



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCC MISC APP 28 OF 2015

IN THE MATTER OF THE ESTATE OF MUGO MUKONO (DECEASED)

CHARITY WAWIRA.....APPLICANT

VERSUS

JACOB NYAGA MUGO.....RESPONDENT

RULING

1. The applicant seeks a revocation of the confirmed grant issued by the Runyenjes Principal Magistrate's court in succession cause No. 119 of 2014 according to her affidavit dated 17th February 2015, which she adopted as her evidence. The applicant (PW 1) testified that the respondent/administrator is her own brother. She also testified that he obtained a confirmed grant of letters of administration intestate secretly.
2. The applicant further testified that the court should sub-divide their father's land among the beneficiaries. In doing so, she testified that those who have done developments on their portions of land should not be evicted from those developed portions. It was also her evidence that she never gave her national identity card to the respondent to file the succession cause in the Runyenjes magisterial court. While under cross-examination, she admitted giving the respondent her national identity card, but they disagreed on the mode of distribution of the suit land. She also admitted that the family including herself sat down and discussed on the mode of distribution of the suit land.
3. It was also her evidence that she is not comfortable with the distribution of the suit land. Furthermore, she admitted under cross-examination that she is the only one who protested against the mode of distribution. She went further to testify that she does not know whether other family members have protested against the mode of distribution. She further testified that it was not true that their father had told them his wishes in respect of the sub-division and distribution of the suit land. Her evidence on this point is that the sub-division and distribution of the land was left to their mother, but who also had not done so before she died.
4. Furthermore, the applicant testified that their father had not indicated to each of the beneficiaries where they were to settle and build. It was also her evidence that her two sisters Kellen Gicuku and Salome were not shown where to settle. Her further evidence was that the subdivision of the land had been agreed as follows: 1 ½ acres was to be allocated Jacob Nyagah Mugo, another 1 ½ acres was allocated to Cleopas Mwaniki Mugo. Lucy Njura Mugo and the applicant were each to get ¾ of an acre. This mode of sharing was agreed after the family sat down and discussed.
5. The applicant also testified that their late father did not communicate to her his oral wishes on the subdivision and distribution of the suit land. The applicant denied that there was an old man who had been told by their late father to look after their affairs following his death. She also denied that this old

man had assisted the family in the burial of their parents. However, the applicant admitted that in Kiambu customs if one goes against the wishes of his deceased father, he would be cursed. When she was shown defence a photograph being defence exhibit D1 and she recognized the old man in that photograph as John Karanja (RW 2), who testified on behalf of the respondent. She denied knowing that Njeru Karanja (RW 2) was the one who represented their late father in their weddings and in the management of their family matters. She also denied being aware that their father had directed that no one should file a case in court to challenge his wishes in respect of the sub-division and distribution of the suit land.

6. The applicant (PW 1) called Bernard Kiarago (PW 2) as her witness. PW 2 is a village elder and a farmer. He knows the applicant and the respondents as village mates. The evidence of PW 2 supports that of the applicant in the mode of subdivision and distribution of land. PW 2 also testified that the mother of the applicant and respondent were given 1 ½ acres but they died before transferring the land to their children. He also testified that John Njeru (RW 2) had gone to see the Assistant Chief Nicasio Nyaga to get permission to hold a family meeting concerning the subdivision and distribution of the suit land. It is also his evidence that Jacob Nyaga Mugo and Cleopas Mwaniki Mugo were each given 1 ½ acres while the applicant and her sister Lucy Njura Mugo were given ¾ of an acre each, part of which belonged to their late mother's share of one and half acres. That mode of distribution was agreed upon by all the parties.

7. However, matters changed when their sister Kellen Gicuku Mugo was chased by her husband. She returned home and both the applicant and Lucy Njura Mugo refused to accommodate her. As a result the respondent accommodate her. Kellen Gicuku Mugo started to claim the share that belonged to their late mother.

8. Jacob Nyaga Mugo (RW 1) testified in opposition to the evidence given by the applicant. His evidence is that his brother Cleopas Mwaniki Mugo and himself were each given 1 ½ acres. He also testified that their deceased father and mother expressed their wishes that the balance of 1 ½ acres was to be given to their late mother and sisters. This evidence is confirmed by John Njeru Karanja (RW 2). The evidence of John Njeru Karanja is that the deceased expressed his wishes that his land parcel number Gature/Nembure/4082 was to be subdivided and distributed among his children and his wife as already stated. Following compliance with the wishes of their late father, the respondent filed succession cause in Runyenjes magisterial court and as a result a confirmed grant was issued and was produced in court as defence exhibit "RW EX 1". He further testified that the applicant was not satisfied with the mode of distribution as a result of which she filed a caution in respect of the suit land. It was also his evidence that the suit land should remain subdivided in terms of the confirmed grant. He also testified that Kellen Gicuku Mugo should have a share of the suit land that is now owned by Lucy Njura Mugo and the applicant.

8. In the light of the foregoing evidence, the issues for determination are as follows. First, whether or not the deceased expressed his wishes as to the mode of subdivision and distribution of the land. Second, whether or not the 1 ½ acres that was allocated to their late mother and her daughters was to be shared among the daughters of the deceased. Third, who should bear the cost of this cause.

9. I have considered the evidence of the applicant and her witness (PW 2) and that of the respondent and his witnesses. I believe the evidence of the respondent and his witnesses that their late father expressed his wishes in respect of the subdivision and distribution of the suit land. I find that the deceased in his wishes allocated 1 ½ acres to each, Jacob Nyagah Mugo and Cleopas Mwaniki Mugo. Furthermore, I find that the balance of 1 ½ acres was to be shared among the wife of the deceased and his daughters. I further find that both the applicant, the respondent and John Njeru Karanja (RW 2) were present when both parents expressed their joint wishes on the mode of distribution of the suit land. I do not believe the evidence of the applicant that she was not aware of the wishes of her parents. I also do not believe her evidence that she never gave her national identity card to the respondent to file succession proceedings. Finally, I find that she participated in the family meetings in which resolutions were made to file the succession cause in the magisterial court at Runyenjes.

10. Furthermore, I find that that agreed mode of distribution changed upon the return of Kellen Gicuku Mugo who had been chased by her husband. Following her return, she was accommodated by Jacob Nyagah Mugo (RW 1). It is the evidence of Jacob Nyaga Mugo and that of John Njeru Karanja that Kellen Gicuku Mugo is entitled to a share of her mother's share in the 1 ½ acres which had been given to their mother and the daughters of the deceased.

11. In the circumstances, I find that Kellen Gicuku Mugo is entitled to a share of her mother's share of the suit land, which consists of 1 ½ acres. It follows therefore that the 1 ½ acres share of their mother and daughters of the deceased shall be divided equally among the applicant, Lucy Njura Mugo and Kellen Gicuku Mugo in accordance with the wishes of their parents, with each getting a half an acre, excluding Salome Njoki Mugo, who renounced her share in the suit land. After considering the entire evidence, I find that the deceased was a visionary person who provided for both his male and female children and I hereby approve his mode of distribution in terms of the confirmed grant dated 23rd October 2014, which was put in evidence as defence exhibit RW Ex 2. In distribution of the suit land the respondent should take into account the developments especially the buildings on the suit land.

12. As regards costs, this being a family dispute, I hereby direct that each party will bear its own costs.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **28th** day of **SEPTEMBER 2016**

In the presence of both the applicant and the respondent

Court clerk Njue

J.M. BWONWONGA

JUDGE

28.09.16