



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 511 OF 1995

**IN THE MATTER OF THE ESTATE OF MICHAEL GACHIHI MBUI alias MICHAEL
GACHEHE MBUI (DECEASED)**

JUDGMENT

1. The deceased herein died on 11th October 1991. Representation to his estate was sought in a petition lodged in this cause on 8th March 1995 by Damaris Wairimu Gacihhi in her alleged capacity as his widow. The deceased was expressed to have been survived by ten (10) individuals, being the widow and nine (9) children. The widow was named as Damaris Wairimu Gacihhi, while the children were Bernard Willy Mbue, Margaret Muthoka, Geoffrey Weru Gacihhi, Robert Mathenge Gacihhi, Wilson Karimi, David Gachanja Gacihhi, James Ndiritu, Lucy Njeri and Jane Njambi Karingu. He was expressed to have died possessed of Muruguru-Githunguri Farm/316, the house at Ruringu, a house at an unknown place, a plot at Ndaiga, money in a bank account with the Standard Bank Nyeri, three (3) cows, a coffee factory, irrigation equipment and shares with Barguret and KPCU. A grant of letters of administration intestate was duly made to the petitioner on 15th August 1995.

2. The original administrator, Damaris Wairimu Gacihhi, died on 30th September 1997, and she was replaced as administrator by Gachanja Gacihhi, James Nderitu Gacihhi and Jane Njambi Karingu, on 7th December 2011, when the grant was rectified. That followed an application dated 19th October 2011.

3. The application I am called upon to determine is a summons dated 4th April 2014 which seeks confirmation of the said grant. It is brought at the instance of one of the administrators, Gachanja Gacihhi, who swore an affidavit on even date. The survivors identified as entitled to a share in the estate are eight (8): Elizabeth Wangui Gacihhi, James Nderitu Gacihhi, Gachanja Gacihhi, Jane Njambi Karingu, Ann Wanjiku Ndirangu, Martin Muchemi, Lucy Njeri Gacihhi and Geoffrey Weru Gacihhi. Two of them are daughters in law, while one is said to be a nephew of one of the dead sons of the deceased. The assets to be distributed are Aguthi/Muruguru/1197, 1198, 1200, 1201, 1202, 1203, 1204, 1205 and Aguthi/Gatitu/667/50. The said assets are shared out at varying ratios between Elizabeth Wangui Gacihhi, James Muriithi Kihara, James Ndiritu Gacihhi, Gachanja Gacihhi, Jane Njambi Karingu, Ann Wanjiku Ndirangu and Martin Muchemi. There is a consent to the proposed confirmation by six (6) individuals namely Elizabeth Wangui Gacihhi, James Ndiritu Gacihhi, Gachanja Gacihhi, Jane Njambi Karingu, Ann Wanjiku Ndirangu and Martin Muchemi. The consent to the mode of distribution is signed by Elizabeth Wangui Gacihhi, James Muriithi Kihara, James Ndiritu Gacihhi, Gachanja Gacihhi, Jane Njambi Karingu, Ann Wanjiku Ndirangu and Martin Muchemi.

4. The application is opposed by two individuals, Ndiritu Gikaria and Lucy Njeri Gacihhi. Both swore affidavits of protest on 20th May 2013. Lucy Njeri Gacihhi avers to be a daughter of the deceased, and complains that although she has been listed as a survivor of the deceased, she has not been allotted any share in the estate. She contends that her marital status should not be a bar to her being provided for. Ndiritu Gikaria is a son in law of the deceased. He alleges that he had bought three (3) acres out of

Aguthi/Muruguru/1203 from a son of the deceased called Bernard Willy Gachihi, who is also dead. He alleges that the deceased had given the said property to the said Bernard Willy Gachihi, but Bernard Willy Gachihi died before he could transfer the property to him. He complains that the administrators have failed to give him his three acres in the proposed distribution. He mentions that there is a suit between him and the widow of Bernard Willy Gachihi in Nyeri HCCC No. 34 of 2008, where she seeks his eviction from the suit land.

5. In rejoinder to the protest affidavits, the administrators swore an affidavit on 13th August 2013. They state that the two objectors are husband and wife. They acknowledge that Ndiritu Gikaria had bought a portion of Aguthi/Muruguru/1203 from Bernard Willy Gachihi, and state that the latter died before the transaction could be completed. They leave it to the court to make a determination on the matter.

6. There is also an affidavit by the widow of Bernard Willy Gachihi, Elizabeth W. Gachihi, sworn on 29th November 2013. She avers that her husband was entitled to Aguthi/Muruguru/1203, but she denies that her husband had sold a portion thereof to Ndiritu Gikaria. She says that she was unaware of the sale, but at the same time says that the sale was null and void as it was contrary to section 45 of the Law of Succession Act, Cap 160, Laws of Kenya. She denies that Ndiritu Gikaria had been put in possession of the property by her husband. She accuses him of intermeddling with the property.

7. The affidavit by Elizabeth W. Gachihi provoked a response from the administrators. The reaction was vide an affidavit by Gachanja sworn on 13th February 2014. He reiterates that Bernard Willy Gachihi had sold three acres of Aguthi/Muruguru/1203 to Ndiritu Gikaria. The buyer was allegedly put in possession of the property as soon as he paid the first installment. After Bernard Willy Gachihi died, his widow Elizabeth W. Gachihi began to complain about Ndiritu Gikaria's occupation of the said property leading to the filing of the suit at the High Court at Nyeri. He asserts that the protestors ought to be settled by Elizabeth W. Gachihi from the share of the estate that is proposed to be given to her on behalf of her departed husband and his family. He avers that Elizabeth W. Gachihi was always aware of the said sale.

8. Elizabeth W. Gachihi responded to the administrator's affidavit by her own affidavit sworn on 21st July 2014. She reiterates her lack of awareness of the alleged sale, asserting that the suit property has never been in possession of Ndiritu Gikaria. She goes on to mention persons who in her case were in possession instead. There are also affidavits allegedly sworn by four sons of Bernard Willy Gachihi - Bernard William, William Maina, Mike Kigotho and Anthony Njogu – asserting that their father had never told them that he had sold property to the protestors.

9. Elizabeth W. Gachihi swore another affidavit on 13th February 2015, where she makes two points. Firstly, she argues that the sale in question could not be valid for it contravened provisions of the Land Control Act. Secondly, she acknowledges that Lucy Njeri Gachihi, as a child of the deceased, was entitled to a share in the estate of her deceased father, but argues that that share ought not be out of the share due to her. She also argues that a property known as Aguthi/Muruguru/1206 belonging to the deceased had been unprocedurally transferred from the name of the deceased to that of James Nderitu Gachihi. He urges the court to take these matters into account when distributing the estate.

10. Directions were given that the matter be disposed orally.

11. The oral hearing started on 16th December 2014. The first to testify on the protestor's side was Nderitu Gikaria. His case was that he was not included in the proposed distribution, yet he had acquired a portion of the estate of the deceased having bought three acres out of Aguthi/Muruguru/1203 from a son of the deceased. He averred that the property was still in the name of the deceased at the time he bought it from the son of the deceased. He stated that he took possession thereof. He contended that his exclusion was discriminatory as another purchaser had been factored in the distribution. He also argued that his wife, being a daughter of the deceased, was entitled as of right to a share in the estate of the deceased.

12. The next to testify on the protestor's side was the other protestor, Njeri Nderitu. She stated that she was a child of the deceased. She complained that the proposed distribution excluded her from benefit

although she was a child of the deceased. She stated that she wanted to be included in the distribution. She argued that even though she was married, she was entitled to be given a share in her father's estate. She testified that the other protestor was her husband, who had bought a portion of the land due to her brother Bernard Willy Gachihi. She said that her brother, the seller, had allowed them to have possession of the suit land. It was her case that it had been agreed within the family that if her husband was allotted the three acres, she would waive her entitlement to a share in the estate, and that was why she did not want to assert her rights initially. Matters changed after her sister in law sought to evict them from the land.

13. The protestor's last witness was Gachinga Gachihi, a son of the deceased and one of the administrators of the estate. He testified that their late brother Bernard Willy Gachihi had sold land to the protestors, and it had been agreed that he would give them their portion after confirmation. He died before confirmation of the grant, and it was assumed that his widow would cede the protestors' portion to them. He stated that the protestors took possession of the property during the lifetime of Bernard Willy Gachihi, and that there was no protest from the said Bernard Willy Gachihi at the time.

14. The respondent's case opened on 2nd March 2015. Only one witness, Elizabeth Wangari Gachihi, testified. She stated that she was a beneficiary of the estate through her husband, Bernard Willy Gachihi. She averred that her husband was entitled to the property known as Aguthi/Muruguru/1203. It had not been transferred to him by the deceased, but he had been merely given permission to utilize it. She asserted that she was unaware of the alleged sale of land to Nderitu Gikaria. She stated that she had not seen any land control board's consent to the alleged transaction, adding that such consent could not possibly be obtained as the property belonged to a dead person. On the second protestor, she conceded that Lucy Njeri Gachihi was a child of the deceased, and was entitled to a share of the estate, but she stated that that share ought not come out of what was due to her late husband, Bernard Willy Gachihi. She denied that the protestors ever had possession of the subject property. She explained that the Nyeri case in HCCC No. 34 of 2008 was dismissed on the grounds that she lacked the requisite legal status to prosecute it as her late husband did not have any legal capacity to transfer it to anybody.

15. At the close of the oral hearing I gave directions on filing of written submissions. The parties have complied with the directions and filed detailed written submissions, complete with authorities.

16. Confirmation of grants is provided for in section 71 of the Law of Succession Act. At confirmation, the court is concerned with two issues. Confirmation of the administrators and distribution of the estate. From what is before me, the issue of administrators does not arise, the question that has arisen, for determination by the court, relates to the distribution of the estate. The portion of section 71 of the Law of Act relevant to distribution is the proviso to section 71(2)(2A), which states as follows-

'Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.'

17. The effect of the proviso is that the court must be satisfied as to the identities of all the persons who are beneficially entitled to a share in the estate, and also the shares to which such persons are entitled. This would mean that there must be a disclosure, in the application for confirmation, of all the persons that the administrators have found to be beneficially entitled to a share in the estate. Such persons could be survivors of the deceased or creditors or any other person beneficially entitled to a share in the estate in any way. There should also be a disclosure of all the assets that are available for distribution and a mode indicating how it is proposed that the assets be distributed.

18. In the application before me, the administrators have identified eight (8) individuals as the persons who have survived the deceased. The list does not tally with that in the petition for grant. It is to be presumed that the persons available to share the estate of the deceased ought to be the same as those listed in the petition for grant. If there is a variation between the persons listed in the petition and that listed in the confirmation application, the administrators ought to explain the discrepancy. The names that appear in the application and are not in the petition are of Elizabeth Wangui Gachihi and Ann Wanjiku Ndirangu.

The names in the petition that are omitted from the list of survivors in the confirmation application are Bernard Willy Mbue, Margaret Muthoka and Robert Mathenge Gachihi. It could be that these individuals have died, but if that be so, then the administrators are obliged to disclose that fact and provide proof thereof. It should also be disclosed whether the dead children of the deceased were survived by spouse and or children.

19. The distribution proposed is to only six (6) of the survivors identified in the confirmation application. Two (2) of the survivors identified in the application are not provided for, that is to say Lucy Njeri Gachihi and Geoffrey Weru Gachihi. The two (2) survivors mentioned in the petition and omitted in the confirmation application, that is to say Bernard Willy Mbue, Margaret Muthoka and Robert Mathenge Gachihi, have not been provided for. There is no explanation for these discrepancies.

20. Furthermore, the proposed distribution gives estate property to individuals who have not been ascertained in the application as survivors of the deceased. There is an allotment to James Muriithi Kihara. It is not explained in the application who this person is with regard to the estate and why he has been allotted a share in the estate. If he is beneficially entitled to a share then he ought to have been entered into the list of survivors, and his relationship with the deceased explained.

21. There is also the question of Martin Muchemi. He is described as a nephew of a son of the deceased called Wilson Karimi Gachihi. The said Wilson Karimi Gachihi is said to be deceased. There is no indication as to whether he was survived by a spouse or children, or whether he died single and without children. That ought to be clarified before the share due to him, if at all there is one, is allotted to anybody else. If it were to be assumed that he died without spouse or issue, there would still be a question as to whether a nephew would be entitled to directly take share from the estate of deceased herein without first pursuing representation to the estate of the said Wilson Karimi Gachihi. The issue is whether Martin Muchemi can accede to the share of Wilson Karimi Gachihi in the manner proposed. Does he have any standing to pursue that interest? That is a matter that ought to have been addressed by the administrators in the application.

22. Rule 40(5) of the Probate and Administration Rules envisages the filing of consents by survivors, or persons beneficially entitled, to a proposed distribution. Although Lucy Njeri Gachihi and Geoffrey Weru Gachihi are listed in the application as survivors, their names are not listed in the consents lodged simultaneously with the application, and therefore the two did not consent to the confirmation and the proposed distribution. The consents of the other surviving children of the deceased omitted in the application – such as Bernard Willy Mbue, Margaret Muthoka and Robert Mathenge Gachihi – or of their families, ought to have been obtained. It is plain from the material before me that quite a number of the children of the deceased have not been allotted shares in the proposed distribution. No explanation has been given in the application for this. I have very carefully and scrupulously gone through the record looking for evidence of a deed of renunciation of interest in the estate by the excluded children or a document establishing waiver of entitlement by such children, and I have seen none.

23. The deceased died intestate. As at the date the confirmation application was filed the deceased's surviving spouse had also passed on. The estate was therefore to be distributed amongst the surviving children of the deceased. Section 38 of the Law of Succession Act governs distribution in the circumstances. The said provision states as follows-

'Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.'

24. The said law expects equal distribution of an intestate estate amongst all the children of the deceased. No distinction is brought out as between male and female children, or between the married and the unmarried. All are to be treated equally. All are to be provided for, unless one or more of them have waived or renounced their entitlement to a share in the estate. It is up to the person beneficially entitled to an estate to waive their right, no other has a right to decide on who ought to be excluded from benefit. The effect of this is that Lucy Njeri Gachihi and all other children excluded from benefit are all equally

entitled to a share unless there exist a reason for their exclusion, which ought to be stated or documented in the application.

25. Ndiritu Gikaria claims to have acquired a stake in the estate. The said stake was allegedly acquired after the deceased died, from among one of the sons of the deceased. The stake acquired was alleged to be immovable property.

26. The estate of a dead person vests in the personal representatives by virtue of section 79 of the Law of Succession Act. the said provision states as follows, for avoidance of doubt:-

‘The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.’

27. Upon the property so vesting in the personal representatives, the said personal representatives are vested with the powers set out in section 82 of the Law of Succession Act, and become subject to the duties enumerated in section 83 thereof. Additional powers are conferred and duties imposed by the Trustee Act, Cap 167, Laws of Kenya. One of the powers conferred on personal representatives is the power of sale of estate property.

28. The record reveals that the person from whom Ndiritu Gikaria acquired the subject property was not the registered owner thereof, and therefore he could not possibly have had any legal title to convey to him. The said person was neither an administrator of the estate of the deceased, and therefore he could not possibly transact with him over estate property. Even if he were an administrator, he would still have had to contend with section 82(b)(ii) of the Law of Succession Act. The said provision states-

‘(ii) no immovable property shall be sold before confirmation of the grant.’

29. In any event, the claim by Ndiritu Gikaria is not against the estate of the deceased herein, for he never transacted with the deceased, or with the administrators of the estate of the deceased. His claim can only be against the person he transacted with, and should that person be dead, his claim should directed against that person’s estate in a civil suit properly brought before the proper forum, or in a cause relating to the estate of that person.

30. In view of what I have stated above, i am moved in the circumstances to make the following orders:-

(a) That the confirmation application dated 4th April 2014 is not properly grounded, at least on the proposed distribution, for the reasons that I have given here above, and I shall therefore dismiss it;

(b) That the administrators shall bring a fresh confirmation application wherein they shall address all the matters that I have raised in the judgment herein;

(c) That all the persons beneficially entitled to a share in the estate, including Lucy Njeri Gachihi, shall be provided for unless they have waived or renounced their rights thereto;

(d) That the claim by Ndiritu Gikaria cannot be secured from the estate of the deceased herein for it lies elsewhere, and he is therefore not entitled to be provided for from the estate of the deceased;

(e) That the estate comprises of property situated at Aguthi of Nyeri County, consequently I do hereby order that the cause herein be transferred to the High Court of Kenya at Nyeri for final disposal; and

(f) That there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF NOVEMBER, 2016.

W. MUSYOKA

JUDGE