37 still comprises the estate of the deceased. For the avoidance of doubt, any subdivision that gave the late Monica Wambui Mutugi and the respondent Labanson Maina Mutugi half of the property each, or at all, is hereby annulled.

14. The evidence of the applicant and Francis Mwangi Mutugi was that the deceased gave the respondent 7 acres comprised in Kiine/Ruiru/366, and that at the time he was dying he (deceased) indicated that, now that the respondent and Francis Mwangi Mutugi had been gifted by him before he died, they would not share in Nyeri/Waraza/37 which would instead go to the rest of the family. The respondent denied this and gave evidence to state that parcel Kiine/Ruiru/366 (which was in his name) never belonged to the deceased. Maina Macharia and Muriuki Njui swore an affidavit each to state that, following the deceased's death, the clan met and agreed to share Nyeri/Waraza/37 equally between the two houses. The two witnesses did not make reference to land parcel Kiine/Ruiru/366, or to the evidence by the applicant that it was the deceased's property which he gifted to the respondent. None of the two witnesses stated that he talked to the deceased over how his estate would devolve upon his death.

15. According to the respondent and his witnesses land parcel Nyeri/Waraza/37 should be shared equally between the houses. The first house (where the respondent comes from) has only him and Teresa Wanjiru Mburi. The 2nd house has 9 (nine) children. Equal sharing between the houses would certainly disadvantage the second house. This is where the applicant comes from. According to the applicant, the sharing should be such that he will get 7 acres, Elizabeth Nyambura will get 6 acres and Charles Mwarari Mutugi will get 7 acres. The rest of the deceased's children, including Teresa Wanjiru Mburi but excluding the respondent, will get 2 acres each. The second house agrees with this sharing. Teresa Wanjiru Mburi agrees with the proposal by the respondent. There was no reason why some family members were being disadvantaged.

16. I have considered this evidence. I accept the version that the deceased had provided for the respondent by giving him 7 acres in Kiine/Ruiru/386. Francis Mwangi Mutugi was given Kiine/Nyangio 238. The two will not benefit from Nyeri/Waraza/37.

17. According to **sections 38 and 40(1) of the Law of Succession Act (Cap 160)**, and now that the deceased's spouses are deceased, the following children of the deceased shall get each equal share in parcel Nyeri/Waraza/37: Teresa Wanjiru Mburi, Polly Wanjiru Mutugi, Catherine Wanjiku Mutugi, Peter Mwai Mutugi, Mary Wanjiru Mutugi, Elizabeth Nyambura, Charles Mwarari Mutugi, Margaret Kagendo Mutugi and Eunice Wangari. In those terms, the joint grant issued to the applicant Peter Mwangi Mutugi and the respondent Labanson Maina Mutugi is confirmed.

18. This was a family dispute. Each party shall bear own costs.

DATED and SIGNED at NAIROBI this 22ND OCTOBER 2018

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 23RD OCTOBER 2018

A.N. ONGERI

JUDGE