



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 134 OF 2014

In the matter of the Estate of SABASTIAN KAGOCHE M'NJAU (Deceased)

TARCISIO NYAGA KAGOCHE..... PETITIONER

V E R S U S

PATRICK KIVUTI MURIITHI.....1ST APPLICANT

MARTIN KARIUKI MURIITHI.....2ND APPLICANT

FLORENCE WANJA MURIITHI.....3RD APPLICANT

DENIS MUKUNDI MURIITHI.....4TH APPLICANT

BEATRICE WANJIKU MUNENE.....5TH APPLICANT

ANDERSON MURAGE MURIITHI.....6TH APPLICANT

A N D

PETER MUCANGI MURIITHI.....RESPONDENT

R U L I N G

1. The six (6) applicants in their application dated 15/3/2016 seek for rectification of the certificate of confirmation issued on 12/3/2015 to reflect the share given to the respondent Peter Mucangi Muriithi to be held in trust for himself and the applicants; that the 1st applicant Patrick Muriithi Kivuti be included as trustee for the applicants alongside the respondents.
2. That any proceeds of sale received by Peter Muriithi Muchangi prior to making this application be declared to have received in trust for himself and the applicants; that the respondent be ordered to account for the proceeds of sale of plots Nos. Embu Municipality 1112/621, 1112/307 1112/440 and 1112/508.
3. The affidavit of Patrick Kivuti Muriithi supports the application. Briefly, it is stated that the applicants are the grandchildren of the deceased Sabastian Kagoche M'Njau Alias Sabastiano Kagoche. He was the father of the applicants' mother Vengerina Muthanje Muriithi who died in June 2010. The late Vengerina is a heir among others to the estate of the deceased in this case.
4. It was agreed by the deceased's children that Vengerina's share in the estate was to be inherited by her children the applicants herein. The first born son of Vengerina, the respondent herein was nominated to

hold their late mother's share in trust for himself and his siblings. The respondent's name was then included in the certificate of confirmation as an heir of the estate of the deceased.

5. However, it was not indicated in the grant that the respondent was to hold his late mother's share in trust for himself and his siblings. The beneficiaries have now sold the above named properties which were registered in their joint names and shared the proceeds between themselves. The respondent has refused to release to the applicants their share of the proceeds meant for them.

6. The 1st applicant states that his siblings and himself are not opposed to the sale of the properties but are opposed to the respondent taking the proceeds of sale alone and denying the applicants their rightful share.

7. The respondent opposes the application on grounds that he was included as a direct beneficiary in his grandfather's estate and that his late mother's name does not feature in these proceedings. He states that the grant was confirmed without any objection from the applicants and none of them have applied for revocation of the same.

8. He further states that the authority to file this application on behalf of all the applicant's was forged in that the 6th applicant Anderson Murage Muriithi did not sign it. He further states that he was not aware of any agreement by his late mother's children to have him appointed to hold any share in trust for the family. It was not until he was served with this application that he came to know that the applicants were opposed to him being a beneficiary for his won benefit.

9. The petitioner filed a replying affidavit sworn on 3rd May in which he supported the application. He states that the applicants and the respondent are children of his late sister Vengerina Muthanje Muriithi. The deceased's family agreed to put the respondent as a beneficiary in the estate to represent the family of his late sister.

10. The respondent was to be a trustee for the family although it was not indicated in the certificate of confirmation. It is correct that some properties have been sold by the beneficiaries and proceeds received. According to him, it is fair that the respondent do account for the money already received and be ordered to share the proceeds with his siblings.

11. The 1st applicant in his supplementary affidavit sworn states that the applicants have no problem with the mode of distribution but are only claiming their share of the sale proceeds of three plots sold by the beneficiaries only to the extent of the late mother's share. He further states that his brother Anderson Mureithi authorized him to proceed with the application. Further that the document marked PKM2 was included by error. He wishes to rely on PKM1 which is an agreement signed by all the beneficiaries in addition to other documents.

12. In his supplementary affidavit, the respondent reiterates some averments in his replying affidavit and adds a few facts. He states that the annexure PKM1 is an agreement purportedly signed by the beneficiaries seven months after the grant was confirmed and should be disregarded.

13. Both parties filed written submissions in which they expounded their arguments in disposal of this application. Messrs Beth Norongo & Co. Advocates represented the applicants while A.P. Kariithi represented the respondent.

14. It is not in dispute that the applicants and the respondent are grandchildren of the deceased. It is their mother who was the daughter of the deceased alongside the beneficiaries named in Form P&A.5. The respondent was the only additional beneficiary to the children of the deceased to stand in the place of his deceased mother. It was not disputed that the respondents and the applicants are all children of the late Vengerina Muthanje, a daughter of the deceased.

15. Section 74 of the Act deals with rectification of grant to correct errors which may have occurred while

confirming the grant. The applicants state that they are in agreement with the mode of distribution of the estate. The application seeks for rectification to factor in the issue of trust on part of the respondent so as to include the applicants to benefit from the share of their late mother. This request may be dealt with in the context of Section 74 subject to the applicants and the administrator satisfying the court on the standards required.

16. The administrator in his affidavit states that the family of the deceased had a meeting in which it was agreed that their late sister would be given a share. It was also agreed that a share was to be bequeathed to the respondent to hold it in trust for himself and the applicants. The administrator is the maker of the summons for confirmation of grant. His evidence that he omitted to expressly state the is credible. This evidence supports the application of the applicants and was not opposed by any of the beneficiaries except by the respondent himself. He claimed that he was very close to the deceased and that is why he was slotted in for a share in the estate.

17. Its important to note that there is no evidence of any wish of the deceased to the effect that his grandson should be given a share in the estate. Neither does the respondent say that there existed any such wishes let alone tendering evidence to that effect. The administrator would be expected to know whether the deceased expressed any such wishes. The deceased died intestate and this is not in dispute. It follows that the only people who would have consented to the respondent being included as a beneficiary are the children of the deceased who include the administrator.

18. It is the administrator who represents the deceased in the estate after the confirmation of the grant and he is ranked in priority over and above the beneficiaries. The Law of Succession provides for the inclusion of grandchildren as heirs where their parents beneficiaries have passed on.

19. It was held in the case of **CHRISTINE WANGARI GACHIGI VS ELIZABETH WANJIRA EVANS & 11 OTHERS [2014] eKLR**, the Court of Appeal in a case with similar facts that:-

We affirm the learned trial Judges decision that the beneficiaries of the estate of the deceased herein comprised all the deceaseds' children surviving as at the time of distribution and the grandchildren of the deceased children of the deceased who had either predeceased her or died shortly after presentation of the Succession Proceedings to court.

20. The holding in that case is in tandem with the provisions of Section 38 of the Act which is applicable to the distribution of the deceased's estate, the deceased was survived by several children and no spouse. His property was therefore divisible in equal shares among his children.

21. The legal position of a grandchild is that he/she can only inherit the share of his/her deceased parent. If the parent is survived by more than one child, the share shall be divided equally among the children.

22. In this case, the law favours the applicants in that the respondent cannot inherit his late mother's share in the deceased's estate alone and deny his siblings their inheritance. The respondent challenged the agreement by the applicants annexed to the application appointing him as their representative as not being genuine because it was made after the grant was confirmed. The children of deceased all signed this agreement. I believe the late entry must have been necessitated by the act of the respondent denying the implied trust after the grant was confirmed.

23. The agreement is evidence that the intention of the administrator and all the children of the deceased was to have the respondent hold his mother's share in trust for himself and his siblings. Notwithstanding the agreement, the law is very clear as to inheritance by children on one part and grandchildren on the other part.

24. I reach a conclusion that the applicants have satisfied the court that there was an error or omission in the grant indicating the respondent as a beneficiary without factoring in the trust bestowed upon him to hold the share of his late mother in the estate on behalf of himself and for the applicants. The corroboration by the administrator of the evidence of trust is proof that there was an error that is

rectifiable under Section 74 of the Act.

25. This being the position, I find that the applicants are entitled to equal shares of any proceeds of sale received by the respondent. Consequently, the respondent has a duty to account for all the funds he has received from the sale of Embu Municipality 1112/307, 1112/440, 1112/621 and 1112/508.

26. In the interests of justice, the first applicant Patrick Kivuti Muriithi will be joined to the respondent to hold in trust of their late mother's share which was bequeathed to the respondent in trust for themselves and all the applicants.

27. I find this application merited and allow it in terms of prayers 2, 3, 5 and 6. Each party to meet their own costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF NOVEMBER, 2016.

F. MUCHEMI

J U D G E

In the presence of:-

Ms. Muriuki for Ms. Ndorongo for Applicants

Mr. Mugambi for A.P. Kariith for Respondent