



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO 83 OF 2006

IN THE MATTER OF THE ESTATE OF CHARLES KARIUKI GACHERU (DECEASED)

STEPHEN NJOROGE KARIUKI.....1ST APPLICANT/OBJECTOR

BENSON RAINI KARIUKI.....2ND APPLICANT/OBJECTOR

**JOHN KIHICO.....3RD
APPLICANT/OBJECTOR**

SAMUEL NJENGA.....4TH APPLICANT/OBJECTOR

VERSUS

JAMES GICHUHI KARIUKI.....1ST RESPONDENT

MARY RUGURU KARIUKI.....2ND RESPONDENT

ELIZABETH MURUGI KARIUKI.....3RD RESPONDENT

RULING

PLEADINGS

By an application filed on 6th July, 2015 by the 1st Applicant Objector Stephen Njoroge Kariuki is the Notice of Motion seeking the following orders;

- a. The Court reviews its orders of the Ruling of 10th April, 2015 specifically **orders (a), (c), (e) and (f)** over the suit property Muguga/Gitaru/1833
- b. That an injunction issues to restrain the Defendants their agents, servants, employees from trespassing, subdividing, alienating or dealing whatsoever with the Applicants enjoyment of the suit land Muguga/Gitaru/1833 until hearing and determination of the suit.

The grounds of the application are;

- 1. That this Court relied on the Will of the deceased dated 26th October, 2003 which was not disclosed when the defendants sought grant of letters of administration and the confirmation of the grant and at the subdivision stage.

2. The said Will should not be taken into account when determining the distribution of the deceased's estate. The deceased did not share the portion to one Mary Ruguru Njogu.
3. Elizabeth Murugi and Samuel Njoroge were bequeathed their share of the suit property from the original property Muguga/Gitaru/150 which was subdivided into Muguga Gitaru/1831, 1834, 1835 and 1832. The rest of the property Muguga/ Gitaru/1833 should be shared amongst the rest of the beneficiaries.
4. Charles Kariuki Gacheru should not inherit any of the deceased's property as he is a grandson of the deceased, son to the child of the deceased; Martha Waithera Gacheru.
5. Plot **D** described as the family cemetery in the Objector's subdivision plan should not be allocated to Mary Ruguru as the said land has the two (2) members of the family buried; namely the late Anthony Njagi Njoroge and late Joseph Gacheru Kariuki. This would mean that exhumation of the two (2) graves should be done.
6. The Applicants Objector's proposal is that Elizabeth Murugi should not be allocated the portion as shown in the Objector's plan for subdivision and the burial site/cemetery to remain as shown in the same subdivision list.

What is allocated to Elizabeth Murugi and Charles Kariuki Gacheru (Junior) should be allocated to Mary Ruguru Njogu as Simon Waweru was buried in the public cemetery which was prejudicial to the deceased's Will and the entire family.

In a nutshell, the Court's Ruling of 10th May 2015 should be reviewed to have the suit property divided among seven (7) children and not nine (9) children of the deceased. The Court should remove Elizabeth Murugi and Charles Kariuki (Junior) from the list. Order (c) of the Ruling should be amended and allocate the portion to Mary Ruguru alone. Order (d) of the Ruling should be amended and be kept as graveyard of the family.

The Respondents filed a Replying Affidavit on 15th July 2015 and objected to the Objector's application and raised the following grounds;

1. The Objector Applicant sought a grant, which was revoked by the Court, and since then he has filed numerous applications ventilating the same issues.
2. The Court Ruling of 10th April 2014 was after the Court heard all the parties and they were all given a chance to file documents.
3. The Applicant/Objector is effectively seeking to reopen the Case on matters already canvassed before this Court and the Court delivered determination.
4. The Applicant has not placed any material before the Court to warrant the review of the orders issued on 10th April 2015.
5. There is no error apparent on the face of the record to warrant the review of the orders of the Court.
6. The appropriate application would be an appeal of this Court orders
7. The Respondents have not relied on any Will of the deceased.
8. The deceased died intestate and the administrators of the deceased's estate have always proceeded on the basis of the intestacy of the deceased.
9. The Applicants/Objectors have not laid any basis for review of the Court orders and/or issuance of an injunction.

ISSUE

1. The issue for determination is whether the Court Ruling of 10th April 2015 should be reviewed in the terms of the Applicant/Objector's proposal and in the meantime an injunction to issue and subsist until hearing and determination of this matter.

DETERMINATION

The instant application is premised on a review brought under **Order IX Rule 80 of the Civil Procedure**

Act, which provides;

Any person who considers himself aggrieved;

- a. *By a decree from which an appeal is allowed by this Act, but from which no appeal has been preferred or*
- b. *By a decree or order from which no appeal is allowed by this Act*

may apply for review of judgment to the Court which passed the decree or made the Order, and the Court may make such order as it thinks fit.

Order 45 of the Civil Procedure Rules 2010 provides; grounds for review are;

- a. *Discovery of new and important matter or evidence*
- b. *Account of mistake or error apparent on the face of the record*
- c. *Any other sufficient reason.*

In the instant case, the Court's Ruling was informed by oral and documentary evidence from the parties.

PROBLEM 1

The distribution of the estate specifically suit property Muguga /Gitaru/1833 is in accordance with the confirmed grant of 8 children of the deceased. Later during the proceedings and subdivision proposals it turned out that Elizabeth Murugi had during the deceased's lifetime been allocated Parcels 1831 and 1834. Therefore the suit property was to be divided amongst the remaining 7 children but including the parcels already bequeathed to Elizabeth Murugi and Samuel Njenga. I find no anomaly or any need to interfere with the subdivision according to the division of the remaining 7 children. This is clearly indicated at page 6 and 13 of the Court's Ruling of 10th April 2015.

PROBLEM 2

The second issue is that this Court relied on the Will of the deceased and by **Order (c)** of the Court's Ruling allocated the deceased's homestead to Elizabeth Murugi and Charles Kariuki Gacheru Junior. The attached document is not a Will as prescribed in **Section 5 and 11 of the Law of Succession Act Cap 160**.

A Will does not include the intended beneficiaries present at the time or where the will is written and 2 competent witnesses must sign it. This is not the case here. The person who translated the minutes of the meeting chose to include the heading "Will [and] Charles Kariuki Gacheru Will Statement" to the Meeting held by the deceased and he spoke to his children and reduced his speech in writing. This document cannot constitute a valid Will in law.

The document is titled discussions with deceased's children in a meeting held by the deceased on Sunday 26th October 2003. The deceased assembled his sons and their wives present as shown by the list in the said document. Among those present were the Objector/Applicant and his wife. The deceased during the said meeting said that where he lived; his homestead and the land thereon; he gave to Elizabeth Murugi and Charles Kariuki Gacheru Junior in equal shares.

This is a gift *intervivos* to the 2 members of his family. The deceased gave this portion to the 2 beneficiaries during his lifetime in the presence of all his children including the Objector. If he had any objection he would have raised it then not now. That is why this portion was not part of the declared assets that comprised of the deceased's estate available for distribution amongst the beneficiaries.

The Court in its Ruling of 10th April 2015 mentioned an alleged Will but referred to the gift *intervivos* for purposes of complying with **Section 42 of the Law of Succession Act Cap 160** taking into account the gifts to the 2 beneficiaries as distribution of the suit property is undertaken. Therefore since the gift was

given to the 2 beneficiaries during his lifetime in the presence of all siblings that order remains intact. It is however not clear where it is captured in the Administrator's and Objector's proposed subdivisions. That will have to be factored in during the subdivision.

PROBLEM 3

The 3rd issue is with regard to allocation of parcels of the suit property in terms of **Court orders (d) (e) & (f)** of the Court Ruling of 10th April 2015.

This court conceded and changed the proposed parcel **E** in the Objector's subdivision proposal and **G** in the administrator's proposed plan that was allocated to Mary Ruguru but developed by Simon Waweru to remain with Simon Waweru and Mary Ruguru moves to **D** in the Administrator's proposal and **F** in the Objector's list. So that remains intact as **Order (d)** of this Court's ruling of 10th April 2015

With regard to **Orders (e) & (f)** of this Court's Ruling of 10th April 2015; this Court has found that there is sufficient reason to amend and adjust the distribution of the parcels of land only in relation to portions allocated to Elizabeth Murugi, Simon Waweru, Mary Ruguru and the burial site. This is because the issue of whether there should be a family burial site or separate burial points is critical to distribution of the suit property.

It is important to avert and resolve the burial site issue to avoid exhumation of those already buried. To that extent then the portion where the late Anthony Njage Njoroge and the late Joseph Kariuki Gacheru are buried shall remain the family burial graveyard for all family members. This means that Parcel **D** of the Objector's proposed subdivision and the Administrator's proposal which is marked **D** as parcel for Mary Ruguru.

The Administrators will be in charge of the Family cemetery on behalf of all beneficiaries by ensuring access by all and maintenance of the same by all and for all families of the deceased.

This leaves Mary Ruguru with only 1 parcel of land as opposed to all others who have 2 parcels and Elizabeth Murugi who has 4; the 2 earlier bequeathed as gifts Parcel 1831 and 1834 half of the deceased's homestead and Land Parcel marked A. Therefore to preserve the Family Cemetery, Elizabeth shall relinquish her Parcel A to Mary Ruguru so that she has 2 parcels as the rest of her siblings and Elizabeth Murugi has 3, 2 parcels gifted by the deceased and half the deceased's homestead.

COURT ORDERS

1. **The Application for review allowed for sufficient reason to the extent to preserve the family cemetery.**
2. **Parcel D in the Administrator's and Objector's proposal is allocated to all beneficiaries as the Family Cemetery as already some family members are buried there. The administrators shall hold the said family cemetery on behalf of all beneficiaries; to ensure maintenance access and use by all beneficiaries.**
3. **Parcel A in the Administrator's and Objector's proposal shall be allocated to Mary Ruguru and not Elizabeth Murugi who already has 3 allotments.**
4. **The Gift to Elizabeth Murugi and Charles Kariuki Gacheru Junior of the deceased's homestead and land thereon in equal shares shall be factored in the subdivision.**
5. **The suit property Muguga/Gitaru/1833 shall be subdivided by 7 children as the 2 children Elizabeth Murugi and Samuel Njenga were allocated Parcels 1831, 1832, 1834 and 1835**
6. **The subdivision shall be carried out by J.R.R. Aganyo Associates in the presence of all beneficiaries and shall include the stated adjustments.**
7. **Each beneficiary is to remain where they have developed, are cultivating or are situated.**
8. **Each party to bear its own costs**

READ AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF MARCH, 2016

MARGARET W. MUIGAI

JUDGE

In the presence of;

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