



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.113 OF 1995

IN THE MATTER OF THE ESTATE OF ELIUD NGICHU GITHIRE (DECEASED)

RUTH WANJA OTSYULA.....APPLICANT

VERSUS

ARTHUR NDURU GITHIRE.....1ST RESPONDENT

BUXTON FARMERS CO. LTD.....2ND RESPONDENT

R U L I N G

There is a long running dispute between the beneficiaries of the estate of the deceased in regard to who is entitled to inherit 186 shares in the 2nd Respondent Company. The Applicant has filed an amended summons pursuant to the provisions of **Rule 49** of the **Probate and Administration Rules**. She seeks several orders from the court. The relevant orders that are germane to the matters in dispute are the following prayers: the Applicant seeks permission of the court to be allowed to act on behalf of the administrator of the estate of the deceased. The Applicant alleges that the administrator is an ailing old lady now aged 92 years and who is incapable of administrating the estate of the deceased. She therefore prays to be allowed to be in-charge of the remainder of the distribution of the estate of the deceased. She further prays that the court allows her to enjoin the 2nd Respondent to the proceedings for the sole purpose of determining the shares held by the deceased in the said company. She finally prayed for an order cancelling the share certificate issued by the 2nd Respondent in favour of the 1st Respondent. She craves that the said shares be reverted back to the name of the administrator or in the alternative to her. The grounds in support of the application are stated in the face of the application. The application is supported by the annexed affidavit of the Applicant. The application is opposed. The 1st Respondent has filed a lengthy replying affidavit in opposition to the application. In essence, the 1st Respondent states that the orders craved for by the Applicant cannot be granted because the court had already given a verdict in the matter. He was of the view that the Applicant was abusing the due process of the court to harass him. This court did not see any response filed by the 2nd Respondent. However, during the hearing of the application, Mr. Kamau for the 2nd Respondent relied on the affidavit which had earlier been filed by the 2nd Respondent on 10th May 2011.

The court heard oral rival submission made by Mr. Gichigo for the Applicant, by the 1st Respondent (who was acting in person) and by Mr. Kamau acting for the 2nd Respondent. This court has carefully

considered the said submission. It has also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the Applicant made an appropriate case for this court to grant the application. As regard the first prayer that she be allowed to act on behalf of the administrator of the estate, this court is of the view that although the Applicant has established that the administrator is ailing and is therefore not capable of properly administering the estate of the deceased, the Applicant was required to seek the consent of all the beneficiaries so that she can be allowed to substitute the present administrator as the administrator of the estate of the deceased. The Applicant cannot, in an application such as the present one, seek the permission of the court to act on behalf of an administrator yet in the first place she has not been appointed as an administrator by this court. Without the consent of the other beneficiaries of the estate of the deceased, this court cannot in the circumstances grant her application to act on behalf of the ailing administrator.

Secondly, in respect of other prayers in her application, the issue as to who is entitled to the 186 shares in the 2nd Respondent Company was settled when this court issued the rectified certificate of confirmation of grant on 22nd September 2009. In that rectified certificate of confirmation of grant, the administrator was to inherit the said 186 shares in Hillcrest farm (now the 2nd Respondent) and hold the same in trust for all beneficiaries of the estate of the deceased. The issue as to whether those shares were the same shares held by the 2nd Respondent was the subject of a Ruling delivered by G.B.M. Kariuki J (as he then was) on 14th June 2012. At page 4 of his Ruling, the learned Judge had this to say:

“The administratrix of the estate holds the 186 shares in Buxton Farmers Co. Ltd in trust for all the children of the deceased....the administratrix of the estate is a trustee in relation to the shares and she is not qua trustee relieved from her obligation to the beneficiaries.”

It is clear from the above ruling that the learned Judge was categorical that the administratrix held the 186 shares in the 2nd Respondent Company in trust for all the children of the deceased. It came to the attention of the court during the hearing of this application that the administratrix had in fact transferred the said shares to the 1st Respondent. The 1st Respondent had in turn sold 21 shares in the said company despite the fact that there existed a court order restraining any dealing in the said shares pending the hearing and determination of this application that was issued by this court on 11th April 2013. The 1st Respondent still retains 165 shares in his name.

Upon evaluation of the facts of this application, it was clear that the administratrix acted *ultra vires* her role as the administrator of the estate of the deceased when she transferred the said 186 shares to the 1st Respondent when the rectified certificate of confirmation of grant clearly provided that the administratrix held the said 186 shares in trust for all beneficiaries of the deceased. From the affidavit on record, it is clear that the said shares translate into a not insubstantial sum of money. Mr. Kamau informed the court that the 2nd Respondent still holds the value of the said 165 shares pending further orders from this court on how the said sum should be disbursed.

As stated earlier in this ruling, the 1st Respondent admitted that he had sold 21 shares out of the 186 shares. He has therefore benefitted from selling part of the said shares. He had no legal authority to sell the said shares. This was because the said shares were transferred to him by the administratrix in contravention of a clear order of the court. There are twelve (12) beneficiaries of the deceased. This includes the widow of the deceased. So that this matter can be concluded, this court directs that the proceeds of the sale of the said 165 shares be paid equally to the eleven (11) remaining beneficiaries of the deceased excluding the 1st Respondent who has already benefitted. To facilitate the said distribution by the 2nd Respondent, the share certificate illegally transferred to the 1st Respondent is hereby ordered cancelled. The 2nd Respondent is ordered to pay the said sums directly to the eleven (11) beneficiaries. The 1st Respondent shall pay the cost of this application. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF APRIL, 2014.

L. KIMARU

JUDGE