



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(FAMILY DIVISION)

CAUSE NO. 3208 OF 2014

**IN THE ESTATE OF THE LATE BETHSEBA WAMBUI SIMON ALIAS BETHSHEBA
WAMBUI (DECEASED)**

RULING

1. The deceased to whom this estate relates Bethsheba Wambui died intestate on 14th December 1998. A petition for grant of letters of administration was made by Gichuru S. Thumbi, Peter Kinyanjui Thumbi and Eunice Njeri Kamau on 23rd July 2012 in succession cause no. 206 of 2012 before the Chief Magistrate's Court at Kiambu. The same was gazette on 1st March 2013 as gazette Notice Number 2827 and the said court issued the grant of letters of administration on 3rd June 2013. Vide summons dated 10th June 2014 the administrators sought to have the said grant confirmed other than the three administrators only Simon Thubi Karanja and Joan Muthithi Waweru are purported to have signed the consent to confirmation of the said grant as follows;

1. **L.R. No. Dagoretti/Thogoto/249 measuring approximately 0.57 Ha be shared as follows;**
 - i. **Gichuru S. Thubi – 0.103 Ha**
 - ii. **Peter Kinyanjui Thubi- 0.103 Ha**
 - iii. **Mary Wanjiru Thubi– 0.103 Ha**
 - iv. **Simon Karanja Thubi– 0.103 Ha**
 - v. **Eunice Njeri Thubi– 0.103 Ha**
 - vi. **Access road - 0.053 Ha.**

Plot No. Dagoretti/Thogoto/T.20 approximately 0.27 acres

- i. **Gichuru Thubi**
- ii. **Peter Kinyanjui Thubi**
- iii. **Eunice Njeri Kamau**

2. This prompted the application of protest by Joan Muthithi Waweru who in her affidavit dated 22nd July 2014 deponed that the applicants in the said application for confirmation left out beneficiaries who were entitled to benefit from the deceased's estate and raised issue with the mode of distribution used by

the administrators. She was the view that the said two parcel of land be shared equally between all the beneficiaries. Mary Wanjiru Thumbi also joined issues with Joan. However The lower Court proceeded to confirm the said grant as per the mode proposed by the administrators. This is what culminated to the current application by the applicant dated 1st December 2014 seek revocation and annulment of the said grant and or the setting aside, stayed and or lifted and further seeking a temporary injunction be issued restraining the respondents their servants or agents from transferring by way of transmission, erecting any building and or structures or in any way causing subdivision of land parcels **Dagoretti/thogoto/249** and **Dagoretti/Thogoto/T.20** pending the hearing and determination of this application and that the O.C.S of Kikuyu Police station oversee compliance of the injunction order.

3. The application is grounded on facts that the proceedings before the Senior Principal Magistrate were defective by making untrue allegations and concealment of material fact. That the succession cause was filed without consent of the applicants and that the net value of the deceased's estate comprising **L.R.Dagoretti/Thogoto/T.20 0.27 Ha** and **Dagoretti/Thogoto/249 0.57 Ha** the deceased's estate is not within the monetary jurisdiction of the lower court. Further that the 1st applicant's signature was forged by the respondents and unless the grant of letters of administration is revoked and the confirmed grant vide succession cause no 206 of 2012 is set aside the applicants will be disinherited in land parcel no. **Dagoretti/Thogoto/249** and if the respondents are not estopped. They will suffer irreparable loss and damage and their application will be rendered nugatory.

4. The applicant in the sworn affidavit aver that the respondents in their application for confirmation of grant omitted Joan Muthithi Waweru and Mary Thumbi from sharing in **Plot No. Dagoretti/Thogoto/T.20 approximately 0.27 acres.**

5. The respondents in reply to the said application filed their replying affidavit dated 22nd June 2015 sought to have the valuation reports authorized by Eunice Njeri Karanja to be thrown out as they were made by a stranger who was not a party to the said proceedings and urged the court to dismiss the applicant's application.

6. The matter came up for hearing on 14/10/2015. PW1 **Joan Muthithi Waweru** testified that she was a lastborn daughter to the deceased Bethsheba and that Gichuru was her elder brother . She stated that they were 10 children but one died. That the deceased lived in Thogoto and died in 1998 leaving behind plot no. Thogoto/Dagoretti and another near Dagoretti Markert. That Peter and Eunice stay at the plot No. T.20 where they have constructed a mabati structure. The shamba has no structures but Gichuru had sold it to someone and the buyer had fenced it and built a house. That though the shamba had been divided it was not divided by the deceased. She added that the value of the plot was 6 million and above while the shamba was of about 12 million and above. She alleges that she did not know that they had obtained the letters of administration and had not signed anything and only learnt of the same when they went to subdivide the shamba. That this prompted her to go to Kiambu Law Court challenging the signature that was said to be hers . She added that she did not agree with the decision of the Kiambu law court adding that the parties wanted a share of the shamba yet they had their plot adding that they too are entitled to a share of the said plot and urged the court to grant a revocation of the lower court's papers and that the said plot and shamba be divided equally among the beneficiaries.

7. On cross-examination by **Eunice** she reaffirmed that she did not sign any papers as alleged by the respondent. She stated that the plot could be divided into 6 parts adding that if her mother was alive she could have given her a portion of the property adding that the respondent could demolish and go construct at the shamba as the land is big.

8. On further cross-examination she stated that she did not sign the papers adding that she was not aware of any meeting supposedly called by the respondents nor did she attend the same. Adding that the respondents divided the plot of land amongst themselves first leaving her out and Gichuru had since sold his. That after the matter at Kiambu they were told if unsatisfied with the court ruling they could appeal at the High Court. She stated that she was the only one who was married while the rest lived in the slums. She stated that she knew that the respondent had been staying there since she got married and cannot bear the cost of demolishing adding that they did not go to Kiambu to subdivide the shamba.

9. On cross-examination by the court she stated that she did not adduce any documents in court as the plot they wanted divide was T.20, which is 100x100 adding that she had no problem with the subdivision in 249 where she had been given 0.086 Ha.

10. PW2 **Mary Wanjiru Thubi** a daughter to the deceased testified that she was given a plot of land of his brother who got lost. She added that at the time she did not know if women could inherit but when she went to bury her daughter she learnt that her brother's wife had cut bananas and she reported the matter at Kikuyu and that is where she learnt that she too could inherit and that the plot could be subdivided with her getting the middle portion. That is when they hired an advocate. She stated that all she wanted was for the said land to be divided equally. She said that she knew that Joan was to be given a portion of land.

11. On cross examination by **Gichuru** he stated that the plot was subdivide into two portions adding that the respondent need not demolish the house but could move to the shamba.

12. On cross-examination by **Peter Kinyanjui**, she stated that she did not even know the portion she was given.

13. On cross-examination by **Eunice** she stated that she did not have any papers to adduce in court and denied having signed any papers at Kiambu law courts. She added that Muthithi was not at Kiambu Law courts when they went adding that the court did not say that they divide the shamba into 6 portions while the plot was divided into 3 portions.

14. DW1 **David Gichuru Thubi**, he testified that of the three girls none doesn't have a homestead where they stay. He states that they divided the shamba and there was no problem but they want to sell the plot because they are not there and will not have any issue for demolishing the houses and they can't all fit in the said plot.

15. On cross-examination he stated that 3 of them petitioned for grant of letters of administration and informed Joan and Wanjiru about it. He denied knowing the value of the shamba nor the plot and that's the reason they indicated kshs.100,000/- adding that Joan and Rahab did not need to inherit anything., He denied selling the shamba adding that he only rented it out and did not know if there was building materials on the said portion of land. He stated that the plot is only 100 x 100 while the shamba was big. He stated that he built at the plot because that is where the mother used to stay.

16. DW2, **Peter Kinyanjui** testified that he had lived at the said Thongoto since birth and where he has raised his children. He stated that the sisters had been given the shamba and the plot was too small to be subdivided adding that they should live there since the same was shared equally.

17. On cross-examination he testified that Joan and Mary gave them permission to make the petition. He also stated that he did not know the value of the plot or shamba.

18. DW3, **Eunice Njeri**, a widow to one of the deceased's sons. She stated that once she got married their mother showed her where to build and where to cultivate and that is where she brought up her children and has nowhere to go and if they sell the said plot, she will not have enough money to build in another place. That they went to the chief and they were chosen as administrators adding that at Kiambu Joan had admitted to signing and went to Kiambu court to ask that they subdivide the plot into equal shares and they were asked to repeat the subdivision so that Joan can get her share.

19. On cross- examination, she stated that on going to the chief's place since they had been chosen as administrators but later they went with Joan. She denied knowing the value of the said shamba or plot adding that they did not tell the court the value of the plot, as they did not know they would sell the plot. She stated that she had not been denied to build on the shamba stating that she could not build, as they had not given Joan her share.

20. Parties filed written submissions, which I have read and considered. The applicant in support of her the application claim that she only learnt of the respondents intention to disinherit her at this late stage

prompting to file a protest further that the signature said to have been made on form 38 was a forgery. She further submitted that the monetary jurisdiction of the said court was beyond the provided Kshs.100,000/-.

21. The applicant in support of the claim that the said court lacks pecuniary jurisdiction they attached two valuation reports. Valuation reports dated 4th June 2015 in relation to **L.R. No. Dagoretti/Thogoto/T.20** valued it at 6,500,000/- while **L.R. No. Dagoretti/Thogoto/249** was valued at Kshs. 12,000,000/-. Though the respondents claim that they were not aware of the value of the said parcels of land it is clear that they misled the lower court in believing that the deceased's estate was for an estimated value of less than Kshs.100,000/- which was within the jurisdiction of the said court. Based on the said valuation reports it is evident that the deceased estate was for a higher value than Kshs. 100,000/- and as such the lower court had no jurisdiction to entertain the matter. Section 47 of the Law of succession Act provides that, "***the High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.***" However, the power vested on the said appointed Resident magistrate is not absolute and has a limitation. Further, Section 48 of the law of succession Act provides that, "***(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under Section 76 and to determine any dispute under this Act and 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 one hundred thousand shillings:***" [emphasis mine]

The respondents argue that **Section 50** of the Law of Succession provides that, "**An appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court thereon shall be final**". I don't agree with the respondent's argument on the same, an appeal would only lie as an appeal if the court that determined the matter had jurisdiction to entertain the matter as it stands the said court lacked pecuniary jurisdiction. The succession cause was not properly before the said court and as such any proceedings before the said court are a nullity abinitio and set aside the proceedings of the lower court. To avoid further delay I order the parties concerned to file their application for grant of letters of administration within 30 days from this judgment. I also take cognizance of the new act **The Magistrate's Court Act 2015** that has enhanced the pecuniary jurisdiction of the magistrate's court (**see section 7**). The file shall be returned back to lower court for hearing and disposal. This being a matter involving siblings costs shall be in the cause. Orders accordingly.

Dated, signed and delivered this **18th** day of **February** 2016.

R. E. OUGO

JUDGE

In the presence of:-

.....**For the Applicants**

.....**For the Respondents**

Ms. Charity

Court Clerk