



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
SUCCESSION CAUSE NO. 6 OF 2015

IN THE MATTER OF THE ESTATE OF MUNGAI GITAU REBE (DECEASED)

CONSOLATA NJERI MUNGAI.....1ST PETITIONER/APPLICANT

-VERSUS-

HANNAH WANGARI MUNGAI.....2ND PETITIONER/RESPONDENT

R U L I N G

1. On 18/2/2015 this court endorsed the written consent dated 2nd February, 2015 concluded by the Petitioner **Consolata Njeri Mungai** and **Hannah Wangari Mungai**, the Objector.

2. The said consent was in the following terms:

“1. The grant of letters of administration intestate issued on the 15th March 2010 to CONSOLATA NJERI MUNGAI be cancelled.

2. A new grant be issued to CONSOLATA NJERI MUNGAI, the Petitioner herein jointly with Objector HANNAH WANGARI MUNGAI.

3. THAT the Petitioner herein does apply for confirmation stating the proposed method of distribution within 21 days of the adoption of this consent.

4. THAT upon service of the said application for confirmation, the Objector does file and serve upon the Petitioner an affidavit detailing her proposed method of distribution.”

3. Pursuant to the consent, Summons for confirmation of grant was filed on 6th July 2015 by **Consolata Njeri Mungai** (the 1st Administrator). Subsequently **Hannah Wangari Mungai** (the 2nd administrator) filed a response on which she opposed the matters set out in the affidavit in support of the confirmation, in particular regarding the extent of the estate of the deceased and the distribution of the same. On its own motion, the court did on 21/6/2016 direct that the parties avail material referred to in filed affidavits but not annexed, such as sale agreements and recent certificates of search relating to various land parcel comprising the estate of the deceased.

4. The court further directed that the respective advocates do thereafter file submissions. The parties filed some documents in compliance with the order and their advocates have now filed their respective submissions. The court has gone through the respective affidavits and submissions as well as filings on record herein.

5. The deceased, **Mungai Gitau Rebe** was the husband of the two administrators herein. He died on 5th August 2009. In the petition for grant initially filed by **Consolata Njeri Mungai** (1st Administrator) only one property, namely **NYANDARUA/KITIRI/3376** was listed as part of the estate of the deceased.

6. However seventeen beneficiaries were listed some of them, being alleged purchasers while the remainder of the named beneficiaries were the 1st Administrator and widow and children of the deceased. The said children are:

1. Joseph Gitau Mungai
2. Lucy Wanjiru Mungai
3. Hellen Wangui Mungai
4. Paul Macharia Mungai
5. Margaret Muthoni Mungai
6. Mercy Wambui Mungai
7. Milka Nyambura Mungai
8. John Mwangi Mungai

7. In the affidavit supporting confirmation of grant **Consolata Njeri Mungai** (Consolata lists the following properties of the estate as already sold out to the purchasers):

1. NYANDARUA/KITIRI/3389
2. NYANDARUA/KITIRI/3388
3. NYANDARUA/KITIRI/3387
4. NYANDARUA/KITIRI/3386
5. NYANDARUA/KITIRI/3383
6. NYANDARUA/KITIRI/3377

8. Regarding **Land Parcel No. 3376** the deponent lists seven purchasers who allegedly bought different parcels thereof from the deceased and one from herself. She asserts that the 2nd Administrator was assigned Land Parcel **NYANDARUA/KITIRI/258** on which she always resided. That a further 5 acres were given to her by the deceased. That the former parcel had been the property of the deceased's father and was subsequently registered in the name of **David Gitau Mungai** the son of the 2nd Administrator, **Hannah Wangari Mungai**.

9. The wish of the 1st Administrator is that she and her children take the remainder of Parcel No. **NYANDARUA/KITIRI/3376** which the said house has always occupied while the family of **Hannah** the 2nd Administrator, take **Plot 258. Hannah**, who is the first widow of the deceased has six children namely:

1. David Gitau Mungai
2. Mary Wanjiru Mungai

3. Joseph Kimani Mungai

4. Sophia Njeri

5. Kibe Mungai

6. Boniface Chege Mungai

10. **Hannah** disputes that any of the estate land parcels have been sold out and demands that the properties be divided in accordance with Section 40 of the Law of Succession Act.

11. It would appear that at the time of his death the deceased had subdivided Land Parcel **NYANDARUA/KITIRI/379** to create Land **Parcels No. 3376 – 3389** but no credible evidence was tendered by **Consolata**, despite my order of 21/6/2016 that any of the resultant parcels had been sold by the deceased prior to his death.

12. Equally parcel number **NYANDARUA/KITIRI/1258** registered in the name of Hannah's sons **David Gitau Mungai** was subdivided in 2015 while this case was ongoing producing **Titles Number 7818 – 7833**. While Hannah does not dispute the assertion that Parcel No. 258 was assigned to her house by the deceased, she is also reticent on her dealings with **Parcel No. 3389** which was allegedly sold by herself to **Loice Wanjiru Kamau** on 1st November 2011 for Shs 500,000/=.

13. **Parcel Nos. 3388** and **3389** were as at July 2016 still registered in the deceased's name. (The said parcels measures 1.83 hectares or 4.5 acres). The subdivision of the **Parcel 258** and the alleged sale of **Land Parcel No. 3389** cannot be sanctioned by this court as these properties were at the time the subject of this dispute.

14. In her submissions the 2nd Administrator claims **Parcels 3376 – 3389** and **Land Parcel 379** as separate entities. She has not tendered any material to controvert the fact established through the 1st Administrator's material that **Parcels 3376 – 3389** were all a product of the subdivision of **Land Parcel 379** whose title was closed in 2002, and which measured 40.5 hectares.

15. The 2nd Administrator on her part admits that **Parcel 3388** and **3389** were assigned to the second Administrator by the deceased alongside **Parcel No. 258** – whose title was closed to produce **Parcels 7818 – 7833** and measured 11.5 hectares before the purported subdivision on 21/1/2015.

16. Thus the properties of the estate of the deceased that existed at his death are

a) **Parcels No. 3376 – 3389** (being subdivisions of **NYANDARUA/KITIRI/379** – 40 hectares.

b) Land Parcel No. **258** and which was registered in the name of **David Gitau Mungai**, a son of the first house, who in 2015 subdivided it into **Parcels 7818 – 7833** (11.5 hectares).

17. The first house headed by Hannah has six children while the second house of **Consolata** has 8 children. Section 40 of the Law of Succession Act states:

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

18. The aim of distribution in succession is not to achieve perfect equality but to do equity, as **Omollo J A** (as he then was) stated in **Rono –Vs- Rono [2005] eKLR**).

“I had the advantage of reading in draft form the judgment prepared by Waki, J.A., and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned Judge to be laying down any principle of law that the Law of Succession Act, Cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr. Gicheru. I can find no such provision in the Act.

My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has discretion to take into account the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each hose be taken into account.

Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in a case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.”

19. Thus in my view the first house should be allowed to keep the property originally known as **NYANDARUA/KITIRI/258** which they have always occupied. It measures 11.5 hectares. In addition they are entitled to 2.033 hectares made up of **Land Parcels 3388** and **3389** (originally parcel 379). Out of **Parcel No. 3376** the family of **Hannah** will get an additional portion measuring 7 hectares.

20. The balance of **Land Parcel 3376** measuring 21.62 hectares and **Parcels 3377** (0.102 ha), **3386** (0.2013 ha), **3387** (0.608 ha) and any other parcels not accounted for in the series **3376 – 3389** will go to the family of **Consolata** because it has nine members. I believe that the parties did not lay all the facts before the court, particularly the second widow who despite annexing a schedule did not attach any documents to indicate the actual status in respect of the plots in the series in question.

21. In so far as the property accounted for is concerned therefore, the house of **Hanna** will received a total of **20.533 hectares** while the family of **Consolata** get a total of **22.533 hectares** (and also any parcel in the series **3376 – 3389** that had not yet been sold and or transferred by the deceased at death).

22. Suffice to say here that all the purported sales, subdivisions and transfers of the properties of the estate to any third party that were done after his death are null and void for the purposes of this cause as they were done without commensurate legal capacity by the purported vendors or transferors. The beneficiaries, including the widows in the two houses will share equally the portion assigned to each respective house. The grant is accordingly confirmed. Parties will bear own costs.

Delivered and signed on this **25th** day of **November, 2016**.

In the presence of:-

Miss Githinji holding brief for Mr. Njuguna for 1st Administrator

N/A for the 2nd Administrator

Court Clerk : Barasa

C. MEOLI

JUDGE