



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 1662 OF 2004**

**IN THE MATTER OF THE ESTATE OF GLADYS WAIRIMU GICHANGA (DECEASED)**

**CAROLINE NYAGUTHII.....APPLICANT**

**VERSUS**

**ROBERT GICHANGA WAGURA.....RESPONDENT**

**RULING**

**INTRODUCTION**

The deceased Gladys Wairimu Gichanga died on 13<sup>th</sup> February, 2004 as evidenced by the death certificate No. 766225.

The deceased was survived by;

- 0. Robert Gichanga Wagura - Husband/widower
- 0. Caroline Nyaguthii Gichanga - Daughter
  
- iii.) Doris Wandia Gichanga - Daughter
  
- 0. Benson Wagura Gichanga - Son
- 0. James Gitonga Gichanga - Son

**PLEADINGS**

The Applicant; Caroline Nyaguthii Gichanga filed an affidavit of protest to the confirmed grant on 24<sup>th</sup> June, 2013, supported by the affidavit of Robert Gichanga Wagura and the written consents of the children of the deceased attached to the application.

The matter was scheduled for hearing on 10<sup>th</sup> December, 2014 but did not proceed as the law firm of Njiru Nyaga Advocate was served instead of Ngata Kamau Advocate for the Petitioner. The service was to be regularized and the hearing proceeded on 3<sup>rd</sup> February, 2015. The affidavit of service filed on 3<sup>rd</sup> February, 2015 and it confirmed the Petitioner's advocate M/s Ngata Kamau Advocates were served with the hearing notice.

The matter proceeded exparte. Mr. Nyamweya for the Applicant told the Court that in reliance of the affidavit of Caroline Nyaguthii Gichanga, the applicant; the grant was confirmed with the understanding and approval of all beneficiaries that there will be 2 administrators; Robert Gichanga Wagura and

Caroline Nyaguthii Gichanga. Unfortunately this did not take place; Robert Gichanga Wagura proceeded with distribution of the deceased's estate solely without the involvement of Caroline Nyaguthii Gichanga.

The Applicant in his affidavit raised other issues; as follows;

- a. The Respondent concealed material facts
- b. He left out some assets of the deceased's estate as outlined in paragraph 6 of the affidavit. These are;
  - i. Parcels of land known as Ruiru/KIU Block 3/356 and Ruiru/KIU Block 3/357.
  - ii. Block of flats on plot number S9/S10 in Kahawa West Estate, Nairobi.
  - iii. Block of flats on plot number V19 in Kahawa West Estate (Juakali), Nairobi.
  - iv. House in Kahawa West (Juakali) Estate, on plot number 53 and 54.
  - v. Bank Account number **[particulars withheld]** Equity Bank, Fourways Towers Branch, Nairobi.
- c. The mode of distribution though consented to by the beneficiaries, children of the deceased and their father, the Respondent; that LR Kiine/Rukanga/2075 to be bequeathed to the Respondent solely and absolutely, is unfair as the children of the deceased have not benefited from their late mother's estate at all.
- d. The properties were acquired jointly by the Respondent and the deceased during their marriage and therefore, the children of the marriage are entitled to benefit from the same and not be left dispossessed of any benefit for the deceased's estate.
- e. The specific properties plots 53 and 54 Kahawa West Juakali estate the matrimonial home of the deceased and Respondent is where the children of the deceased, beneficiaries, are resident. There has been imminent danger of eviction by the Respondent's conduct.
- f. The A/C **[particulars withheld]** at Equity Bank was joint account of the Respondent and the deceased, the beneficiaries have not obtained any funds or accounts of the said account.
- g. The Respondent married another wife and has another family the beneficiaries are apprehensive that they will be disinherited.
- h. The Respondent forced the Applicant to sign bank papers/documents. She did not refuse to do so, instead she agreed as she trusted her father and could not think he could act/do anything detrimental/prejudicial to the welfare and interest of his children. For these reasons the Applicant stated, that the confirmed grant herein was obtained by fraudulent means due to concealment of material facts which make it prejudicial to the children and beneficiaries of the deceased's estate.

The application was served on the Respondent through the advocate on record and in spite of service, there is no Replying Affidavit or any evidence or response by the Respondent and /or his advocate on record.

### **ISSUES**

- a. Is the confirmed grant of 15<sup>th</sup> May, 2013 valid, legal and regular?
- b. Is the mode of distribution fair, just and equitable to all beneficiaries of the estate of the deceased?
- c. Is it prejudicial to the beneficiaries of the estate of the deceased?

### **ANALYSIS**

The confirmed grant of 15<sup>th</sup> May, 2013 was entered into after confirmation of the requisite consents. The beneficiaries of the estate were outlined and they gave their written consent that their father was to take and hold the asset of the deceased's estate absolutely.

As deposed by the Co-administrator; the Applicant herein, she trusted that her father would use and distribute the said asset for the benefit of himself and the children of the marriage. So the confirmation of the grant of letters of administration was in compliance of **Section 66 of the Law of Succession Act Cap 160 and Part III Rule 7 Part VII Rule 26 of the Probate and Administration Rules.**

The vortex of the instant matter is the implementation of the confirmed grant of 15<sup>th</sup> May, 2013. It is and was expected that L. R. Kiine/Rukanga/2075 would be held by the administrators; the Respondent and Applicant and to be distributed to benefit all the children of the deceased. In other words; the property was to be distributed to the Respondent and the children of the deceased.

In the petition filed on 7<sup>th</sup> June, 2004, there were 2 assets;

- a. L. R. Kiine/Rukanga/2075
- b. Proceeds of A/C No. *[particulars withheld]*- Equity Building Society

From the evidence of the Applicant's affidavit; she was asked to sign bank documents by the Respondent; since she trusted him as her father to act in their best interest she signed the documents. She did not read what the document disclosed. Since then she did not get information of the account proceeds. She and her siblings have not benefited from the said proceeds.

The Court has confirmed from the record that no form or mode of distribution was made to the Court to approve except that the Respondent was take the only asset L. R. Kiine/Rukanga/2075 absolutely and seems to have obtained the proceeds of the A/C *[particulars withheld]* Equity Building Society solely. The **Law of Succession** provides;

- a. **Section 71 of the Law of Succession Act** provides 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”.*

- b. **Section 35 of the Law of Succession** provides that;

*(1) Where an intestate has left one surviving spouse and a child or children the surviving spouse shall be entitled to;*

*(a) the personal and household effects of the deceased absolutely; and*

- b. *a life interest in the whole residue of the net intestate estate”.*

*(3)“where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the Court for the appointment of his share, with or without variation of any appointment already made”.*

- (c) **Section 37 of Law of Succession Act** provides that;

*“A surviving spouse entitled to a life interest under the provisions of section 35 or 36, with the consent of all co-trustees and all children of full age, or with the consent of the Court, may, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance”.*

*“Provided that, in the case of in the case of immovable property, the exercise of that power shall always be subject to the consent of the Court”.*

The confirmed grant is a valid order of the Court but its implementation has been to the detriment of the children of the deceased. They have not had any benefit from the father as administrator of the estate of their mother and are in danger of eviction from their home by their father.

The Respondent has a duty to the beneficiaries as one of the administrators of the deceased's estate. He ought to carry out the statutory mandate provided by **Section 83 Law of Succession Act Cap 160** jointly with the Co-administrator the Applicant herein. This as is borne out by evidence he did not.

Secondly he ought to distribute the assets of the deceased's estate to benefit all beneficiaries;

He has obtained proceeds from;

- a. **[particulars withheld]** Equity Bank without consent of the children of the marriage with the deceased.
- b. He did not disclose the position with regard to A/C **[particulars withheld]**-Equity Building Society
- c. He has attempted eviction of the children of the deceased from Plot 53 and 54 of Kahawa West Juakali Estate.

In light of these facts which are uncontroverted by the evidence on record it is clear that the Respondent has not carried out his duty as administrator of the deceased estate as referred under **Section 83 (e) (f) and (g) of the Law of Succession Act Cap 160**

The Administrator/Respondent concealed material facts as to the deceased's assets as he failed to disclose the other assets of the deceased in terms of **Section 76(b) Law of Succession Act Cap 160**. The administrator/Respondent even after obtaining the grant failed to proceed diligently with the administration of the estate as required under **Section 76 (d) (ii) Law of Succession Act Cap 160**.

Due to the above reasons the Respondent has deprived the beneficiaries of their rightful share of their mother's estate. In the absence of any explanation to be considered by the Court to explain why he did not act as administrator, honestly, reasonably and in good faith as required under **Section 92 of the Law of Succession Act Cap 160**; the Court orders as follows;

#### **FINAL ORDERS**

- a. That the Respondent as administrator of the deceased estate is hereby revoked/annulled forthwith due to his conduct.
- b. The grant of 5<sup>th</sup> May, 2013 is hereby revoked/annulled and a new grant in the names of
  - i)Caroline Nyaguthii Gichanga
  - ii) Benson Wagura Gichanga is issued and they are to carry out their statutory mandate under **Section 83 Law of Succession Act Cap 160** to the benefit of all beneficiaries of the deceased's estate.
- c. The Respondent is restrained from evicting the children of the deceased from the house in Plot No. 53 and 54 Kahawa West Juakali estate until the new grant is confirmed and mode of distribution agreed by all beneficiaries and the Court.
- d. The Respondent to account for proceeds in A/C **[particulars withheld]** Equity Bank and/or A/C No. **[particulars withheld]** Equity Building Society.
- e. The administrators to file for confirmed grant including all properties/assets of the deceased and proposed mode of distribution by all beneficiaries within 90 days from today
- f. Any aggrieved party is at liberty to apply and file proposal of mode of distribution.
- g. No orders as to costs; each party to bear its own costs.

**READ AND SIGNED IN OPEN COURT ON THIS 30<sup>TH</sup> DAY OF APRIL, 2015**

**M. W. MUIGAI**

**JUDGE**

***In the presence of;***

*Mr. Nyamweya for the Protestor/Objector.*