



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 202 OF 2014
IN THE MATTER OF THE ESTATE OF KAMAU GATHUNGU MBIRIRI (DECEASED)

RULING

1. The deceased to whom this succession cause relates died testate on 5th November 2012. He was survived by one wife and 8 children. The testator did not name an executor of his will and as such they agreed for **Lucy Njeri Kamau** widow to the deceased and **Zaituni Wanjiru Kamau** apply for the grant of letters of administration on 4th February 2014 and the same was granted on 16th September 2014.

2. On 30th October 2014 one **Esther Muthoni Gathangu** the applicant hereinafter referred as the applicant filed a summons to revoke the grant. The applicant seeks the orders that the court revokes the grant issued to the Administrators on 16th September 2014 and preservation orders preserving **L.R. Ngong/Ngong/55464**. She also seeks that the Court consolidates this cause with **HCSC No. 239 of 2014** the estate of the **Kamau Gathangu Mbiriri** which is pending for hearing and determination before this court. The said application was premised on grounds that the grant was obtained by concealment of material facts as not all beneficiaries were involved in the process hence the grant so obtained was defective in substance. That the administrators have issued the tenants of **L.R. Ngong/Ngong/55464** with a notice to terminate their tenancy with effect from 31st October 2014 an act they claim amounts to intermeddling. That the deceased and the applicant are children of **Humphrey Gathungu Mbiriri** who in his lifetime subdivided his land **L.R. Ngong/7745** to his 3 homes and **L.R. Ngong/Ngong/55464** was registered in the name of the deceased to hold in trust for **Esther Muthoni Gathangu, Mary Kabura** and **Hiram Machua**. Therefore the said **L.R. Ngong/Ngong/55464** was not acquired by the deceased but by their late father and the same was held in trust and as such the applicant her two other siblings are entitled to inherit their late father's property adding that the deceased died intestate and allege that the said will was forged.

3. The application was opposed. Lucy Njeri hereinafter referred to as the respondent filed a replying affidavit dated 8th December 2014. She avers that the applicant is the sister of the deceased but on the contrary her allegation that she is resident on **L.R. Ngong/Ngong/55464** is in dispute; that Mary Kabura and Hiram Machua were never directly dependent upon the deceased nor did they derive their livelihood from the said property on **L.R. Ngong/Ngong/55464**; that the two are brother and sisters to the deceased and do not rank in priority to the deceased's wife and children neither did they conceal any material facts as alleged. That though **Humphrey Gathungu Mbiriri** subdivided **L.R. No. Ngong /Ngong/7745** and distributed the same to his 3 houses that **L.R. Ngong/Ngong/55464** still formed part of the deceased's inheritance and that then same was not held in trust by the deceased as alleged as **Humphrey Gathungu** did not state so while subdividing the same and the applicants did not raise any issue during the lifetime of the deceased and doing so now only smacks mischief aimed at dis-entitling her and her children their rightful inheritance. That the applicants were not necessary applicants for probate adding that the

deceased left behind a valid will expressing how he wished his estate to be distributed and adding the applicants would go contrary to his wishes. That nothing has been adduced to prove that the said land registered absolutely was held in trust for the applicants. That the fact that the applicants are siblings to the deceased does not necessarily confer upon them any claim of entitlement to inherit the deceased's property without proof of direct dependency adding that the applicants the applicants have their respective shares inherited directly from their father. That though the applicants are legible to inherit from their father's estate the said property does not form part of the applicants' father's estate. That the applicant forced her way into **L.R. Ngong/Ngong/55464** during the lifetime of the deceased's mother and her residence or carrying on business does not entitle her to inherit the deceased's estate and that the letters issued terminating the tenants tenancy was within the administrators legal mandate in a bid to administer the deceased's estate and denied any knowledge of the proceeding in **HCCC No 239 Of 2014**. She further added that none of the applicants has a direct claim worth enforcement but the same is mere mischief as the estate has its rightful beneficiaries who rank in priority against the applicant.

4. The applicant filed a further supplementary affidavit on 18th March 2015. She avers that their father was the initial owner of **L.R. Ngong/Ngong/1674** from which the plots emanate. He had 3 wives namely Edith Wanjiru, Margaret Ngendo (their mother) and Mary Wariara.

Their late father distributed his land **L.R. Ngong/Ngong/1674** into 5 plots as follows; **L.R. Ngong/Ngong/7742** which he retained, **L.R. Ngong/Ngong/7744** sold to Ibrahim Kihara, **L.R. Ngong/Ngong/7745** given to her mother but registered in her brother's name and **L.R. Ngong/Ngong/7745** was given to **Mary Wariara**. That the deceased later subdivided the said plot into two parcels of land;

i. **Ngong/Ngong/55464 of 0.067 Ha** suit property

ii. **Ngong/Ngong/55/465 of 0.033 Ha** which he sold

5. That later on their father subdivided and distributed his plot **L.R. Ngong/Ngong/7742** to all his children. Plots **Ngong/Ngong/17134/17135/17136/17137/17138/17139** went to her, the deceased and her other siblings. They sold 17134 and 17139 and shared the sale proceeds. 17134 went to the deceased, 171 to the applicant, 17137 went to her sister and 171138 went to Hiram.

6. On the 23rd of March 2015 Succession Cause No. 239 of 2014 and 202 of 2014 were consolidated, Succession Cause 202 of 2014 became the pilot file.

7. The issue for determination at this stage is whether the court should grant the preservative orders as sought in prayer 2 and 3 of the application dated the 30th of October 2014.

8. There is no dispute that the applicants and the deceased are siblings. It is also not in dispute that the said parcel of land **L.R. Ngong/Ngong/7745** emanated from the subdivision of parcel no.

9. **L .R. Ngong/Ngong/1674** which was owned by **Humphrey Gathungu Mbiriri** the deceased and applicants' father. There is the allegation by the applicants that the **L.R. Ngong/Ngong/55464** was registered in the name of the deceased to be held in trust for his sibling the applicants being amongst them. The applicant also alleges that the will the administrators relied on was forged. The respondents have challenged the applicants allegations and aver that the applicant have not shown that they were dependents of the deceased. There are averments made by both parties on how the suit the subject of this application was bequeathed. Each claims a right to the said parcel of land. At this stage all the applicants have to show is that they have a prima facie case with a probability of success and that if the orders are not granted then they will suffer irreparable damages, (see **Giella Vs. Cassman Brown (1973) E. A. Page 358**). I recognize that land issues are emotive. Since the applicant have raised the issue that the land was to be held in trust for them by their late brother, even as I do recognize that the respondent **Lucy Njeri Kamau** being the widow rank in priority to the applicant, the issue of whether the land was held in trust must be determined. Thus in the interest of justice I find it in order to issue the preservative orders sought but for a limited period for it is necessary to conclude the matters concerning the deceased's

estate. In my view granting the said order will not prejudice any of the parties.

10. I therefore order that pending the hearing and determination of the summons for revocation of the grant application filed by the applicants a preservative order shall issue preserving the **L.R. Ngong/Ngong/55464**. The administrators their servants and or agents are further restrained from evicting the tenants and occupants of **L.R. Ngong/Ngong/55464** or in any other way interfering with their quiet possession. The said orders shall be in force for a period of only **six (6) months** from the date of this ruling. The applicants shall ensure that they take a date for hearing of their application for revocation of the grant within the said period or in the alterative the parties can settle the issues before them and record consent if any is reached. Costs shall be in the cause. It is so ordered.

Dated signed and delivered this **18th** day of **June** 2015.

R. E. OUGO.

JUDGE

In the presence of:

.....**Applicants**

.....**Respondents**

Charity Court clerk