



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 926 OF 2014

IN THE MATTER OF THE ESTATE OF GITURA HITI GATHUNA (DECEASED)

ESTHER WANJIKU MACHATHA.....APPLICANT

VERSUS

TIMOTHY NJENGA GITURA.....1ST RESPONDENT

DAVID GICHERU GITURA.....2ND RESPONDENT

AND

MONICA WAMBUI GITURA

SAMUEL MBATIA GITURA

INTERESTED PARTIES

MARY WANJA GITURA

RULING

PLEADINGS

Gitura Hiti Gathuna died on 23rd July, 2012. The application filed on 16th September, 2014 **under Section 45(1), 47 of the Law of Succession Act, Rule 59(1), 61(1) of the Probate & Administration Rules** is brought by Esther Wanjiku Machatha (one of the administrators of the estate of the deceased) under certificate of urgency.

The Applicant's grounds the application on the following reasons;

The Respondents Timothy Njenga and David Gicheru Gitura have purported to lease part of the land comprising of the estate of the deceased to unknown persons who have commenced construction of low cost housing units for rent, there is a risk that the construction will be completed soon and tenants will occupy the houses; to evict them later will delay the distribution of the estate. The Respondents are subdividing the land and erecting fences purportedly demarcating the portions of land. All these activities

amount to intermeddling of the estate; Dagoretti Waithaka/309.

The Applicant seeks orders from this Court that the Respondents by themselves or their agents and/or workmen or any person whatsoever be and are hereby restrained from demarcating and/or subdividing, felling trees, erecting fences, constructing buildings on the land Dagoretti/Waithaka/309 pending the hearing and determination of the application and the distribution of the estate of the deceased.

The 1ST Respondent on his own behalf and that of the 2nd Respondent deponed by the Replying Affidavit of 19th September, 2014, that he is one of the administrators of the deceased's estate. The land in question L.R. No. Dagoretti/Waithaka/309 had already been subdivided on the ground. This was done by the deceased when he was alive. He intended to distribute the subdivided portions to each of the beneficiaries as gift intervivos but he died before he completed the transaction.

The 1st Respondent deponed that it is the Applicant herein who has built a building and the house is ready for renting and has constructed the house on the 1st Respondent's portion. The 1st Respondent deponed that injunction orders sought by the Applicant cannot be implemented

The parties filed another certificate of urgency application on 2nd October, 2014. It was brought **under Section 45(1) & 47 of the Law of Succession Act Rule (59(1) of Probate & Administration Rules** and reiterated similar concerns expressed in the application of 16th September 2014. The Applicant Esther Wanjiku Mucatha deponed the continuing intermeddling at the estate of the deceased by the Respondents. The urgency was occasioned by the matter not proceeding on the scheduled date 27th September, 2014. The matter was not listed for hearing on 22nd September 2014 and was rescheduled to 27th September exparte hearing.

The 1st Respondent Timothy Njenga Gitura filed a Replying Affidavit on 24th October 2014 and relied on the content of the Replying affidavit filed on 19th September 2014.

The parties filed another application in under certificate of urgency on 8th October 2014 brought under **Section 45,47 of Law of Succession Act and Rule 59 (1) and 61 (1) of the P&A Rules**. The Applicant herein is an Interested Party in other applications- Mary Wanja Gitura who deponed that of beneficiaries of the estate 2 of them, the Respondents illegally demarcated and started to lease off part of the properties without consent and authority of this court. The grants of letters of administration of the deceased's estate granted on 22nd April, 2014 have not been confirmed.

The Respondents have caused fear by intimidating other beneficiaries. The rest of the beneficiaries sought interventions from the District Officer, Dagoretti Division authority where they were advised to obtain a court Order.

The applications were alluded to during the hearing of the application of 16th September 2014 by respective Counsel for the Applicants, Respondents and Interested parties.

ISSUES

The issues for determination are as follows:

1. Have the appointed administrators;
 - a. Monicah Wambui (wife of deceased, mother to the beneficiaries).
 - b. Timothy Njenga Gitura(son of the deceased)
 - c. Esther Wanjiku Machatha (daughter of the deceased) carried out their duties of the estate of the deceased?

2. Are the actions by the administration (s) been:-
 - a) With the knowledge of beneficiaries.
 - b) With the consents of beneficiaries
 - c) With the authority of the court.
 - d) And for the benefit of all beneficiaries of the estate of the deceased?
3. Are the activities alleged to have been undertaken with regard to the deceased's estate, to preserve or waste the estate and amount to intermeddling with the estate of the deceased?
4. Are the alleged activities permissible regular and legal to the beneficiaries of the estate and the court.
5. What remedies are appropriate in the circumstances?

The administrators, mother and widow of the deceased, eldest daughter and eldest son obtained grant of letters of administration on 22nd April, 2014. The administrator's duties and responsibilities are explicit and outlined in **Section 79, 82 and 83 of the Law of Succession Act Cap 160**.

All the property of the deceased vests in the administrators/executors. Their duties entail;

- a. Enforce by suit all causes of action that survive the deceased,
- b. Sell or otherwise turn to account – where necessary or desirable in execution of their duties,
- c. Provide and pay out the estate, expenses of a reasonable funeral of the deceased
- d. Get in all free property.
- e. Pay out of the estate all expenses.
- f. Ascertain and pay out of the estate of the deceased all his debts.
- g. Produce within 6 months to the court a full and accurate inventory of the assets and liabilities of the deceased.
- h. A full and accurate account of all dealings therewith up to the date of account.

In the instant case the administrators have not carried out the above outlined duties of administrators. Instead, the widow of the deceased and mother of the beneficiaries is ailing and in ill health. The 2 other beneficiaries are at loggerheads and not working in consultation and concert for the benefit of all beneficiaries but pursuing individual interests; each party is alleged to be engaged in alienating and building on the land that is the subject of administration of the deceased's estate.

In the application filed on 16th September 2014 the Respondents, 1st and 2nd Respondent have leased parts of land Title Number Dagoretti/Riruta/309 to 3rd parties who are constructing residential semi-permanent homes as shown by the annexed photographs "EWM1".

In the Replying affidavit of 1st Respondent of 19th September, 2014, the Applicants have constructed a

building on the subject land and on the 1st Respondent's portion as evidenced by attached photographs "TNG5".

In the Application under certificate of urgency filed on 8th October 2014 the Applicant deponed that the 1st and 2nd Respondents have illegally leased portions of land Title Number Dagoretti/Riruta/309 to strangers who have continued with excavation and construction of structures as evidenced by the attached photographs mentioned "MWG1".

All the above activities by the 2nd and 3rd administrators and the 2nd Respondent are contrary to the legal provisions that outline duties of administrators. Infact the 2nd and 3rd Administrators are in conflict with each other over the property of the deceased as beneficiaries and have ignored and abandoned that role and responsibility of being administrators to this estate of the deceased. From the 3 Applications filed in quick succession the content and the photographs thereof this court is satisfied that there are activities on the land Dagoretti/Waithaka/309 contrary to the legal mandate of the administrators.

The ongoing subdivision and leasing of the land, the excavating and construction of rental houses have been carried out without the knowledge consultation or consent of the other beneficiaries; namely;

1. Monicah Wambui Gitura (widow and mother)
2. Samwel Mbatia Gitura
3. Mary Wanja Gitura.

They consented to the 3 administrators' appointment to administrator the estate in the interests of all beneficiaries.

The 1st and 2nd Respondents Replying affidavit of 19th September, 2014, the 1st Respondent Timothy Njenga Gitura deponed that L.R No. Dagoretti/Wathaka/309 was already subdivided by the deceased as shown by the map and mutation forms marked "TNG3". The deceased intended to transfer the subdivided portions to each of the beneficiaries as gift-intervivos. It was not effected as he died before he could complete the transaction as evidenced by the letter annexed "TNG4".

The court has read the letter by the deceased dated 22nd September 2010 written to the Ministry of lands and Housing Department of Survey. In part it reads;

"I trusted you to process the subdivision of the title to enable me distribute these to my sons and daughters while I am alive... I am now 87 years of age which make me not young at all"

The deceased intended to distribute his estate during his lifetime to his sons and daughters and begun the process as evidenced by the letter. However, he did not complete the process and that is why the administrators obtained letters of administration intestate to collect and gather the deceased's assets and liabilities and propose a mode of distribution to the court when sanctioned shall be the basis of distribution of the estate. Instead of collecting and gathering the assets and liabilities of the deceased, the administrators have engaged and embarked on developing their "own" portions of land to the exclusion of other beneficiaries and without the order of the court.

Section 55 of the Law of Succession Act stipulates;

"No grant of representation, whether or not limited in its terms, shall confer prior to distribution any capital assets constituting the net estate , or the make any division of property, unless and until the grant has been confirmed as provided by Section 71 of the Law of Succession Act."

The ongoing activities of subdividing and leasing portions of land Dagoretti/ Riruta/309 and excavating to construct houses are activities that are not permissible, regular or legal as they are not to preserve the estate of the deceased and for the benefit of all beneficiaries but are geared to wasting the estate and amounts to intermeddling of the estate of the deceased.

Section 45 of Law of Succession Act states:

***“No person shall, for any purpose, take possession or dispute of or.....intermeddle with, any free property of a deceased*”**

In the instant case, the affidavit of the Applicant in the Application filed on 16th September, 2014 shows pictures of progressive ongoing construction of semi-permanent houses; The 3 pictures show, the first one, clear land with erected poles. The second picture now clear structures erected and the third picture complete modern house structure and this demonstrates hurried activity on the deceased’s estate.

Similarly, on the pictures attached to the Respondent’s Replying affidavit of 19th September, 2014 those are pictures of finished and complete stone houses. Then, the most recent application of 2nd October, 2014, there are wooden structures with iron sheets as semi permanent houses.

The activities on the deceased’s estate exceed administrators statutory powers outlined in **Section 82 and 83 of Law of Succession Act.**

In the course of oral submission by the counsel for the parties in this matter, this court had occasion to hear from the family members who were unanimous that the 1st administrator, Monicah Wambui Gitura mother of the beneficiaries and widow of the deceased is ailing and is in ill health requiring medical attention and care. The conditions seem to be exacerbated by the ongoing sibling rivalry over the management and administration of the deceased estate. **Section 37 of the Law of Succession Act Cap 160** provides that the surviving spouse should have a life interest of the estate of the deceased. As pleaded in paragraph 17 of the 1st Respondent’s Replying Affidavit of 19th September, paragraph 3 of the ground of the application filed on 4th October 2014 confirm that the 1st administrator has not carried out her duties as administrator due to ill health and yet she ought to have been considered as one with life interest in the deceased’s property so as to access medical attention and care.

This court finds that the totality of the pleadings, oral submissions and annexed documents, the administrators have exceeded their statutory mandate and engaged or facilitated activities that are to waste the estate of the deceased and have intermeddled with the estate.

In the case of **Paul Rono Pymto & Another Vs Giles Tarpin Lyonnet 2014 Eklr**

Succession Cause No. 57 Of 2010 F. Ochieng J. stated with regard to administration of the estate;

“It is important for the chief and family members to appreciate that in matter of administration of the estates of persons who died intestate- they have a limited role. Meanwhile, administrators must also appreciate that their role is to gather together all the assets of the deceased. They then also identify the liabilities; they have no authority to dispose of assets without express orders from the court. They do not even have authority to distribute assets when they have paid of all the liabilities. The Administrative must come to Court to seek authority to distribute remaining assets to the beneficiaries”.

In the case of Titus Mbaabu M’ Racha M’ Racha vs. Justus Muthamia Succession Cause 155 of 2001. HCT Embu (Lessiit J)

The administrators continued to sell the plots before the conclusion of the Succession Cause. The Court held the administrators exceeded the statutory powers as administrators in handling the estate.

The upshot of this application (s) is that the court finds that the administrator(s) have exceeded their statutory mandate and intermeddled with the estate of the deceased by subdivision, leasing and construction of houses, before consultation of all beneficiaries and proposed mode of distribution and confirmation of grant.

The court order as follows;

1. By virtue of **Section 66 and 76 (d) (ii) of the Law of Succession Act Cap 160** I direct that Mary Wanja Gitura and Samwel Mbatia Gitura be co- administrators of the estate of the deceased in addition to the existing administrators of the estate of the deceased and carry out the duties is **Section 82 and 83 Law of Succession Act**.
2. The grant letters this of administration intestate issued on 22nd July, 2014 be amended/rectified to include the interested parties in the application of 16th September, 2014, together with the existing administrators of the estate.
3. All parties, administrators or beneficiaries of the estate of the deceased are restrained from subdividing the land, availing forms execrating, constructing houses, leasing, obtaining tenants, alienating, disposing land Dagoretti/Waithka/309 except for reasonable use and access to the land by those residing on the same, until the hearing and final determination of this matte or confirmation of grant.
4. The order of the court be supervised by the O.C.S Riruta/ Police station and/or District Officer/Dagorreti Division.
5. The 2 new appointed administrators to ensure upkeep, medical attention and care of the widow/mother/administrator Monica Wambui Gitura by accessing funds in Equity Bank Account of the deceased for the medical purposes.
6. The administrators to carry out the mandate envisaged under **Section 82 and 83 of Law of Succession Act** and file for confirmation of grant within the requisite period wherein the court shall determine the mode of the distribution of the estate of deceased in the event parties do not agree.
7. The 2 additional administrators shall file a report with Deputy Registrar Family Division within one (1) month from today on the status progress of administration of estate and care of the 1st administrator.
8. Each party shall bear its out costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JANUARY , 2015

M. MUIGAI

JUDGE

In the presence of:

Mr. Kiani

MS. Muthoni for the applicant.

Mr. Gitaru Interested party.