



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 2226 of 2008

IN THE MATTER OF THE ESTATE OF KIBATA WAMUKUU GICHUKI (DECEASED)

LUCY WANJIRU KIBABA.....1ST APPLICANT

ANTHONY MBUGUA.....2ND APPLICANT

VERSUS

LUCY WANJIRA MUCHENE.....RESPONDENT

RULING

KIBATA WAMUKUU GICHUKI, the deceased in this succession cause, died on 5th February 2008 at Lusugetti in Kiambu District. He died intestate owning land parcel number KARAI/KARAI/901 measuring 4.5 hectares. He was a polygamist with three wives. The **first wife, Lucy Mwihaki Mbugua** who is still alive had with the deceased 6 children three of whom are deceased. The **second wife, Kanyi Kibaba** who is dead had 3 daughters with the deceased one of whom, Lucy Wanjira Muchene, is the Respondent. The **third wife** of the deceased, **Lucy Wanjiru Kibaba** is still alive. She had 9 children with the deceased. She and her grandson, Antony Mbugua, have made the application. The contest in the application is between the 3rd house and the 2nd house.

A grant of Letters of Administration intestate was made on 14.5.2009 to Lucy Wanjira Gichuki, a daughter of the deceased's 2nd wife, after the Petition for the Grant was advertised on 13th March 2009 in the Kenya gazette. The Grant was confirmed on 28.6.2010. The Certificate of Confirmation of the Grant shows that the deceased's estate, namely, land parcel No.KARAI/KARAI/90 was equally distributed among the three houses each house taking 3.6 acres. In the 1st house, Esther Mwihaki was to hold in trust for the deceased's 5 children, namely, Wanjira Kibaba, Gichuru Kibaba, Wambui Kibaba, Njoki Kibaba, and Ngugi Kibaba and in the 2nd house, Lucy Wanjira Muchene, the respondent, was to hold in trust for three children, namely, Lucy Wanjira Muchene, Hannah Wanjiru and Salome Waithira Njenga while in the 3rd house Lucy Wanjiru was to hold in trust for the 8 children namely Wanja Kibaba, Guthera Kibaba, Gicheru Kibaba, Muthoni Kibaba, Wanjiku Kibaba, Kinyanjui Kibaba, Njoki Kibaba and Njunge Kibaba.

Lucy Wanjira Kibaba and Antony Mbugua, the widow and grandson of the deceased, now seek in their summons dated 7.10.2011 revocation of the confirmed grant. It is contended by the applicants that the proceedings to obtain the grant were defective in substance and that the grant was obtained fraudulently by the making of false statements. It is further contended that there was fraudulent concealment from the court of facts material to the case. These are the grounds set out in Section 76 of the Law of Succession Act, Cap 160. The applicants buttressed their application on the affidavits sworn by Lucy Wanjiru Kibaba on 07.10.2011 and 18.11.2011. A replying affidavit was filed on 2nd November 2011 by advocates

Munyalo Muli & Company on behalf of Lucy Wanjira Muchene.

The hearing of the application came up before me on 26.10.2011 and again on 23.11.2011. Mr. E. N.Githuka, advocate, appeared for the applicants on both occasions while Mr. L. K. Nganga appeared for the respondents on 26.10.2011 and Mr. T. M. Muli appeared for the respondents on 23.11.2011.

It was argued on behalf of the applicants that the Respondent did not inform or involve the applicants while making the petition seeking grant of letters of representation in the Estate of the deceased. Consequently, the applicants did not know and did not participate in the petition in which the grant of letters of representation made to the respondent was subsequently confirmed. There is no evidence adduced to controvert these allegations. The applicants' counsel pointed out an anomaly in the certificate of confirmation of the grant which shows that it was confirmed on 28th July 2010 while it appears to have been dated and signed on 28th June 2010. The original record of the court does not bear any record of proceedings on 28.07.2010. It seems that the grant made to Lucy Wanjira Muchene on 14th May 2009 was rectified and confirmed on 28.06.2010. The reference of the date to wit 28.07.2010 in the certificate of confirmation of grant seems to have been an error. The court has powers to correct errors on the face of the record. Accordingly, on the basis of this finding, I direct that the reference to "July" be deleted in the certificate of confirmation of grant and "June" be inserted in its place.

Counsel for the applicants also submitted that the deceased did not leave a widow whose name was Esther as appears in the certificate of confirmation of grant. Further, he contended that two administrators and not one administrator should have been appointed in the estate because there was a minor in the house of Lucy Wanjiru, the 3rd wife. It is a requirement of the provisions of Section 58(1) of the Law of Succession Act, Cap 160, that no grant of letter of administration in respect of an intestate estate shall be made to one person alone except where that person is the Public Trustee or a Trust Corporation. The provisions of Section 41 of the said Act also require that property devolving upon a minor or minors should be held in trust in equal shares in the case of more than one minor until they attain the age of majority or if they are females, until they marry. Moreover, it was pointed out that the distribution of the estate which resulted in the issuance of the certificate of confirmation of the grant, was without the participation or consent of the applicants.

On his part, Mr. Muli, counsel for the respondent, opposed the application and relied on the replying affidavit of the respondent. He made heavy weather of the omission by the applicants' counsel to file Notice of Appointment of Advocates. But I observe that on 10th October 2011, Messrs Ndungu Githuka & Company filed Notice of Entry of Appearance contemporaneously with the application for the revocation of the grant. It was Ms Muli's contention that Ndungu Githuka & Co. Advocates were not properly on record and that, in any case, proceedings were closed after the confirmation of the grant on 28.06.2010. But these are proceedings under the provisions of the Law of Succession Act. The stringent rules applicable in civil matters governed by the Civil Procedure Rules do not apply to succession matters governed by the provisions of the Law of Succession Act and the Probate and Administration Rules and the rules in the First to the Ninth Schedule of the Act. Indeed, rule 63(1) of the Probate and Administration rules imports only a limited number of rules from the Civil Procedure rules. It is clear that it was never the intention of the Legislature that proceedings under the Law of Succession Act should be governed by stringent rules the way proceedings under Civil Procedure Act are. In short, technicalities of procedure in succession matters are treated less seriously than in civil matters because of the nature of succession proceedings and the great need to focus on substance with a view to do justice to the parties. For this reason, I decline to accede to the request by Mr. Muli to expunge from the record the submissions made on behalf of the applicants. It was also submitted by Mr. Muli that all the necessary steps were not taken before the application came up for hearing. But he did not show any prejudice that his client may have suffered as a result. He urged the court to dismiss the application.

I have considered the averments in the affidavits of the applicants and the respondent. I have also considered the submissions made by both counsel. It is my finding that in the light of the fact that there was a minor in the estate of the deceased, the provisions of Section 58(1) of the Law of Succession Act were not complied with because, clearly, two administrators should have been appointed. I have also

discerned that the applicants were not informed of the petition and did not participate in the distribution of the estate although they were entitled to be informed and to participate in and consent to the distribution of the Estate. They were well known to the respondent and to the other members of the three houses as they all lived in close proximity to one another. These are cogent reasons why the confirmed Grant must be revoked. But of greater importance are the results this led to. The manner in which the Estate of the deceased was distributed can hardly be described as fair and equitable. The children in the 2nd house are only three while the children in the 3rd house are nine and the children in the 1st house are six. Clearly, equal distribution among the three houses in disregard of the number of children in each house was bound to result in inequitable distribution.

I am persuaded that the applicants have met the criteria set out in Section 76 (a), (b) & (c) of the Law of Succession Act to warrant revocation of the grant. Accordingly, I allow the summons for revocation of the grant dated 7th October 2011 and I make the following orders:

1. The grant of letters of administration intestate made in the Estate of Kibaba Wamukuu Gichuki (deceased) on 14th May 2009 to Lucy Wanjira Muchene which was rectified on 28th June 2010 and the certificate of confirmation of Grant dated 28th June 2010 are hereby annulled and revoked.
2. Parties shall seek a fresh grant and each of the three houses represented by each of the three widows of the deceased shall be represented in such grant unless all the beneficiaries consent to the contrary.
3. The subdivision of the land constituting the Estate of the deceased, that is to say, Land Title No.Karai/Karai/901 is hereby cancelled.
4. The subdivided portions namely Karai/Karai/2906, Karai/Karai/2907 & Karai/Karai/2908 from Title No. Karai/Karai/901 are hereby cancelled.
5. It is hereby ordered that title to the deceased's Land No.Karai/Karai/901 shall be restored forthwith.
6. It is further hereby ordered that the District Land Registrar in Kiambu Lands Registry, Kiambu County, shall forthwith comply with and effect orders numbers 3, 4 & 5 hereof by making the necessary entries, cancellations, and adjustments in the registers.
7. The parties and the families in each of the three houses in this estate shall continue to reside on and to use the land as they have been doing until this succession cause is finalized and the Estate distributed properly again.
8. Each party shall bear it's on costs.

G. B. M. KARIUKI, SC

JUDGE

Dated and delivered at Milimani Law Courts, Nairobi, on this 29th day of April 2013 by the Honourable Justice W. Musyoka on behalf of Justice G.B.M. Kariuki.

W. MUSYOKA

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JUDGE

COUNSEL APPEARING

Mr. E. N. Githuka of Ndungu Githuka & Co. Advocates, for the applicants

Mr. T. M. Muli of Munyalo Muli & Co. Advocates, for the Respondent

