



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
IN THE MATTER OF THE ESTATE OF KARIUKI MUCHINA MBUTI (DECEASED)
SUCCESSION CAUSE 2255 OF 2009
(SRM COURT GITHUNGURI SUCCESSION CAUSE 22 OF 1999)

JUDGMENT

PLEADINGS

The deceased Simon Kariuki Muchina Mbuti died on 29th March 1995.

The deceased's widow

- 1. Serah Wanjiku Kariuki and their 2 sons namely**
- 2. Paul Ndichu Kariuki and**
- 3. Joseph Ndungu Kariuki**
- 4. Hannah Gathoni Kariuki**

Filed petition for grant of letters of administration intestate for the deceased's estate. The assets that comprise of deceased's estate were;

- a) Githunguri/Githunguri/1541**
- b) Githunguri/Githunguri/1539**
- c) Githunguri/Githunguri/1538**
- d) Githunguri/Githunguri/1540**
- e) Githunguri/Githunguri/1542**
- f) Githunguri/Kanjai/804**
- g) Githunguri/Constitutency Ranching Co Ballot no 1833**

The grant was issued by **Githunguri Law Courts in Succession Cause 22 of 1999** on 30th September 1999. The grant was confirmed on 24th February 2000. The gist of the said confirmed grant was that all

assets that comprised of the deceased's estate were to be shared equally between the 3 beneficiaries.

On 21st October 2009, the Objectors daughters of the deceased namely;

- 1. Nancy Nyambura Njenga**
- 2. Polly Wairimu Gaitho**
- 3. Margaret Njanja Kamau**
- 4. Grace Njeri Muthua**
- 5. Esther Nduta Kariuki**
- 6. Naomi Wanjeri Kariuki**

filed Summons for revocation and annulment of grant on the basis of Section 76 of Law of Succession Act; the proceedings to obtain grant were defective, the grant was obtained fraudulently by making false affidavit and concealment of material facts of the survivors of the deceased.

According to their supporting affidavit to the application, the Objectors deposed that the widow, 2 sons and 1 daughter claimed to be the survivors of the deceased to the exclusion of the other children of the deceased. They were not informed, consulted and they did not consent to the petition of grant and to the distribution of the deceased's estate as per the confirmed grant.

Anne Muthoni Kariuki swore an affidavit on 21st April 2010 and stated that indeed she was named as survivor of the deceased. The 2 brothers asked her to sign consent on a document and she did sign and later realized the sons of deceased had deceived her to sign off consent without including her sisters; daughters of the deceased. She was not allocated any property of the deceased's estate in the confirmed grant even after she gave written consent. She supported the Objectors in revocation and annulment of grant.

In the meantime, Paul Ndichu Kariuki died on 25th June 2005 and the deceased's widow and mother to the beneficiaries, Serah Wanjiku Kariuki died on

Joseph Ndungu Kariuki died on 28th July 2009 and his widow Mercy Waringa Gachare and his mother Serah Wanjiku Kariuki filed petition for grant of letters of administration intestate to his estate. The widow attached copy of marriage certificate. The assets at stake were Githunguri/Githunguri/1539 which was encumbered by an unserviced loan from Equity Bank and 995 shares out of 1000 in Luzon Communication Limited.

Nancy Nyambura Njenga filed an affidavit in opposition of the application for grant of letters of administration of the Joseph Ndungu Kariuki's estate. In her affidavit she deposed that Mercy Waringa Gachare was estranged to the deceased husband, they separated 3 years prior to his death where he was murdered. The widow knew of his death upon being informed by the Objectors. They had no children. Therefore she ought not to obtain grant of letters of administration from his estate.

On 7th April 2014 all parties sought to amicably resolve the matter and filed affidavit and Consent document. In the documents, they agreed on the list of beneficiaries, the administrators but all the parties did not sign the affidavit and Consent.

Margaret N. Gakuna filed affidavit of Protest on 9th May 2014 and stated as Paul Ndichu's widow and on behalf of Joseph Ndungu's widow, Mercy Waringa Gachare they protest to distribution of the suit properties of the deceased's estate equally because the deceased during his lifetime explicitly stated his wishes that Githunguri/Githunguri/1542 being ancestral land should be bequeathed to the sons of the deceased equally. Their mother Serah Wanjiku kariuki had life interest. The deceased during his lifetime

had divided the said suit property into 2 equal parts.

By a family meeting held on 21st March 2009, the beneficiaries agreed and conceded that the said suit property belonged to their 2 brothers. The Protestor's proposal was that the suit property Githunguri/Githunguri/1542 be left to the widows of deceased's sons and the rest of the properties be divided equally amongst 9 beneficiaries.

Nancy Nyambura Njenga filed Reply on 17th July 2014 and challenged the Protestor's representation of Mercy Waringa Gachare as there were no written instructions, she was served severally and did not respond or attend Court and therefore Nancy represented her in these proceedings. Secondly, she challenged the Protestor that during the meeting of 21st March 2009, nothing was agreed on distribution of the deceased's estate and it was one meeting amongst series of family meetings.

On 3rd July 2015, Nancy Nyambura Njenga filed further affidavit and stated pursuant to Court's directions on 22nd April 2015 that parties amicably agree on distribution of the estate, on advice of Counsel they sought a Valuer to value the assets that comprise of deceased's estate. The valuer's report is annexed as **NNN2** and Report by Surveyor and proposed mode of distribution of suit property Githunguri/Githunguri/1542 marked **NNN3**

On 6th July 2015, Margaret N. Gakuna reiterated through her affidavit that she protested the mode of distribution to share equally the suit properties and insisted that the suit property Githunguri/Githunguri/1542 be distributed equally amongst all beneficiaries.

On 20th July 2015 Joseph Ndungu Kariuki's widow, Mercy Waringa Gachare filed affidavit and disagreed with the daughters of the deceased on equal distribution of the deceased's estate and instead supported Co -Objector Paul Ndichu's widow Margaret Gakuna that the suit property is to be distributed amongst both widows of the sons of the deceased and the rest of the properties equally between all beneficiaries.

Nancy Nyambura Njenga filed further affidavit on 19th February 2016 and reiterated that the suit property be divided equally amongst all beneficiaries as per the Surveyor's report. She confirmed that the widows would be allocated land including their husband's graves and she attached copies of greencard to confirm that Githunguri/Githunguri/1538 and 1540 were sold by both late sons of the deceased.

Margaret Gakuna in affidavit filed on 24th March 2016 objected to the distribution of the suit property as per the Surveyor's Report as it does not reflect the position on the ground. The subdivision encroaches on her homestead, 2 sons' houses cowshed and late husband's grave. She resides on the said land and have been there since 1987 and the proposed subdivision plan conceals, disguises and obscures the fact that the subdivision is to destroy her homestead.

HEARING

On 22nd April 2015, Margaret Nyawira Gakuna PW1 widow of Paul Ndichu Kariuki son to the deceased herein, testified that she filed protest on 10th May 2014 to the proposed mode of distribution of the deceased's estate pursuant to the Consent filed in Court. The reason was that the distribution did not reflect what they agreed.

The bone of contention is that, the deceased had bequeathed the suit property Githunguri/Githunguri/1542 to the sons of the deceased only; namely Paul Ndichu Kariuki (deceased) and Joseph Ndungu Kariuki (deceased) therefore the suit property ought to be bequeathed to the widows of the 2 sons; namely the Witness and Mercy Waringa Gachare. Secondly, she stated that since she was married in 1987, she lived on the suit property with their 4 children; developed the land, built their home, sons' homes, cattle shed and subsistence farming. There is also the grave of her late husband on the said land. The family met in 2009 and could not agree on the way forward.

Mercy Waringa Gachare widow to Joseph Ndungu Kariuki was married in 2000 and he died in 2009 and

they did not have children; she now lives in Naivasha. She proposed that the suit property be left to both of them as widows of the deceased's sons.

Margaret Njanja Kamau PW2 stated that she is 4th born in a family of 9 siblings and her 2 brothers and mother administrators of the deceased's estate are deceased. She informed Court that they filed Consent on 7th April 2014 and the Protestor PW1 refused to attend Court despite being summoned severally. They have no problem with widows getting their share of the estate; but not benefit from the fraudulent grant obtained by sons of the deceased without their knowledge, information and consent. The estate should be distributed equally amongst children of the deceased.

SUBMISSIONS

The matter proceeded by filing of written submissions by Margaret N. Gakuna filed through Counsel on 15th August 2016. Mercy Waringa Gachare filed written submissions through Counsel on 5th September 2016. Nancy Nyambura filed written submissions through Counsel on 5th September 2016. They substantially outlined in detail their respective positions with regard to mode of distribution of the deceased's estate.

DETERMINATION

Upon reading the pleadings and submissions from parties; the issue for determination is what mode of distribution should beneficiaries apply to the deceased's estate?

The undisputed facts are that the deceased died intestate; both Applicants and Protestors are daughters and daughters in law of the deceased. The widow and sons of the deceased jointly applied for grant of letter of administration and confirmed grant without knowledge, information or consents of the daughters of the deceased. The administrators/ beneficiaries sold part of the land and settled on the remaining land.

In 2009 daughters of deceased filed revocation and annulment of grant application which was not heard and determined on merit as the administrators/beneficiaries died. The subsisting tussle has been between daughters of deceased and widows of sons of the deceased.

The Applicants Daughters of the deceased claimed that the grant issued on 30th September 1999 and confirmed on 24th February 2000 without their consents. The petition for grant of letters of administration did not disclose that they are survivors of the deceased. They discovered the anomaly after the death of both sons of the deceased and that is when they filed the instant application for revocation and annulment of grant. They cited **Article 2 (4) & 27(3) COK2010** to fortify their position that there should be no discrimination on the basis of gender and marital status as was enunciated in the following cases;

PETER KARUMBI KEINGATI & 4 OTHERS vs DR ANN NYOKABI NGUITHI & 3 OTHERS [2014] e KLR P&A 1140 of 1990

IN RE ESTATE OF SOLOMON NGATIA KARIUKI [2008] eKLR

PETER KIIRU GATHEMBA & OTHERS VS MARGARET WANJIKU HCSC 1955 OF 1996

The grant and confirmed grant were obtained through fraud the administrators deliberately and knowingly excluded the daughters of the deceased in the Succession proceedings. Upon obtaining grant they sold and transferred land to themselves to the exclusion of other beneficiaries of the deceased's estate. This position is buttressed by the handwritten letters discovered from the late Joseph Ndungu's belongings marked **NNN1(a) & (b)** annexed to Nancy Nyambura Njenga's affidavit where both brothers admit to excluding their sisters in the administration of their late father's estate. The Objectors did controvert this evidence. Therefore, the grant was obtained in defective proceedings, through fraud; where there was concealment of material facts excluding daughters of the deceased and in contravention of **Section 76 of Law of Succession Act Cap 160. It is hereby revoked and annulled.**

The next issue for determination is with regard to distribution of the estate of the deceased.

There is contention from daughters of the deceased that the properties Githunguri/Githunguri/1538 and 1540 were sold by the deceased's sons and therefore should be considered part of their respective estate and taken into consideration when equal or equitable distribution of the rest of the deceased's estate is done for all beneficiaries.

Mercy Waringa Gachare by her submissions stated that the properties were sold before the deceased's demise in 1998 so that her late husband could pursue further studies abroad. Therefore the 2 properties cannot be included as part of their respective estate in the distribution.

In **Section 3 of Law of Succession Act Cap 160**; the *estate* of the deceased; means the free property of a deceased person. Secondly, the 2 suit properties Githunguri/Githunguri/1538 and 1540 that were sold are not available for distribution. This court has no evidence on record to confirm how the 2 properties were disposed of; it is one's word against the other. This Court shall not include these 2 properties in the distribution of the estate.

The third aspect of distribution is that according to Margaret N.Gakuna PW1 and Mercy Waringa Gachare widows of Joseph Ndungu Kariuki Paul Ndichu Kariuki; Githunguri/Githunguri/1542 was bequeathed to the 2 sons equally during the lifetime of the deceased. It was the deceased's wish that the suit property Githunguri/Githunguri/1542 being ancestral land was to be left in custody of the 2 sons only. These wishes were pronounced in the presence of all beneficiaries and with their approval and acquiescence. Mercy relied on the case of;

PAUL KIRUHI NYINGI & ANOTHER vs. FRANCIS WANJOHI NYINGI [2009]eKLR

The High Court in Nyeri declared:

that the deceased's black book remained uncontroverted expression of the deceased's wishes. It was not produced as Will but it was to show his intentions on the way the estate should be distributed. Unless it can be demonstrated that those wishes of the deceased captured in the black book are illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected in my view.

Margaret N. Gakuna in her submissions relied on the following cases on the issue of *inter vivos* gifts under **Section 42 of Law of Succession Act Cap 160**;

IN THE MATTER OF THE ESTATE OF MWANGI KIRIIRI P&A 1 OF 2006 HIGH COURT NYERI;

The elders who gave evidence in the Lower Court stated that the deceased had indicated in his lifetime that his sons should get 2 acres of land. This evidence was not discredited. having considered the evidence, the appeal will succeed.

SAMUEL MAINA MWANGI & 2 OTHERS vs MUTHONI KAGIRI CIVIL APPEAL 339 OF 2010 where the Court of appeal reaffirmed High court on the fact that the suit properties were bequeathed to the Appellants as gifts *inter vivos* as the deceased registered the parcels of land in their names.

In the instant case, the allegation by the widows to deceased's sons that the deceased bequeathed the suit property Githunguri/Githunguri/1542 is not borne by evidence; unlike the above cases cited; in each case there was independent evidence of gift *inter vivos*; in the above cited cases; there was a black book by the deceased, evidence by elders and actual transfer of land to the sons by the deceased. This is not the case here; apart from the widow's assertion, the family members do not confirm the same or is there any other evidence produced to prove this fact. In the absence of such evidence, the suit property shall be available for distribution to all beneficiaries.

The Court noticed with concern that with all proposals for distribution; Anne Gathoni has had a raw deal. As per her affidavit filed on 21st April 2010, she was named in the petition for grant of letters of administration. When the grant was confirmed she was not allocated any of the properties comprising of the deceased's estate. It is on record that she stayed at the parents' home and took care of the deceased's widow till her death. Yet in the family meeting held in 2009 family members proposed that she vacate the family home. In the current proposals for distribution; she is allocated the land that holds parents' and Joseph's graves; the acreage is smaller at 3.5m unlike others who have 4.5m each. For these reasons, this Court determines that her share is equal to other beneficiaries and not where graves are located.

The Court finds that apart from all properties sold before the grant was issued and confirmed all other properties belong to the deceased's estate and are available for distribution. Githunguri/Githunguri/1541 and Githunguri/Githunguri/1539 shall be available for distribution because they were transferred to the deceased's son's names in 2004 after issuance of grant and confirmed grant by the administrators fraudulently. They deliberately excluded daughters of the deceased's estate in the Succession proceedings.

The Court has taken into account that Margaret Nyawira Gakuna widow of Paul Ndichu Kariuki has been on the suit property Githunguri/Githunguri/1542 from 1987 when she married the deceased's son. She resided on the said property and developed her portion and lives on the property to date. Her main objection is that the Applicants' proposed mode of distribution has interfered with her home, her sons' homes, the cattle grazing area, cultivation area and her late husband's grave. This fact was not contested by the Applicants and they conceded to vary the distribution to allow her land that covers the area she developed. Therefore the distribution of the properties shall take into account that the Objector's developed is hived off and left to her and her family exclusively as the developments on the land if destroyed she will not be compensated. The Court also takes into account that the Objector has 4 children where she resides and has no other source of income for upkeep of her family. For this reason, the 4 children of the late Paul Ndichu Kariuki are allocated Githunguri/Githunguri/1541 jointly and equally.

Mercy Waringa Gachare widow of Joseph Ndungu Kariuki confirmed marriage vide copy of marriage certificate attached to her petition for grant of letters of administration for her late husband's estate. They were married in 2000. However, Nancy Nyambura in her affidavit filed on 23rd November 2010 informed Court that the deceased was murdered, the widow was informed of his death by his family, as she was his estranged wife, they had separated 3 years prior to his death. They had no children. The suit property Githunguri/Githunguri/1539 is encumbered with a charge in respect of a loan with Equity bank taken by the deceased. However, the title attached does not reflect the encumbrance. If it is proved through evidence it is encumbered it may not be available for distribution. If it is unencumbered then it is available for distribution by all beneficiaries. The deceased's widow herein did not have children, and she specifically requested to have the land where her home and husband's grave is, which she is entitled to and shall be allocated as her share of the estate of the deceased.

The Court has considered the Surveyor's report and the amended report and the Objector's proposed subdivision. All of them will not be relied on as they were done by each party without the other parties present.

DISPOSITION

The distribution of the estate of the deceased shall be equitable and not equal amongst the beneficiaries due to certain prevailing factors; as follows;

1. The grant of 30th September 1999 confirmed 24th February 2000 is revoked vide Section 76 of Law of Succession Act Cap 160.

2. The new grant is to be issued in the names of new administrators;

a) Nancy Nyambura Njenga

- b) Polly Wairimu Gaitho**
- c) Margaret Njanja Kamau**
- d) Margaret N. Gakuna**

3. All the beneficiaries shall meet and agree on one suitable Surveyor or recall the Surveyor (s) on record to adjust distribution and if unable to agree they shall obtain services of Kiambu County Surveyor and in the presence of all beneficiaries agree on equal distribution of remaining part of Gthunguri/Githunguri 1942 excluding;

- a. The homestead , developments and grave where Margaret N. Gakuna resides and her family;**
- b. The part that Mercy Waringa Gachare's home, developments and grave are;**
- c. The deceased's home allocated to all daughters of the deceased jointly and equally.**
- d. Githunguri/Githunguri/1541 allocated to Paul Ndichu Kariuki's children jointly and severally and**
- e. Githunguri/Githunguri/1539 if it is proved to be encumbered by loan with Equity bank todate. including;**
- f. Githunguri/Kanjai/804**
- g. Ruiru/Kiu/ Block 2/3775**

4.The remaining assets shall be distributed amongst;

- a. Nancy Nyambura Njenga**
- b. Polly Wairimu Gaitho**
- c. Margaret Njanja Kamau**
- d. Grace Njeri Muthua**
- e. Esther Nduta Kinyua**
- f. Naomi Njeri Kariuki**
- g. Ann Gathoni**

5. The beneficiaries shall share surveyor's fees.

6. Each party to bear own costs of the suit.

DELIVERED SIGNED & DATED IN OPEN COURT ON 27TH JUNE 2017.

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF;

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