



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 2979 OF 2012

IN THE MATTER OF ESTATE OF WILLIAM GAKUNJU MWICIGI.....
(DECEASED)

JUDGMENT

1. The deceased herein, William Gakunju Mwicigi, died on 14th November 1991 at the age of 77. According to a letter dated 12th January 2009 from the Chief of Kamburu Location, he was survived by sons and daughters from two houses. From House One were Mwicigi Gakunju, John Kamau Njuguna, David Njoroge Njuguna and Fredrick Kuria Njuguna, while from House Two were Joseph Ng'ang'a Gakunju, Lydia Wanjiru Kibira, Cecilia Waithira Wangai and Geoffrey Kagai.
2. Representation to his estate was sought by Fredrick Kuria Njuguna and Joseph Ng'ang'a Gakunju, in their capacity as sons of the deceased, in a petition lodged at the Githunguri Senior Resident Magistrate's court in **SRMCSC No. 9 of 2009**. In the petition, the deceased is said to have been survived by six (6) sons and two (2) daughters in law being – Mwachigi Gakunju, John Kamau Njuguna, David Njoroge Njuguna, Fredrick Kuria Njuguna, Joseph Ng'ang'a Gakunju, Lydia Wanjiru Kibira, Cecilia Waithira Wangai and Geoffrey Kagai. He is expressed to have died possessed of a parcel of land known as Gatamaiyu/Kamburu/481. The value of the said asset was put at Kshs.100,000.00.
3. The said petition was granted and letters of administration intestate were made on 7th May 2009 to Fredrick Kuria Njuguna and Joseph Ng'ang'a Gakunju.
4. On 16th November 2009 one of the administrators, Fredrick Kuria Njuguna, moved the court for subdivision of parcel number Gatamaiyu/Kamburu/481. His summons for confirmation of grant was undated. In his affidavit in support, he stated that the deceased had way back in 1988 allocated the heirs their portions in and a survey was carried out. The land comprises of 8.7 acres with a road cutting through it, splitting it into two unequal portions. One portion abuts the Bathi River while the other abuts the Kangari stream. The Bathi side is larger than the Kangari side. Four of the survivors were allocated land on the Bathi side while the other four got land from the Kangari side. Those on the Bathi side got 1.25 acres each, while those on the Kangari side got 1.00acre each.
5. The other administrator objected to the mode of distribution proposed by the applicant. He swore an affidavit on 23rd November 2009 in reply to the said application, which was treated by the court as an affidavit of protest. He admitted that the parcel of land measured 8.7 acres, but protested that the applicant had distributed the same as if it measured 9.0 acres. He also conceded that a surveyor by the name John Kamau Miano had be instructed by the deceased to subdivide the land, he allocated each beneficiary a portion of 0.9 acres leaving 1.5 acres to the deceased. He stated that he wished to have the land subdivided equally as per the wishes of the deceased. According to his calculations each beneficiary was entitled to 1.0875 acres out of the 8.7 acres.

6. The matter came up on 21st January 2010 before S. Ndegwa, Resident Magistrate. Four beneficiaries were in court. Two of them supported the application, while the other two objected. The court directed that oral evidence be taken. The parties adduced oral evidence on 22nd April 2010, 27th May 2010 and 17th June 2010. On 12th July 2010 visited the scene. The trial court delivered judgment on 2nd September 2010 the court when the application was allowed on the grounds that the subdivision proposed by the applicant followed the distribution carried by the deceased during his lifetime.

7. Following the said judgment of 2nd September 2010, a certificate of confirmation of grant was duly issued on 20th September 2010. It distributed the estate as follows:-

On Bathi side

- a. John Kamau Njuguna - 1.25 acres
- b. Fredrick Kuria Njuguna - 1.25 acres
- c. Lydia Wanjiru Kibera - 1.25 acres
- d. Geoffrey Kagai - 1.25 acres

On Kangari side

- a. Mwicigi Gakunju - 1.00acres
- b. David Njoroge - 1.00acres
- c. Cecilia Waithira Wangai - 1.00acres
- d. Joseph Ng'ang'a Gakunju - 1.00acres

8. The summons for determination is dated 23rd July 2011, filed by one administrator, Fredrick Kuria Njuguna. He proposes amendment of the certificate of confirmation to conform with the size of the land on the ground. The actual size is 8.7 acres, yet the land distributed in the certificate of confirmation totals 9.0 acres. The effect of the amendment would be to reduce the entitlements of each of the beneficiaries. He proposed that each the beneficiary getting a share from the portion on the Bathi River side take 1.205 acres each, while those on the Kangari River side take 0.955 acres each.

9. The other administrator replied to this application vide his affidavit sworn on 3rd October 2011. He proposes equal distribution where each of the beneficiaries take 1.0878 acres each. This is the same proposal that he had made in the confirmation application, and which proposal the court dismissed in the judgment of 2nd September 2011.

10. There is a further affidavit of the applicant sworn on 23rd March 2012. According to the applicant, the subdivision that confirms with the acreage on the ground should be that the form beneficiaries on the Bathi River side should take 1.25 acres each, while those on the Kangari Ruiru side take 0.925 acres each.

11. The matter was heard partially by B.M. Nzakyo, Senior Resident Magistrate, at Githunguri Law Courts. On 4th October 2012, he ruled that the land was valued in excess of Kshs.100,000.00 and therefore he had no jurisdiction. He ordered the transfer of the matter to the High Court for disposal. It is on that basis that the matter is now before me.

12. When the matter was placed before me, I opted to take oral evidence from the parties, for that is the approach that the Senior Resident Magistrate had adopted with respect to the said application. The applicant testified and was cross-examined, and so did his co-administrator who was also cross-examined.

13. What is before me is not an appeal against the judgment of S. Ndegwa, Resident Magistrate, of 2nd September 2009, nor a review of the said judgment. I am merely being asked to correct an error in the certificate of confirmation. The applicant had in his summons for confirmation distributed 9.00 acres of the subject property instead of distributing 8.7 acres. He has come back to court with a revised distribution which is founded on 8.7 acres rather than 9.0 acres. I cannot therefore go beyond that.

14. I find merit in the case advanced by the applicant. I hereby order that the confirmation orders made on 2nd September 2010 be reviewed so as to distribute the estate as per the proposals in the affidavit sworn by the applicant on 23rd March 2012.

15. The effect of this is that the certificate of confirmation of grant dated 20th September 2010 shall be amended so as to reflect distribution as follows:-

1. Distribution of Gatamaiyu/Kamburu/481 to those on the side of Bathi River to remain as per the certificate of confirmation of grant of 20th September 2011.
2. Distribution of Gatamaiyu/Kamburu/481 to those on the side of Kangari River.
 - a. Mwicigi Gakunju -0.925acres
 - b. David Njoroge -0.925acres
 - c. Cecilia Waithira Wangai -0.925acres
 - d. Joseph Ng'ang'a Gakunju -0.925acres

16. There shall be no order as costs. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 26th DAY OF September, 2014.

W. MUSYOKA

JUDGE