



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT SUCCESSION CAUSE NO. 655 OF 2010

IN THE MATTER OF THE ESTATE OF PENINA MUTHONI GICHU (DECEASED)

DENNIS KIMOTHO GICHU.....APPLICANT

- V E R S U S -

RICHARD KARIUKI GICHU.....RESPONDENT

RULING

The application before me is the Summons General dated 14<sup>th</sup> March 2016 brought by Dennis Kimotho Gichu. He seeks an order that the court be pleased to order that the estate of the deceased herein **LR. No. Chinga/Kagongo/377** be subdivided as per the certificate of confirmation of grant issued on 28<sup>th</sup> October 2011 by ordering the Nyeri District Land Surveyor to conduct the said exercise; and that the OCS Chinga Police Station to give ample security during the exercise.

The application is supported by the affidavit sworn by the applicant on 14<sup>th</sup> March 2016 where he makes reference to the certificate of confirmation of grant of letters intestate made on 28<sup>th</sup> October 2011 where the property L.R.No. **Chinga/Kagongo/377** measuring 5.5 Acres to be shared as follows: -

- 1) LOISE WAHU GICHU                      2.85Acres
- 2) DENIS KIMOTHO GICHU              0.883 Acres
- 3) ONESMUS MAKANGA GICHU        0.883 Acres
- 4) FLORENCE HUGIRU GICHU          0.883 Acres

The respondent Richard Kariuki Gichu filed an affidavit in reply opposing the application. He deponed that his father the deceased had two wives, his mother Loise and Penina the mother to the applicant whom he married in 1925 and 1939 respectively. That in 1962 before he died, his father allotted each of his wives her own portion of land.

In 1981, the High Court at Nyeri in **Misc. Appl. No.28 of 1981** heard the succession cause and the judge then Justice Mathew Muli divided the land according to the deceased's wishes. By the time the two widows died in 1991, the boundaries between their parcels had been known and intact since 1981. He contends that on this fact alone, the application as made by the applicant is *sub judice*.

In a further affidavit sworn on 22<sup>nd</sup> April 2017, the applicant contended that the application has nothing to do with the respondent's mother's portion, but was with regard to his mother's portion only. That it was true that the **Misc. Appl. of 28 of 1981** shared the deceased's properties into two portions, and in his view each widow was allocated an equal share of 2.65 acres. He attached a copy of certificate of succession showing that LR No. **Chinga/Kigongo/337** had been divided into two equal shares. He also annexed a certificate of search showing that his mother's share of the parcel of land was registered in the names of the four beneficiaries.

The respondent in a further affidavit, attached the ruling by Hon. Justice Mathew Muli in **Re the estate of Gichu s/o Makanga**. It details how the land was to be demarcated and how the homestead was to be shared between the widows. Following the wishes of their husband, he made separate provisions for the homestead, and a separate provision for the rest of the land directing the District Surveyor to move with speed and demarcate the boundaries. According to the respondent this was never done. His view is that that failure renders the application before this court a non-starter, as no land exists answering to the description **LR No. 337 of 377 Chinga/Kangogo**, in the name of Peninah Muthoni Gichu.

Mr. Kiminda appeared for the applicant, Mr. Gathiga Mwangi for the respondent.

Mr. Gathiga Mwangi argued that no such land as LR No. Chinga/Kagongo/377 exists, hence the application is a non-starter. Mr. Kiminda on his part argued that the estate of Gichu Makanga was transmitted in 1983 and shared equally between the two widows. He relied on the certificate of succession dated 25<sup>th</sup> November 1983. That this cause was filed by the children of Peninah for sole purpose of only getting their mother's portion and it is that share only that they wish to be separated from that of Loise Wahu. That it would not be prudent to re do the whole cause again.

Mr. Gathiga Mwangi counsel for the respondent pointed out that the whole the succession cause was based on the non-existent the parcel of land described in the petition and other documents as **LR No. Chinga/Kagongo/377**. In addition, the confirmation of grant of letters of administration intestate for the estate of Pauline Gichu was based on that non -existent parcel of land, hence no such estate exists at all.

He also pointed out that the alleged transmission of the estate of Penina Gichu to her heirs in parcel LR no. Chinga/Kangogo/337 was made on 27<sup>th</sup> August 2007. This was even before this cause was filed. That entry could only have been done fraudulently, as by that time there was no grant in place to enable the alleged transmission. The applicant did not explain how that could have happened, and the Land Registrar involved would have a long day explaining the same.

He argued that what that there was no error and the applicant ought to comply with the law. He urged this court to dismiss the application with costs to the respondent.

Having heard both counsel and perused the rival affidavits, it is not in dispute that the applicant and respondent are step brothers, children of co-wives of the late Gichu s/o Makanga. It is common ground that in 1981 the High Court at Nyeri settled the issues of the Estate of Gichu s/o of Makanga which was LR. No. **Chinga/Kagongo/337**. The Judge detailed how that parcel of land was to be shared.

“...there is evidence that the deceased did allot portions of the said land to his wives during his life time and that there exists a boundary between the portions save for smaller part towards the home stead... I have caused the land Surveyor and the valuer to view the land have confirmed in their reports that the partial boundary exists. I do not think I will be justified in interfering with this long respected boundary which was erected by the deceased during his lifetime... I direct the land surveyor and the Land Registrar to effect these orders as soon as possible to avoid further disputes over the land...”

Unfortunately, both widows died before the formalities were dealt with.

This cause, and this application is an outcome of that failure on their part.

The fact is that the record shows that in 2010 the children of Penina brought this cause. According to the letter from the Chief Kagongo sub/location they wanted Penina's share out of parcel **LR No. Chinga/Kangogo/337**, which would then be shared equally among her children. They did this on the presumption that the parcel had been shared equally between the two widows.

It is another fact from the record that in the subsequent documents the parcel of land was wrongfully described as **LR. No Chinga/Kangogo/377**. In my view that was a clear typing error, which was repeated in the record up to the time the grant was confirmed. Too much time and energy have been spent on this error unnecessarily. For both parties the only issue is the drawing the boundaries of the estate of their father to demarcate each of mother's share, according to the 1981 decision of this court.

I agree with the submissions by Mr. Gathiga Mwangi that it is odd that the estate of Gichu s/o Makanga was transmitted and entries made in LR No. Chinga/ Kangogo/ 337 before the filing of this cause. How could that happen? Clearly the entries made on LR No. Chinga/Kagongo/337 on 27<sup>th</sup> August 2007 could not have been based on orders in this succession cause. Even the confirmed grant was erroneous describing the property as **377** instead of **337**. There was no application for the rectification of the grant confirmed on 28<sup>th</sup> October 2011. Without any explanation from the applicant, the only conclusion I can draw is at that entry was made in a fraudulent manner, and cannot be allowed to stand.

But how do we sort out this very clear issue without prolonging this matter unnecessarily?

The respondent in his affidavit of 25<sup>th</sup> May 2017 has deponed at paragraph 13 that the land be shared out according to the orders issued by Justice Muli. I am wont to agree. There was no appeal against his ruling of 19<sup>th</sup> July 1981. It is the only basis upon which the shares of Peninah and Loise can be known. I will not be the one to go against the wishes of the deceased as so clearly set out by Justice Muli.

The instant act would be to dismiss the application based on the anomaly created by the mistake of the numbers 337 and 377. However, my humble view is that this court, under rule 73 of the Probate and Administration Rules has inherent jurisdiction to make orders to ensure the ends of justice and to prevent abuse of the court process. The respondents can always be compensated by way of costs for any inconvenience caused to them by the actions of the applicant. Nonetheless, the ends of justice will be met in the execution of the orders made by Justice Muli on 19<sup>th</sup> of July 1981. To that end, I make the following orders;

- 1) That the application of 14<sup>th</sup> of March 2016 is held in abeyance.
- 2) That the two parties herein to comply with the other orders of Justice Muli in the ruling of 19<sup>th</sup> July 1981 and regarding the demarcation on the ground of the parcel LR No. Chinga/Kagongo/337 according to the boundaries in existence since 1981. Each party to bear its own costs of the exercise.
- 3) This order be complied with within 90 days hereof.

4) Matter to be mention thereafter to confirm compliance

Orders Accordingly

Right of Appeal 30 Days

**Dated, delivered and signed at Nyeri this 29<sup>th</sup> November 2017**

**TERESIA MATHEKA**

**JUDGE**

In the presence of;

Court Assistant Hariet

Mr. Kiminda for the Applicant

Mr. Muthee for the respondent