



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**SUCCESSION CAUSE NO. 15 OF 1990**

**IN THE MATTER OF THE ESTATE OF ARTHUR GITHINJI SAMUEL KAMAU a.k.a  
ARTHUR GITHINJI KAMAU (DECEASED)**

**GLADWELL WANJIRU GITHINJI .....APPLICANT**

**VERSUS**

**DAVID KAMAU GITHINJI. ....RESPONDENT**

**RULING**

**INTRODUCTION/PLEADINGS**

The application presented in this Court is the affidavit of protest to the confirmation of grant filed on 6<sup>th</sup> December, 2010. The Applicant David Kamau Githinji a son of the deceased protested against the confirmation of grant application filed on 2<sup>nd</sup> September, 2010 by the administrator's of the estate.

There is common ground as to the list of beneficiaries, list of assets and part of the mode of distribution. With regard to property Kiambu/Waguthu/679 it is to be divided equally amongst the widow of the deceased and all the six (6) children of the deceased as settled and agreed by the beneficiaries of the deceased's estate.

The bone of contention is as regards the Residential Plot No. 810 Ongata Rongai 114 which according to the confirmation of grant is to be subdivided as follows;

1. David Kamau Githinji – solely to inherit 19 feet x 100 feet
2. Gladwell Wanjiru Githinji  
Joyce Wangui Githinji                      jointly to inherit 24 feet x 100 feet
3. Daniel Macheho Githinji  
Joyce Wangui Githinji jointly to inherit 57 feet x 100 feet  
Lucy Rachael Wamaitha

The Applicant took issue with the proposed mode of distribution of Plot No. 810/Residential in Ongata Rongai as it did not take into account the current position regarding his interest and the wishes of the deceased.

The Applicant deponed in his affidavit of protest that Plot No 810 was purchased jointly by the deceased and himself. He is therefore entitled to ½ of the property as of his own right and in addition to a further share as one of the beneficiaries of the deceased.

In paragraph six (6) of the affidavit, the Applicant proposed to obtain the following portion of Plot 810 Residential Ongata Rongai Trading Centre as follows;

1. David Kamau Githinji – 29 feet by 117 feet (1/3 of the Plot)
2. The other siblings and the widow of the deceased share the remaining 2/3 of the Plot.

The Applicant deponed that this was the most reasonable proposal in amicable resolution of the dispute in the family over the deceased's estate.

The Applicant filed a supplementary affidavit on 12<sup>th</sup> February, 2014 and in paragraph four (4) proposed that division of the said Plot is as follows;

1. David Kamau (himself) – ½ of the plot
2. Gladwell Wanjiru – ½ of the plot

The Applicant disowned the proposal he made in the affidavit filed on 16<sup>th</sup> December, 2010 and the proposal by the widow in the summons for confirmation of grant of 22<sup>nd</sup> June 2010. He further deponed that the other beneficiaries did not honour the agreement made following a written consent on 8<sup>th</sup> February, 2010 with regard to the proposed subdivision of the land.

## **SUBMISSIONS**

The widow's and administrators' Counsel Mr. Isindu filed written submissions on 3<sup>rd</sup> February, 2015 and alluded to the above issues. In a nutshell the thrust of the submissions was;

- a. The Applicant is a Co- administrator of the deceased's estate.
- b. He is the son of the deceased and the widow who is Co-administrator to the same estate.
- c. The Applicant received gifts inter vivos from the deceased during his lifetime.
- d. The Applicant has deponed that the deceased died intestate and then claimed that there was a Will attached to the affidavit of protest marked "DNG" filed on 12<sup>TH</sup> February, 2014.
- e. There should be equitable distribution of the deceased's estate.

The Court has considered the pleadings filed. From the Court record, on 21<sup>st</sup> January, 2015 the Counsel for the Applicant Mr. Gatheru and the Counsel for the Respondent Mr. Isindu informed the Court that they could not resolve the matter amicably between the family members.

On 9<sup>th</sup> February, 2015 Mr. Gatheru informed the Court that Mr. Isindu filed further submissions yet he had not been served with an affidavit filed with the submissions. Therefore he could not file submissions on behalf of his client. The same application was made on 9<sup>th</sup> March, 2015.

The Court allowed the service of the affidavit and the right to reply. On 9<sup>th</sup> March, 2015 the affidavit had not been served and therefore no reply was filed.

On 5<sup>th</sup> May, 2015 the Applicant advocates did not attend Court no reasons or circumstances were adduced or explained for the Court to consider. In the absence of any attendance and /or explanation the matter was put down for ruling on 5<sup>th</sup> June, 2015.

## **DETERMINATION**

The Court in analysis and determination of this matter is guided by the provisions of the **Law of Succession Act Cap 160** specifically **Section 35(5)** and **Section 38** which provides where there are children of the deceased property should ideally be shared equally amongst themselves. In the case of widow(s) and houses it should be shared equally taking into account circumstances outlined in **Section 28 and 35(4) of Law of Section Act Cap 160**. Therefore the six (6) children/siblings of the deceased should share the said Plot No. 810 Ongata Rongai equitably in the absence of any pre-existing circumstances.

The second issue is that the Applicant's evidence as deponed in the affidavits filed is contradictory. He first alleged that he bought the said plot jointly with the deceased. The Court was not furnished with any evidence of the sale, either a Sale Agreement or written Agreement; the purchase price and or payment schedule, who the seller was and any witnesses to the sale transaction.

In the absence of such evidence the claim is not confirmed by any evidence and the allegation cannot carry the day. It is dismissed due to lack of cogent evidence or proof.

The second allegation by the Applicant is that the deceased wrote a Will which was annexed to the supplementary affidavit filed on 12<sup>th</sup> February, 2014.

This matter was filed in Court in 1990 and Applicant and widow of the deceased were appointed administrators. The Applicant did not disclose the facts of the deceased's Will until 2014 that is 24 years later. Surely, if the Applicant knew of the deceased's Will why did he not disclose it? Where was it all that time?

This matter did not proceed for hearing interpartes so the Applicant did not adduce oral evidence. The Counsel for the parties opted to file written submissions and then took a ruling date in Court.

The Court took a cursory glance of the Will attached to the application. The Court observed it is not an original document; i.e written in the deceased's own hand but it is typed. The Will is not signed by witnesses as required by law. The document is so clean and clear that it could not have been kept in this way for all those years in that mint condition.

The evidence before this Court strongly suggests that the letter/Will is a forgery. All in all it does not conform to the requirements in **Section 11 of Law of Succession Act Cap 160**. This Court disregards the same and will distribute the deceased's estate intestate.

In light of the contradicting evidence by the Applicant it is difficult for the Court to accept any of the evidence adduced as true.

The Court has evaluated the three (3) proposals of the mode of distribution of Plot 180 Ongata Rongai, the one in the submissions for confirmation of grant of 22<sup>nd</sup> May, 2010, the one of 6<sup>th</sup> December, 2010 and the one of 12<sup>th</sup> February, 2014 and finds the most equitable distribution of the said Plot is the one in the submission of confirmation of grant of 22<sup>nd</sup> May, 2010.

This Court approves and confirms the said grant as per the proposed mode of distribution and the consents filed by the beneficiaries as required under Section 71 of the Law of Succession Act Cap 160.

There will be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JUNE 2015.**

**M. W. MUIGAI**

**JUDGE**

*In the presence of;*