



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 49 OF 2013

IN THE MATTER OF THE ESTATE OF HENRY GITHINJI MUNYI (DECEASED)

PRISCILAR WANJIKU GITHINJI.....APPLICANTS

CHRISTOPHER KARIMI GITHINJI

VERSUS

CHARLES MURIUKI GITHINJI.....PROTESTOR

JUDGMENT

1. This cause involves the estate of the late Henry Githinji Munyi (deceased) who died on 1st May, 2005 resident at Kaguyu, Kirinyaga County. The petition for letters of administration was presented to this court by Priscilla Wanjiku Githinji, (the surviving widow) and Christopher Karimi Githinji (one of the sons). The deceased herein left the following dependants surviving him:

- (i) Priscilla Wanjiku Githinji (widow)
- (ii) Charles Muriuki Githinji
- (iii) Fredrick Muthii Githinji Sons
- (iv) Christopher Karimi Githinji
- (v) Joseph Karani Githinji
- (vi) Jane Nyaguthii Mwangi
- (vii) Ann Wanjiru Githinji
- (viii) Beth Nyawira Gachoki
- (ix) Betty Wangechi Githinji Daughters
- (x) Eunice Waithera Githinji
- (xi) Judy Wangui Githinji

2. The assets comprising the estates are listed as follows:

(a) **MUTIRA/KAGUYU/1045** measuring approximately 2.02 ha.

(b) **MUTIRA/KAGUYU/1149**

(c) **MUTIRA/KAGUYU/272**

3. This Court appointed the petitioners Priscilla Wanjiku Githinji and Christopher Karimi Githinji joint administratrix and administrator respectively of the estate of the deceased herein vide a grant issued on 13th November, 2009. The two applied for confirmation of the said grant through summons for confirmation of grant dated 13th January, 2012 and proposed to have the estate distributed as follows:

(1) Land Parcel No. **MUTIRA/KAGUYU/1045**

(a) 2 acres out of **MUTIRA/KAGUYU/1045** to go to Priscilla Wanjiku Githinji for her benefit and in trust of:-

(i) Jane Nyaguthii Githinji

(ii) Ann Wanjiru Githinji

(iii) Beth Nyawira Githinji

(iv) Betty Wangechi Githinji; and

(v) Judy Wangui Githinji

(b) Fredrick Muthii Githinji to have 1.5 acres

(c) Christopher Karimi Githinji – 0.75 acres

(d) Joseph Karani Githinji – 0.75 acres

(2) **L. R. MUTIRA/KAGUYU/1149**

(a) Charles Muriuki Githinji – 0.5 acres

(b) Christopher Karimi Githinji – 0.75 acres

(c) Joseph Karani Githinji – 0.75 acres

(3) **L.R. MUTIRA/KAGUYU/1907** (1 acre)

To be given to Charles Muriuki Githinji.

(4) KCB Shares Account Number [Particulars withheld] to Priscilla Wanjiku Githinji

4. Charles Muriuki Githinji, the protestor herein, was dissatisfied with the proposed mode and filed an affidavit of protest sworn on 8th February, 2012. In his opinion the property known as L.R. MUTIRA/KAGUYU/1907 does not form part of the estate and that the property is in the hands of Roseline Nyaguthii. According to the protestor, the distribution of the estate of the deceased should be as follows:

A. L. R. MUTIRA/KAGUYU/1045

(i) Priscilla Wanjiku Githinji to get 2 acres for herself and to hold in trust for daughters, Jane,

Nyaguthii Githinji, Ann Wanjiru Githinji, Beth Nyawira Githinji, Betty Wangechi Githinji, Eunice Waithira Githinji, and Judy Wanguri Githinji.

(ii) Fredrick Muthii Githinji – 0.75 acres

(iii) Christopher Karimi Githinji – 0.75 acres

(iv) Joseph Karani Githinji – 0.75 acres

(v) Charles Muriuki Githinji – 0.75 acres

B. L. R. NO. MUTIRA/KAGUYU/1149

(i) Charles Muriuki Githinji – 0.5 acres

(ii) Christopher Karimi Githinji – 0.5 acres

(iii) Joseph Karani Githinji – 0.5 acres

(iv) Fredrick Muthii Githinji – 0.5 acres

(C) KCB Shares

Account No. [Particulars withheld] to go to Priscilla Wanjiku Githinji.

5. In view of the protest/disagreement, this Court directed the protest to be canvassed through viva voce evidence and the first to testify was Charles Muriuki Githinji who testified that parcel No. **MUTIRA/KAGUYU/1907** measuring about 1 acre is not part of the estate and that he acquired the property through a private treaty. He tendered an agreement (P. Exhibit 1A) to foster his claim. He further produced two receipts (P. Exhibit 1b and P. Exhibit 1 e) from the advocate who drew to prove that he had paid legal fees to M/S P. M. Muchira Advocate the learned counsel who drew and witnessed the agreement.

6. The protestor further testified that he later sold the same parcel to one Faith Wambui Kinyanjui on 27th November, 1991 and tendered an agreement (P. Exhibit 2) to prove the same. He also stated some time in 1994, the same Faith Wambui sold back the parcel to him and produced another agreement dated 9th February, 1994 (P. Exhibit 3) to prove the allegation and fortified the claim by producing a duly executed transfer (P. Exhibit 4). It was his evidence that he chose to have his father (the deceased herein) registered as the owner and that later his father gave him back the land as a gift. He explained that the property was registered in his father's name because he had issues with K.R.A and did not want to have any property bearing his name at the time. He however, conceded under cross-examination that his late father prior to his demise was utilizing the plot by picking and selling the tea leaves out of the tea bushes growing on it.

7. On her part, the 1st petitioner (administratrix) testified that all her children save for the protestor supported her proposed mode of distribution as the same in her view reflected the wishes of her late husband (deceased). She testified that the deceased bought parcel No. Mutira/Kaguyu/1907 after the protestor asked for money from him to purchase the property. She tendered a copy of the register (commonly referred to as Green card) to prove her claims. She added that the property was later transferred to the protestor to assist him with his business and added that they had resolved as a family to let the protestor keep 1 acre as his share of the estate.

8. The 2nd petitioner (Christopher Karimi Githinji) testified and supported his mother's (the 1st petitioner) sentiments. In his view they had resolved as a family to have each son get 1 acre in the estate and that the agreement was reached on 20th January, 2010. He faulted his brother (the protestor) for changing his

mind when they had all initially agreed. He however, added that he did not know the details of how parcel No. **MUTIRA/KAGUYU/1907** was acquired and/or transferred by his late father (deceased) to the protestor but insisted that it was a gift from his father to the protestor.

9. In their submissions made through learned counsel M/S H. K. Ndirangu, the petitioners have submitted that parcel No. **MUTIRA/KAGUYU/1907** should be considered as a gift *intervivos* to the protestor by the deceased and that the same should be considered so in the distribution of the estate herein.

10. The protestor has in his written submissions contested this insisting that the property in dispute is not part of the estate neither was it a gift *intervivos* from his late father.

11. I have considered the protest herein, and the evidence tendered by both the protestor and the petitioners. I have also considered their respective written submissions. The only source of disagreement in this cause is the status of **L.R. MUTIRA/KAGUYU/1907** and whether the property should be considered as part of the estate and/or a gift *intervivos* from the deceased to the protestor or not.

12. The provisions of **Section 42** of the **Law of Succession Act (Cap 160 Laws of Kenya)** provides that previous benefits accruing to any beneficiary/dependant should be taken into account when determining the share of the net estate finally accruing to the beneficiary/dependant. The big question in this protest therefore is whether or not that property known as **MUTIRA/KAGUYU/1907** belonged to the deceased and was handed over to the protestor as a gift *intervivos* by the deceased prior to his demise. I have considered the evidence tendered before me. I have noted from the petition (Probate & Administration 5) that the property **MUTIRA/KAGUYU/1907** is not listed as part of the assets in the estate. The omission has not been explained by the petitioners. If anything another property known as **MUTIRA/KAGUYU/272** was listed but there was no evidence tendered by the petitioners or the protestor to show that the asset was registered in the name of the deceased or belonged to him. The protestor has produced documents (agreements and a formal transfer) I have mentioned above showing how he acquired the property (**MUTIRA/KAGUYU/1907**) and how the property ended up in his father's (deceased) name and finally to him. The first agreement (P. Exhibit 1(a) (actually an acknowledgement together) with receipts (Exhibit 1b and 1c) from the advocate drawing the agreement in my view shows that the protestor's claim has been proved on a balance of probabilities and that, is the threshold in cases of civil nature such as this cause. I have considered all the documents tendered in evidence and I am satisfied that **MUTIRA/KAGUYU/1907** is not part of the estate. It cannot be considered as an asset available for distribution as per the definition assigned to "free property" of a deceased person under **Section 3 (1)** of the **Law of Succession Act**. The petitioners have failed to adduce sufficient evidence to this court to bring the cited provisions of Section 42 of Law of Succession Act into operation. This Court is therefore unable to find basis to consider **L.R. MUTIRA/KAGUYU/1907** as a gift to the protestor by the deceased in his lifetime notwithstanding the fact that the same may have been described as such in the formal transfer form from the deceased to the protestor. The evidence tendered by the protestor in my view dispels that notion.

13. Having determined the contested issue in this cause, the remaining issue is the question of distribution. The provisions of **Section 35 (1)** of the **Law of Succession Act** provides that where an intestate dies leaving behind a surviving spouse and children the property shall be divided as follows:

- (i) The surviving spouse is entitled to personal and household effects of the deceased absolutely.
- (ii) Life interest in the whole residue of the estate.
- (iii) On death, the estate shall be divided equally among the surviving children.

14. According to the evidence tendered before Court the assets comprising the estate in this cause are as follows:

- (i) **MUTIRA/KAGUYU/1045** (approximately 5 acres)

(ii) **MUTIRA/KAGUYU/1149** (approximately 2 acres) and

(iii) **KCB Shares** Account No. [Particulars withheld].

There was no document to suggest that **MUTIRA/KAGUYU/272** though listed as an asset in the petition, actually forms part of the estate herein. In view of the same the properties listed as **MUTIRA/KAGUYU/1045** and **Mutira/Kaguyu/1149** shall be held by Priscilla Wanjiku Githinji for her benefit (lifetime interest) and in trust of the following:-

- (1) Charles Muriuki Githinji
- (2) Fredrick Muthii Githinji
- (3) Christopher Karimi Githinji
- (4) Joseph Karani Githinji
- (5) Jane Nyaguthii Githinji
- (6) Ann Wanjiru Githinji
- (7) Beth Nyawira Githinji
- (8) Betty Wangechi Githinji
- (9) Eunice Waithera Githinji and
- (10) Judy Wangui Githinji

The above ten children shall upon the demise of Priscilla Wanjiku Githinji share the properties equally amongst themselves as provided by law. The shares in KCB Account No.[Particulars withheld] shall absolutely go to Priscilla Wanjiku Githinji. There shall be no order of costs so each party shall bear own costs.

Dated and delivered at Kerugoya this 25th day of May, 2017.

R. K. LIMO

JUDGE

25.5.2017

Coram

Hon. Justice R. K. Limo J.,

Wachira court assistant

Parties absent

Judgment signed, dated and delivered in the open court in the absence of parties and their counsels.

R. K. LIMO

JUDGE

25.5.2017