



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

P&A CAUSE NO. 5 OF 1984

IN THE MATTER OF THE ESTATE OF TIRUS GITAU KAMANDA (DECEASED)

EVANS NGUTI GITAU.....1ST APPLICANT

MARGARET WANJIRU GITAU.....ND APPLICANT

STEPHENE NGERU GITAU.....3RD APPLICANT

JAMES GITAU KAMANDA.....4TH APPLICANT

SAMWEL KAMANDA.....5TH APPLICANT

-VERSUS-

ABRAHAM KIPTOO CHEBIL.....RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated 27 September 2017. It was filed under Sections 40 and 74 of the Law of Succession Act, Chapter 160 of the Laws of Kenya, for orders that:

- [a] he application be certified urgent and be heard expeditiously;
- [b] That an order be made for the reconstruction of the file;
- [c] That upon granting prayer [b] above, an order be made for the substitution of the administrators herein by the Applicants;
- [d] That upon granting prayer [c] above, the Court be at liberty to confirm the Grant issued on 4 October 1984 by ordering the issuance of a Certificate of Confirmation of the Grant;
- [e] That costs be in the cause.

[2] The application was predicated on the grounds that, this cause was filed way back in 1984 and that the Administrators/Petitioners to whom grant was issued have all since died; that there are many beneficiaries who would wish to have their respective shares registered in their names; that the original file cannot be traced; and that it will be in the interest of justice for the prayers sought to be granted as no prejudice will be occasioned to the estate or to any of the beneficiaries. In support of the aforesaid grounds, an affidavit was sworn by the 1st Applicant, **Evans Nguti Gitau** on 27 September 2017 to which the deponent attached copies of the documents filed and issued in the original court file as well as copies of the Death Certificates for three of the Administrators.

[3] The application was opposed by one **Jacinter Wanjiru Nguti** who I shall refer to henceforth as the 1st Respondent. She filed a Replying Affidavit sworn on 13 July 2018 averring that she is the Administratrix of the estate of **Evanson Nguti Kamanda**; whose estate is the subject of **Eldoret P & A No. 36 of 2002**. She averred further that **LR No. 10018** which is mentioned as one of the assets of the deceased herein, was jointly acquired by the deceased and **Evanson Nguti Kamanda**, her late father; and that the Applicants are proposing to distribute **LR 10018** among themselves and third parties to the exclusion of the beneficiaries of the estate of **Evanson Nguti Kamanda** who have a confirmed Grant in their favour. She further asserted that the Applicants herein deliberately withheld and concealed from the Court the fact

that they dishonestly and fraudulently obtained Limited Grant of Letters of Administration vide **Eldoret Succession Cause No. 42 of 2015** without reference to one of the surviving Administrators, **Mary Wanjiru**.

[4] Another Affidavit in opposition to the application was filed on **20 July 2018**, sworn by **Phylis Nyambura Karanja** (hereinafter "the 2nd Respondent"). She averred that the deceased herein was survived by beneficiaries comprised of four houses as particularized in Paragraph 4 of her affidavit. Her quarrel with the application as presented is that if allowed, some houses would be over-represented while others, would be left without any representation at all. She averred for instance that while the house of **Hannah Wahu Gitau** (the 1st House) is not represented, it is proposed that the 4th Applicant, a grandson of **Tabitha Wambui** (2nd House) be brought on board in addition to Tabitha Wambui's son, **Evans Nguti Gitau** (the 1st Applicant).

[5] It was further the averment of **Phylis Nyambura Karanja** that the Applicants have not only concealed material information from the Court but have also acted deceitfully in their proposal to substitute one of the surviving Administrators, **Mary Wanjiru**, and in presenting fake Certificates of Death to the Court. She also faulted the Applicants for not disclosing that **LR 8448** was divided to the children of the deceased and that the applicants sold off their respective shares and moved out of the land.

[6] On account of the foregoing averments, Counsel for the Applicants, **Mr. Lilan** informed the Court, on the **16 July 2018**, that the surviving widow, **Mary Wanjiru**, is incapable of discharging her responsibilities as an Administrator due to sickness and old age. He subsequently caused the said **Mary Wanjiru** to be brought to court on **25 July 2018** and asked the Court to rise and move to the car park to see and interview her. Directions were then given for the Deputy Registrar of the Court to attend to that request; whereupon the Deputy Registrar filed her Report herein. She confirmed that she physically went to the parking lot and was directed to **Motor Vehicle Registration No. KBD 167F** in which she found two occupants, namely **Margaret Wanjiru Gitau** and an old lady who introduced herself as **Wanjiru Gitau**. Having observed and interviewed the said **Wanjiru Gitau**, the Deputy Registrar was of the view that she was unable to move without support and that she was not coherent.

[7] **Mr. Lilan** also filed an affidavit, sworn by him on the **25 July 2018**, in which he averred that he requested **Prof. Lukoye Atwoli** to examine and prepare a medical report in respect of **Mary Wanjiru Gitau**; and that the examination was done and a report submitted to him by **Prof. Atwoli** dated **20 July 2018**. He annexed a copy of that medical report to his affidavit. On the basis of the foregoing, **Mr. Lilan** urged that the application be allowed arguing that since **LR No. 10018** was owned jointly by the two deceased brothers, the Administrators of **Evanson Nguti Gitau** have no *locus standi* to oppose this application. Nevertheless, in response to the positions taken by the two Respondents in their Replying Affidavits, **Mr. Lilan** made the following concessions:

[a] That the 2nd Respondent be brought on board as the widow of **Stephen Karanja Gitau**.

[b] That only three of the Applicants be appointed in substitution of the four administrators herein in addition to **Phylis Nyambura Karanja**; namely: **Evans Nguti Gitau, Stephen Nderu Gitau and James Kamanda Gitau**.

[c] That the prayer for confirmation of the Grant of Letters of Administration Intestate issued herein on **4 October 1984** be deferred pending negotiation and settlement or further orders of the Court.

[8] **Mr. Kibii**, Learned Counsel for the Respondent, opposed the application raising two preliminary points for the court's consideration before going into the merits of the application. According to him **Mr. Lilan** was not properly on record for the reason that he had not complied with the provisions of **Order 9 of the Civil Procedure Rules**, in that he did not file a Notice of Appointment, or a consent for Change of Advocates. Secondly, it was the contention of **Mr. Kibii** that the medical report of **Prof. Atwoli** was irregularly filed as no leave for its filing was obtained from the Court.

[9] On the merits, **Mr. Kibii** relied on the affidavit of **Jacinter Wanjiru Nguti** and amplified the contention that there was outright perjury as well as concealment of material facts by the Applicants in connection with the allegation that all the four administrators have died; and in not disclosing that **LR No. 10018** also forms part of the estate of **Evanson Nguti Kamanda** and the subject of **Succession Cause No. 36 of 2002**. He also pointed out that since the **Law of Succession Act** limits the number of legal representatives to four, the application for substitution by 5 applicants is misconceived. **Mr. Kibii** relied on **Edith Wanjovi vs. Eunice Kanyiva Misheck & Another [2015] eKLR** and **Polycarp Wathuta Kanyugo & 2 Others vs. The County Government of Kirinyaga [2014] eKLR** to buttress his submissions.

[10] On behalf of the 2nd Respondent, **Ms. Lelei** had no objection to the proposal by **Mr. Lilan** to have the 2nd Respondent included as an Administrator. She however raised an issue in connection with the 4th and 5th Applicants who were, in her view over-represented as members of the 2nd House; and that the inclusion of some of the proposed administrators may be aimed merely at wasting the estate as some of them had already sold their inheritance to third parties.

[11] I have given due consideration to the application, the affidavits filed in respect thereof as well as the submissions made before the Court by Learned Counsel for the parties. I have also perused the record herein and noted that on **2 October 2017** when the matter first came before the Court, orders were granted *ex parte* for the reconstruction of the file as prayed in Prayer 2 thereof. As **Mr. Lilan** rightly pointed out, Prayer 4 for confirmation of Grant, ought to await substitution and hearing if need be, of all the beneficiaries. In any event, an application for confirmation of grant has its own prescribed procedure under **Section 71 of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules**. Accordingly, the only issue for determination is whether good cause has been shown to warrant the issuance of Prayer 3 of the Notice of Motion dated **27 September 2017**.

[12] Starting with the preliminary points raised by **Mr. Kibii**, I have given the same due consideration and find that the objection to the appearance herein of **Mr. Lilan** is misguided. Misguided because it is the right of any party to be represented by an advocate of his/her own choice. The Applicants herein had initially approached the Court in person. Thereafter on **13 November 2017**, a Notice of Appointment of Advocate was filed on their behalf by the law firm of **M/s Angu Kitigin & Company Advocates**. That was in compliance with **Order 9 Rule 7 of the Civil Procedure Rules**. Subsequently on **20 July 2018**, another Notice of Appointment of Advocates was filed by **Mr. C.**

Simon Lilan, Advocate, indicating that he had been appointed to act for the Applicants alongside **M/s Angu Kitigin Advocates**. Accordingly, **Mr. Lilan** is properly on record for the Applicants.

[13] As to the number of administrators, **Section 56** of the **Law of Succession Act** is plain, that no grant can be issued to more than four persons in respect of the same property. Accordingly, **Mr. Kibii** was correct in his argument that not all the five applicants qualify as substitutes for the four administrators herein. I note that in acknowledgement of this fact, **Mr. Lilan** proposed that some of the applicants be dropped. That proposal was not resisted by either **Mr. Kibii** or **Ms. Lelei** and I would endorse the same.

[14] As to whether the 1st Applicant perjured himself by averring that all the Administrators are dead as submitted by **Mr. Kibii**, I have carefully looked at the Supporting Affidavit and the annexures thereto note that, in the Grant of Letters dated **4 October 1984** was issued to the following four administrators:

- [a] Hana Wahu
- [b] Tabitha Wambui
- [c] Damaris Wangare
- [d] Mary Wanjiru;

[15] At paragraph 6 of the Supporting Affidavit, it was averred that three of the widows/co-administrators have since died; and in support of that assertion evidence was adduced herein by way of Certificates of Death. I therefore find no merit in the submission by **Mr. Kibii** that the 1st Applicant lied to the court, for it is a fact admitted by the Respondents that **Hana Wahu, Tabitha Wambui** and **Damaris Wangare** are indeed deceased. In the same vein, the Applicants availed uncontroverted evidence that the 4th Administrator, **Mary Wanjiru**, though surviving, is unable to discharge her duties as an administrator. While I agree with **Mr. Kibii** that **Mr. Lilan's** affidavit to which **Prof. Atwoli's** report was annexed was filed without the leave of the Court and therefore ought to be expunged from the record, it is manifest from the report of the Deputy Registrar that **Mary Wanjiru** is not in a good state of health and is therefore unable to continue discharging her duties as an Administrator of the deceased. In effect therefore, the Court is satisfied that good cause has been shown by the Applicants for substitution of all four administrators herein.

[16] Regarding the 1st Respondent's objection, it is manifest that it was hinged on the apprehension that the Applicants are intent on disinheriting the beneficiaries of the late **Evanson Nguti Kamanda**, who was co-owner with the deceased herein of **LR No. 10018**. Hence, the 1st Respondent contended that the Applicants had concealed from this Court the fact that **LR No. 10018** had been the subject of **Eldoret Succession Cause No. 36 of 2002** and **Eldoret ELC No. 191 of 2015**. That, in my view, is a matter that should fall for determination in the application for confirmation of grant and should have no bearing on the Applicants' right to pursue their interests as the beneficiaries of the deceased, **Tirus Gitau Kamanda**.

[17] In the result, I would allow prayer (3) of the Applicants' Notice of Motion dated **27 September 2017** and grant orders that the four administrators herein be substituted by:

- [a] Evans Nguti Gitau
- [b] Phylis Nyambura Karanja
- [c] Stephen Nderu Gitau, and
- [d] James Kamanda Gitau;

and that the costs of the application be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OF NOVEMBER 2018

OLGA SEWE

JUDGE