



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO 114 OF 2013

(FORMERLY NYERI HC SUCCESSION CAUSE NO 535 OF 2009)

IN THE MATTER OF THE ESTATE OF GATHIMBU MUNYUA, DECEASED

KIRAGU MWANGI.....1ST ADMINISTRATOR/APPLICANT

VERSUS

JAMES MWANGI KAGERA.....2ND ADMINISTRATOR/RESPONDENT

R U L I N G

1. On 23/09/2009 a grant of letters of administration intestate was issued in this cause jointly to **Kiragu Mwangi** and **James Mwangi Kagera** by the High court at Nyeri. Both administrators subsequently jointly applied for confirmation of that grant by summons dated 03/06/2009. They swore a joint affidavit in support of the application. They proposed at paragraph 5 of the affidavit that the two properties comprising the Deceased's estate be distributed as follows-

Land Parcel LOC 14/KAGUMOINI/616

- (i) Kiragu Mwangi - 0.875 Acres
- (ii) Julius Muriu Gathumbi - 0.875 Acres
- (iii) James Wachiuri Mwangi
- (iv) Gerald Macharia Gathimbu - 0.250 Acres

Land Parcel LOC 14/KIRU/779

- (i) James Wachiuri Mwangi - 0.775 Acres
- (ii) Winnie Ngonyo Kaniu - 0.875 Acres
- (iii) Gerald Macharia Gathimbu - 0.775 Acres
- (iv) Nancy Nyambura Kariuki - 0.875 Acres
- (v) James Mwangi Kagera - 0.550 Acres

2. There was no affidavit of protest or other objection to confirmation filed, and there was a consent in Form 37 signed and filed by the other beneficiaries. On 23/07/2010 the court (Sergon, J) allowed the summons for confirmation as prayed, and a certificate of confirmation of grant dated 23/07/2010 was issued. It provided for distribution of the two properties of the estate as proposed in the joint affidavit sworn in support of the summons.

3. On 02/09/2011 the 1st Administrator (**Kiragu Mwangi**) applied by chamber summons dated 30/08/2011 for two orders –

(i) An order directing the Deputy Registrar to “sign all the necessary transfer documentations” in place of James Mwangi Kagera (the 2nd Administrator).

(ii) The Murang’a District Surveyor be ordered “to subdivide/partition land parcel number LOC 14 Kiru/779 as per the certificate of confirmation of grant issued by thiscourt on 23rd July 2010”

4. That application was filed against the 2nd Administrator (**James Mwangi Kagera**) as Respondent. It was alleged in the supporting affidavit sworn by Kiragu Mwangi that James Mwangi Kagera had refused to co-operate with the other beneficiaries to effectuate the certificate of confirmation of grant.

5. James Mwangi Kagera filed a replying affidavit on 15/09/2011 sworn by himself. He stated that the 1st Administrator/Applicant had “failed to include parcel or piece of land number LOC 14/Kagumoini/616 in his application”; that the 1st Administrator/Applicant had given him the smallest acreage in parcel number LOC 14/Kiru/779 without reasonable cause; that the 1st Administrator/Applicant and other beneficiaries had held meetings without informing or calling him to meet with them; that the order of confirmation of grant of 23/07/2010 was issued without his knowledge and in his absence; that 1st Administrator/Applicant and other beneficiaries “hid” from him the proceedings of this cause; that he (2nd Administrator/Respondent) did not appeal against the order confirming the grant because he did not know that the grant had been confirmed until he was served with the application at hand; and that the court should, in effect, set aside the order confirming the grant and re-open the issue of distribution so that the 1st Administrator/Applicant and other beneficiaries can explain why the 2nd Administrator/Respondent was getting the smallest portion of the Deceased’s estate.

6. The 2nd Administrator/Respondent filed a further affidavit on 31/10/2011 (which he called “supporting affidavit”). In it he requested the court to order that the two parcels of land comprising the Deceased’s estate be shared equally among his 7 dependants so that each gets a total of 0.828 acres.

7. The chamber summons dated 30/08/2011 was heard on 14/11/2011 (Wakiaga, J) in the presence of James Mwangi Kagera but in the absence of Kiragu Mwangi. In a considered ruling dated and delivered on 25/11/2011 the learned Judge delivered himself as follows -

“The applicant has not provided any reason and/or justification for the uneven or inequitable distribution herein, and the court is of the considered view that the Respondent has reasonable justification for refusing to execute the transfers herein.

Since the issue herein is that of distribution of the assets of the Deceased, and since the Applicant has not shown any jurisdiction as to the way he would like to distribute the assets...., and taking into account the fact that the Respondent seems to be unfairly treated in the proposed distribution; and in exercise of the powers granted under Rule 73 of the P & A Rules, I do hereby order that the parcels of land herein being LOC 14/Kagumoini/616 and LOC 14/Kiru/779 be shared equally among the seven (7) beneficiaries of the estate of Gathimbu Munyua, and that the Murang’a District Surveyor do subdivide the two parcels of land as practically possible in equal shares or equitably should there be special circumstances to warrant the same, and the cost of the same exercise should be shared between all the beneficiaries of the estate herein, and the two administrators to sign all the necessary

documents for transmission upon completion of the sub-division exercise”

8. It appeared to have escaped the attention of the learned Judge that there was an order of confirmation of grant (which he had in effect just set aside) given by a Judge of co-ordinate jurisdiction (Sergon, J), and that there was no proper application before him (Wakiaga, J) for review and setting aside of that order. Furthermore, it also appeared to escape the Judge’s attention that the application to confirm the grant (which resulted in the order of confirmation of grant made by Sergon, J) was a joint application by both administrators apparently signed by both, and which was supported by a joint affidavit duly sworn by both before a commissioner for oaths.

9. In his two affidavits sworn in response to the application before Wakiaga, J the 2nd Administrator/Respondent (James Mwangi Kagera) did not allege at all that he never applied for confirmation of grant, or that the signature thereon and on the joint supporting affidavit purporting to be his was in fact a forgery.

10. So it does appear, with respect, that my learned brother, Wakiaga, J was clearly in grave error in setting aside the order of confirmation of grant without a proper application in that regard before him, and apparently without a proper appreciation of all surrounding facts. The learned judge even went further than the 2nd Administrator/Respondent had requested (he had sought a re-hearing of the summons for confirmation of the grant); he in effect set aside the order of confirmation of grant made by Sergon, J, but did not order a re-hearing of the summons for confirmation as sought by the 2nd Administrator. Instead he ordered a new distribution in accordance with the 2nd Administrator’s proposals.

11. It is thus not surprising that the 1st Administrator (Kiragu Mwangi) applied by **summons dated 02/11/2012** for review and setting aside of the ruling and orders of Wakiaga, J of 25/11/2011, and for distribution as ordered by Sergon, J to be reinstated. That application, which is the subject of this ruling, is opposed by the 2nd Administrator (James Mwangi Kagera).

12. I have read the supporting and opposing affidavits. I have also considered the written submissions filed for the parties by their respective advocates.

13. The application calls upon me, in effect, to correct the errors of fact and law committed by my learned brother, Wakiaga, J, a judge of the same jurisdiction as I. I have already pointed out elsewhere above what those errors might be. To entertain the application would be to compound the mistakes made by Wakiaga, J in improperly setting aside the order of confirmation of grant made by Sergon, J.

14. It is not for this court to correct the errors of law of, or the misapprehension of facts by, Wakiaga, J. That is for the **Court of Appeal** to do. The best I can do now in exercise of my inherent jurisdiction, is to grant to the 1st Administrator (though not sought just yet) leave to appeal against the orders of Wakiaga, J of 25/11/2011 and to lodge the necessary notice of appeal. This leave must be exercised within thirty (30) days of delivery of this ruling. In default it will automatically lapse.

15. For now suffice it to say that the 1st Administrator’s application by summons dated 02/11/2012 is hereby refused. It is dismissed with no order as to costs. It is so ordered.

DATED AND SIGNED AT MURANG’A THIS 19TH DAY OF MAY 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG’A THIS 20TH DAY OF MAY 2016