



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO. 100 OF 2004
IN THE MATTER OF THE ESTATE OF GITUCHA MAGOCHI ALIAS KANJA NJUGUNA
JUDGMENT

1. Joseph Njuguna Karanja the objector in this Succession Cause filed a Summons for Revocation or Annulment of grant dated 19th January 2004 under Section 76 of the Law of Succession Act and Rule 44 of the probate and administration Rules. The objector seeks the following orders that the grant issued on the 7th November 2003 be revoked or annulled on the grounds that;

- i. The Thika Magistrate's Court had no jurisdiction to confirm the grant after the protestor had filed his protest to the confirmation thereof;
- ii. The Thika Magistrate's Court was obliged to refer the application for confirmation to the High Court when the protestor filed his protest, which it did not do.
- iii. The Thika Magistrate's court should not have adjudged upon the question of confirmation of the grant when the protestor had raised the issue of lack of diligence on the part of co-administrator Stephen Mwatha Kanja in the administration of the estate, without first exploring the issue of lack of diligence
- iv. The distribution of the estate was unfair and unjust.
- v. The confirmation of the grant omitted in the distribution a part of the deceased's estate i.e parcel of land L.R. No. Ngenda/Githungucu/885 measuring 4 acres.
- vi. The confirmation purported to distribute property which was not part of the deceased's estate i.e parcel L.R. No. Ngenda/Githungucu/855.

2. The application is supported by his affidavit dated 19th January 2004. He avers as follows; That Gitucha Magochi alias Kanja Njuguna died on the 8th July, 1988 and a grant of letters of administration intestate was made to Beth Witiri Kanja and Stephen Mwatha Kanja. Beth Watiri Kanja is over ninety (90) years old and not capable. Stephen Mwatha Kanja alone applied to the said Thika Chief Magistrate's court on 15th January 2003 applied for confirmation of the said grant, with a proposed distribution of the deceased's assets. The grant was confirmed by the Thika Chief Magistrate's Court on the 7th November 2003. The said confirmation was wrongful and illegal because:-

- a) On the 13th January 2003 he filed a protest to the confirmation of the said grant. Therefore the Thika Magistrate's Court was disentitled from jurisdiction to hear the application for confirmation

of grant. It should have referred the matter to the High Court for hearing and determination.

b) The said Stephen Mwatha Kanja who was administering the estate solely the exclusion of the over 90 year old Beth Watiri Kanja had failed to diligently proceed with the administration of the estate in that he had failed to remit into the deceased's account rent monies collected the deceased's commercial building at Gatundu Market. He had brought this to the attention of the magistrate but the court failed to require the said Mwatha to account for the monies.

c) The purported confirmation of grant contains a purported distribution of land parcel L.R. No. Ngenda/Githungucu/855, which does not form part of the deceased's assets in the application for the grant.

d) The purported confirmation of grant has left out one of the deceased's assets land parcel No. Ngenda/Githungucu/855 which is ancestral land and whose distribution was crucial.

3. That he is the first born surviving son of the deceased and has first priority in seeking a fresh grant as Stephen Mwatha Kanja is the fourth born son of the deceased (i.e the third born son from the deceased's first wife). His mother Beth Watiri Kanja is the deceased's first wife.

4. The application was opposed by Stephen Mwatha Kanja vide his replying affidavit dated 13th November 2015. He avers that his late father passed on 8th July 1987 and not 1998 as alleged. That Beth Watiri is not the biological mother of the deponent and that it is not true that she was not capable of challenging the confirmation of grant since she actually commenced the Succession Cause for this Estate being Thika Succession Cause No. 205 of 2001 which she filed on 6th June 2001. Beth never raised any objection since issuance of the certificate of confirmation of grant issued on 7th November 2003. That being an administrator like him she was entitled to apply for confirmation of the grant which she did not meaning she consented to his proposed mode of distribution. That in his supporting affidavit to the application of confirmation of grant he attached a list containing all beneficiaries and some signed it. That Beth attended the court proceedings and testified in court on the 12th of June 2002 hence this application is an afterthought. That Beth was included in the mode of distribution as indicated in the confirmation of grant. That no assets was left out in the mode of distribution. That L.R. No. Ngenda/Githunguchu/885 which forms part of the deceased assets was wrongly indicated as L.R. No. Ngenda/Githunguchu/855 and thus no asset belong to the deceased was left out. That this was just a typographical error that can be rectified. That he knows Beth Mirigo as a sister in law to Joseph Njuguna Kanja and no a blood sister and a daughter in law to Beth Mirigo and not her biological daughter. That the estate of Gitucha Magochi alias Kanja Njuguna was properly administered and distributed according to the law whereby children of the deceased were counted as unit and wives were to hold life interest of the estate as this is/was a polygamous family. He does not agree with the suggested mode of distribution as it amounts to abuse of court process and will cause inconveniences to the other beneficiaries who are now settled.

5. After directions on the 15th of June 2016 parties proceeded by way of viva voce evidence. Pw1 was Beth Mirigo Kanja. She testified that the deceased was her father in law and her husband was the child of the first wife Beth Watiri Kanja. That she was aware of the Succession Cause that was instituted in Thika. Her mother in law left the case to Joseph Njunguna as she could not talk. The two administrators were Joseph Njunguna and Stephen Mwathe. Beth Watiri and Teresia Kanja were also administrators. That the case in Thika was not decided well as the property was not distributed as per the deceased's Will. The deceased had done subdivision as per the two wives. Each wife was thereafter to divide to her children. She is not aware if Joseph Njuguna filed an objection in the lower court. She pointed out that the following properties were not distributed fairly; Plot No. 6 Gatundu as it was not divided the way the deceased wanted. It is a developed plot, it has shops within it and rent is being collected. They collect rent of Kshs. 12000 from the shops behind and the rent from the front shops is Kshs. 800. She has never been given the said rent. They are supposed to get half of the rent. She added that plot parcel no. Juja 10090/71 was supposed to be given to their family but only Stephen's family cultivates it. The Thika court did not decide fairly on the said plot. The Court did not divide the said property amongst the two wives. Plot L.R. No. Ngenda/Githunguchu/885 was not divided as should be. She requested the court that the properties be

divided amongst the two houses as they did with the shares and the money at KCB. She had adopted her affidavit dated 11th May 2015. During cross examination she admitted attending a court adding that Joseph was given Parcel No. 883 being the one in charge of his mother's property and that they live in Parcel no. 885. She admitted having sold where they stay adding that Dominic also sold his portion in 883.

6. PW2 Peter Kiarie testified that the deceased was his grandfather and that his grandmother was the administrator with Teresia. His father filed a protest and he replaced his father after he passed on. According to him his grandmother was the first wife and Teresia the 2nd wife. His grandfather divided the properties as per the wives. That he is aware of the Succession Cause in Thika however he knows that there was consent but the administrators did not agree. According to him the family of Teresia acquired more during the distribution. That they do not know where the rent in Plot no. 6 goes. That the rent received so far could be about 3 million and they have received nothing. That Plot no. 885 has five acres. His grandfather stated how the shamba should be divided. Beth's family does not occupy any portion of Parcel No. 885. He relied on his affidavit dated 11th May 2015 on the mode of distribution. During cross-examination he admitted that both families live in parcel no. 885 and that Beth Watiri was given 884. That he does not know about selling a portion of 884 and that his grandfather's family was not included in the grant at Thika Law Courts.

7. DW1 was Stephen Mwathe Kanja. He testified that the deceased was his father. The deceased had two wives as stated Beth and Teresia. Beth had two sons and his mother Teresia had six children. According to him his father had divided his property before his death with each child getting an equal share. On the Thika Succession Cause he recalled that he was a co-administrator and since Beth did not apply to confirm the grant and he moved to the court to confirm the grant. Beth's family was included in the matter. That the Court made a mistake in writing that the Parcel was no. 885 instead of 855. One can apply to rectify the said error. He is aware that Joseph filed an affidavit in protest. He did not leave any beneficiary out when he applied for the grant. According to him Parcel no. 884 should be left as decided by the Thika Court and Parcel no. 885 should be as per the court's discretion. The shares and the cash in KCB should be divided equally. Plot No. 6 Gatundu should be shared amongst all of them. Currently his mother uses its income for her upkeep. He added that his father gave ½ acre to Kiambu County as a road reserve yet one objector has built 20 houses on it. He stated that he is the only administrator and would like the other house to appoint and administrator so that they can administer together. During cross-examination he admitted that he was also a co-administrator with Beth and that Beth did not sign anywhere in the application to confirm the grant. He also admitted that she was an older lady and that Parcel No. 554 produced 883, 884 and 885. He stated that his father gave Dominic parcel no. 883 and that 884 was not given to Beth's family to balance the issues. 885 is a shamba of 4 acres. Their father, Beth, Joseph and John were buried in parcel no. 885. He testified further that plot no. 6 gives rental income from 5 rooms and that his mother collects rent from the two rooms his father left. He had no statement of account of the said rent. He concluded by testifying that the deceased wish was to divide the property in equal shares.

8. Dw2 was Dominic Njunguna Kanja, he testified that he is the son of the deceased and that the deceased gave him parcel no. 883. He was not given the said plot to take a loan, it was a gift. That all of them used parcel no. 885 and that plot no. 6 Gatundu is being used by his mother. He added that the plot can be shared equally amongst the sons including Juja plot no. 10090/71. During cross-examination he stated that every son is to be given a portion of parcel no. 884. He admitted that he had no witness to support that 883 was gifted to him nor did he have an application from the Land Control Board. He denied knowing that his father gave Beth Parcel no.884. He admitted that Beth and her sons another family member are buried in Parcel no. 885.

9. Parties filed written submissions. The Applicants in their submissions filed in court reiterated the pleadings and evidence and submitted further as follows; the protestors being beneficiaries and representing interests of the 1st wife family and dependents, would wish that the both families be treated equally in accordance with the wish and will of the deceased. That the 1st wife family and dependents have all equal rights as that of the 2nd wife family and dependents. The Applicants relied on the following

authorities; In the matter of the Estate of Solomon Wangari Kimita (deceased) Ruth Muthoni Wangai – vs- Bonface Mwangi Wangai, in the High Court of Kenya at Nyeri. Succession Cause Number 332 of 2011, In the matter of the Estate of the late Wahome Mwenje Ngorono (deceased) Priscicah Muthoni Wahome & another -vs – John Mwenje Wahome, Succession Cause Number 196 of 2015 and in the Matter for the estate of Washington Mugo Kigo (deceased) Succession 196 of 2005, Sophia Wangechi Mugo –vs- Geoffrey Wambugu Mugo & another.

10. The respondent in his submission gave a brief background to the fact leading to the application for revocation. According to the respondent the issues for determination are as follows;

- a) Did the lower court have jurisdiction to confirm the grant after protestor had filed his protest?
- b) How should the distribution of estate of the deceased be done?
- c) Did the confirmation of grant omit any property during distribution and did it purport to distribute a property which was not part of the deceased’s estate. If yes, can the same be remedied without necessarily revoking the grant?
- d) Should the grant be revoked and/or annulled?
- e) Who should bear the costs?

11. It was submitted that the Court at Thika had jurisdiction to confirm a grant under Section 17 of Law of Act after an application is made by a holder of letters of administration the only application it was limited to hear was one under Section 76 of the Law of Succession Act. That the protestor was given a chance to be heard and that the protestor had a chance to appeal on the decision before the grant was confirmed. It was submitted further that the administrator included all the capital assets belonging to the deceased and all beneficiaries and the mode of distribution. That the applicant being aware of the matter in court ought to have sworn an affidavit on the mode of distribution before confirmation. On the distribution of the estate it was submitted that distribution should be done as a polygamous family as the deceased had two houses. That Section 40 (1) of the Law of Succession Act should apply and distribution should be as per Section 35 to Section 38 of the said Act. The respondent relied on the case of Mary Rono. Vs. Jane Rono in Eldoret No. 66 of 2012, where the court held that the applicable law in an estate where the deceased was survived by two widows and 9 children, the applicable law was the Law of Succession Act which makes provision for distribution of the net estate of the houses according to the number of children in each house, but adding any wife as an addition unit. That Justice Omolo stated that Section 40 did not require that he estate to be divided equally between the houses, as the provision calls for the consideration of the number of children in each house. The respondent also relied on the case of Robenson Kirimi Magiri Vs. Nkoro Magiri and another (2015) ekLR HSC 2009/2012 Meru where Justice Gikonyo is upholding Section 40 of the Law of Succession Act, state that:-

“..... under section of the Law of Succession Act, distribution of the estate of a person who was polygamous is influenced by the number of houses, the number of children in those houses and any living spouse.....”

He further stated that,

“..... in the present case, both wives of the deceased are living and it becomes much easier to deal with the estate under Section 40 of the Law of Succession Act. Each wife is added as an additional unit to the number of children in each house.....”

The respondent submitted that the first wife at the time of petition was survived by Beth Watiri (now deceased), John Kinuno Kanja (deceased) was survived by his wife Beth Kinuno (one of the applicants herein), Joseph Njuguna Kanja (now deceased) while the second house was survived by Theresia Kanyi (widow to the deceased), Dominic Njuguna Kanja, Martin Muhoni, Stephen Mwatha, Simon Njau, John Mahugu and Samuel Kiguru. That they proposed that the whole estate be divided according to Section (40

(1) of the Law of Succession Act whereby the surviving widow should be calculated as a unit altogether with her children and the surviving children from the other house. That L.R No. Ngenda/Githunguchi/883 should be left out during distribution as it was left out to Dominic Njuguna Kanja as a gift *inter vivos*. It was further submitted that no property was left out as the administrator erroneously included a property known as L.R. No. Ngenda/Githunguchu/885 instead of L.R No. Ngenda/Githunguchi/885. That the same can be rectified under the provision of Rule 73 of the Probate and Administration Rules. The respondent concluded by asking the court not to revoke the grant but to appoint a core administrator from the 1st house. On costs the respondent sought to have the applicants bear the costs arguing that their application was unmerited, frivolous and an abuse of the court process and should be dismissed.

Determination

Having considered the affidavits, oral evidence, submissions and the law, the issues for determinations are;

- a. Should the Court revoke the grant that was issued by the Magistrate's Court on the 7th November 2003?
- b. Who should be the Administrators?
- c. How should the Estate be distributed?

i. Should the court revoke the grant that was issued by the Lower Court on the 7th November 2003?

Section 48 of the Law of Succession Act before the amendment provided that a resident magistrate shall have jurisdiction of an estate the gross value of which does not exceed Kshs.100,000.00. The estate of the deceased as narrated in the Chief Magistrate's Court file comprised of Gatwanyaga share Certificate no. 586, Ngenda/Gichunguchu/ 884, Plot 6 at Gatundu Market, Ngenda/Gichunguchu/ 855, Land Parcel Juja 10090/71 and cash in Commercial Bank Saving A/c No. 197059873. This list is as per the certificate of grant issued on 7th November 2003. Section 48 **(1) of the Law of Succession Act was amended as follows;**

Notwithstanding any other written law which limits jurisdiction but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates' Courts Act, 2015.

It is therefore clear that the Chief Magistrate's Court in matters relating to succession had jurisdiction of only upto Kshs, 100,000. By merely looking at the list of properties of the deceased estate their value exceeds Kshs.100, 000.00. I therefore find that the Chief Magistrate's Court had no jurisdiction the in the year 2003 to entertain the matter as it lacked jurisdiction. The application in the lower court was a petition for grant of the deceased's estate. What should have guided the lower court was the monetary value of the deceased's estate. Section 71 provides for what the administrator should do at the expiry of 6 months once a grant is issued. Section 48 provided the jurisdiction of the Resident Magistrate's Court. Having found that the lower court lacked jurisdiction this court revokes the grant that was issued on the 7th of November 2003. A fresh grant shall issue in the names of **Stephen Mwatha Kanja, Beth Mirigo and Peter Kiage Njuguna** as administrators of the estate of **Gitucha Magochi** alias **Kanja Njuguna**.

a) How should the distribution of estate of the deceased be done?

The deceased was survived by two wives Beth Mirigo first wife (now deceased) whose children were, John Kinuno Kanja (deceased) survived by Beth Kinuno (applicant) and Joseph Njuguna Kanja (deceased). The 2nd house comprises Teresia Kanyi Kanja widow of the deceased and the following

children, Dominic Njuguna Kanja, Martin Muhoni, Stephen Mwatha, Simon Njau, John Mahugu and Samuel Kiguru. Section 40 (1) of the Law of Succession provides that “where *an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children*”.

It is not in dispute that the deceased left the following assets Gatuaryaga share Certificate no. 586, Ngenda/Gichunguchu/ 884, Plot 6 at Gatundu Market, Ngenda/Gichunguchu/ 855, Land Parcel Juja 10090/71 and cash in Commercial Bank Saving A/c No. [particulars withheld]. Parties have agreed that the following properties should be shared equally; Gatuaryaga share Certificate no. 586 and cash in Commercial Bank Saving A/c No. [particulars withheld]. It is apparent from the documents that parcel No. 885 was erroneously indicated as 855. This error can be rectified as the law provides under Section 74 of Cap 160 that an error in names and description maybe rectified by the court whether before or after confirmation. The land parcel shall read 885 and not 855.

There is evidence that the plot at Gatundu Market has shops. The applicants state that they have not been given any portion of the rents that were being collected. The respondent does not deny this. The applicants have raised a point that they too are entitled to proceeds from the said plot. Since the respondent did not provide accounts on the rents received this court directs that the respondent shall file an affidavit attaching the rents received from the period the deceased died todate to enable this court make an order on distribution on the rental income.

On land parcels number 884 and 885 it is apparent to me that the wives were entitled to share equally. The 1st house at the time of the petition was survived by Beth Watiri (now deceased), John Kinuno Kanja (deceased) was survived by his wife Beth Kinuno (one of the applicants herein), Joseph Njuguna Kanja (now deceased) while the second house was survived by Theresia Kanyi (widow to the deceased) Dominic Njuguna Kanja, Martin Muhoni, Stephen Mwatha, Simon Njau, John Mahugu and Samuel Kiguru. Guided by the provisions of Section 40 whereby the surviving widow should be calculated as a unit with her children and the surviving children from the other house, the distribution shall be as follows; the house of Beth Watiri Kanyi and Teresia Kanyi Kanja to get 2.0 acres each from Ngenda/Githungucu/885 and Parcel No. 884 shall be shared equally between the two houses. Parcel No. 883 shall go Dominic Njunguna Kanja. Land Parcel Juja 10090/71 shall be shared equally between the two houses. The respondent shall file an affidavit giving accounts of rents received from plot No. 6 at Gatundu market within 60 days from the date of this ruling. The court shall thereafter make a finding on the mode of distribution of the said plot and rent received. Parties to take a mention date before the court. Since this is a family matter each party shall bear its own costs. It is so ordered.

Dated, signed and delivered this 29th Day of August 2017

R. E. OUGO

JUDGE

In the presence of:

Mr. Mwaura For the Applicants

Respondent Absent

Ms. Charity Court clerk