



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

SUCCESSION CAUSE NO. 972 OF 2012

IN THE MATTER OF THE ESTATE OF JOHN LAWRENCE DAVID GAITHO (DECEASED)

ANNAH WAMAITHA GITHINJI.....APPLICANT

VERSUS

GEORGE GAKIO KINOGA.....RESPONDENT

RULING

PLEADINGS

The matter presented in Court is the application under certificate of urgency filed in 27th June, 2014 by the Applicant. The gist of the application is that the Applicant sought that the Respondent be restrained from obtaining receivables; rent payments from the houses on L. R. No. Dagoretti/Kangemi/776 pending the hearing and determination of the application for revocation of grant. Secondly, in the alternative the Court orders a joint interest earning account be opened in the name of the Applicant and Respondent to safeguard the rights of both parties.

The Applicant deponed in the affidavit that the Respondent is a brother to the deceased who draws rent from the houses on the deceased's property L.R. No. Dagoretti/Kangemi/776. The Applicant obtained grant of letters of administration to the deceased's estate on 17th September, 2012. The grant was confirmed on 11th May, 2013 as drawn by the Applicant as administrator of the estate as follows;

“L.R. Dagoretti/Kangemi/776 to be inherited by; **ANNAH WAMAITHA GITHINJI** to hold in trust on behalf of the other beneficiaries

1. **ALEX KARANJA (SON)**
2. **NICHOLUS NGANGA WAMAITHA (SON)**
3. **ESTHER WANJA GAITHO (DAUGHTER)**

As administrator and trustee the Applicant was not able to access the suit property. The Respondent since the demise of the deceased has administered the estate without any legal justification and to the detriment of lawful beneficiaries and legal representatives.

The Respondent refused to surrender the original title deed in respect of **L.R. NO. DAGORETTI/KANGEMI/776**. Instead he filed an application for summons for revocation of grant. The Applicant sought orders; that the deceased's estate to be preserved until the hearing and

determination of the application for revocation of grant.

The Respondent filed a Replying affidavit on 17th July, 2014 to the application filed on 27th June, 2014 by the Applicant. He confirmed he is a brother to the deceased, who died on 25th April, 2005. He alleged the deceased gave him the parcel land L.R. No. Dagoretti/Kangemi/776, 2 years before his death and he was allowed to construct rental houses therein and has been collecting rent since then.

He deponed that the Applicant never lived on the suit property and she secretly applied for grant of letters of administration of the estate of the deceased in 2012 yet the deceased died in 2005.

SUBMISSIONS

The Applicant filed written submissions through Counsel on 23rd January, 2015 and reiterated that she is the legal representative of the deceased's estate by virtue of the grant of letters of administration of 17th September, 2012 and the confirmed grant of 14th May, 2013.

The Respondent filed submissions on 9th February, 2015 through Counsel. He emphasised that he built on the land L.R. Dagoretti/Kangemi/776 houses from 2005-2009 and has drawn rent for his upkeep. The houses are semi-permanent houses and can be removed.

The Respondents bone of contention is that the Applicant is not the deceased's wife and she was not given the title deed to the suit property. Instead he was left the title deed by the deceased. The income from the houses belongs to the Respondent and not the estate of the deceased. The land was to be used by the Respondent and then left to the daughter of the deceased **Esther Wanja Gaitho** his only surviving child if she did not get married.

DETERMINATION

The Court has considered the evidence as deponed in the pleadings filed and written submissions and finds as follows;

- a. The grant and confirmed grant of letters of administration of the estate of the deceased were obtained by the Applicant in 2012 and 2013. The confirmed grant included Esther Wanja Gaitho but she never appeared in Court to confirm her consent.
- b. *The Applicant is in possession of the Title deed of L.R.Dagoretti/Kangemi/776 left to him by the deceased. In one version in the Replying Affidavit he stated he was given the land by his late brother in another version in the submissions he states he was given the land to use and if his niece the only surviving child of the deceased **ESTHER WANJA GAITHO** does not get married he should give her a share and retain the rest of the land.*
- c. There is a contest whether the Applicant was the wife of the deceased and if the two (2) sons are the children of the deceased.

The law prescribes in **Law of Succession Act Cap 160 Section 3(5)** the wife of the deceased under **Succession Law**.

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy, where her husband has contracted a previous or subsequent monogamous marriage to another another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”

In the instant case there has been no proof of any marriage because the matter was not heard interpartes but disposed of by written submissions.

Section 3(2) describes a child.

“References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

The issue of whether the Applicant is a wife to the deceased or not was ventilated but a grant was issued and confirmed and has not been set aside amended or revoked. The issue of the two (2) children of the administrator this Court cannot confirm voluntary parental responsibility as the deceased is no more.

However, as long as the confirmed grant remains valid, the property of the deceased ought to be distributed among the existing spouse and children of the deceased. The Respondent shall allow the property of the deceased to be shared by the Applicant and three (3) children of the deceased unless he can prove that the Applicant is not a wife of the deceased.

The distribution shall be conducted when he removes the semi permanent structures. The title deed of the suit property shall be given to the administrator to hold in trust for herself and the three (3) children in equal shares. The Respondent’s action that he was given land by the deceased cannot be substantiated. It is not borne out by evidence. The deceased did not leave a Will he died intestate.

The administration of the estate is by grant of letters of administration intestate. The Respondent shall give vacant possession of the suit property and the title of the estate to the beneficiaries.

The fact of the deceased’s wish that the Respondent holds onto the property and when the deceased’s only surviving child is not married to give her a portion of land and retains the rest of the land himself, is also not borne out by evidence.

The **Law of Succession** does not prescribe a condition precedent to the right to inherit as long as one is a child of the deceased. Secondly, the deceased did not write down his wishes as there is no Will. Therefore in the absence of a written Will, the **Law of Succession** in administration of estate intestate takes precedence.

FINAL ORDERS

The Court orders as follows;

- a. **The Respondent shall surrender the Title deed of the suit property I.R. Dagoretti/Kangemi/776 to the administrator.**
- b. **The Respondent to give vacant possession of the suit property to the beneficiaries to remove the semi permanent structures and leave the land.**
- c. **The administrator to hold Title deed and suit property in trust for herself and the three (3) children to share equally.**
- d. **Any party is at liberty to apply.**
- e. **Each party to bear its own costs.**

READ AND SIGNED IN OPEN COURT ON THIS 12TH DAY OF JUNE, 2015

M. W. MUIGAI

JUDGE

In the presence of;