



REPUBLIC OF KENYA

HIGH COURT AT NYERI

SUCCESSION CAUSE NO. 358 OF 2007

GILBERT WAMUGUNDA THUITA alias

WAMUGUNDA THUITA..... DECEASED

AND

MELIOTH KEGA WAMUGUNDA.....PETITIONER

JUDGMENT

1. By Chamber Summons dated 27th September 2010 and brought under Rules 58, 59 and 73 of Probate and Administration Rules the 1st Petitioner/applicant moved the court for ORDER

1. That this honourable court be pleased to authorize the bank manager Barclays Bank to sign and or execute the discharge of charge in respect of land title reg. No. TETU/IHURURU/69 for the estate of GILBERT WAMUGUNDA THUITA alias WAMUGUNDA THUITA – deceased in favour of the joint petitioner MERIOTH KEGA WAMUGUNDA and SALOME MUTHIGIO WAMUGUNDA to effectuate the subdivision and transfer of the land pursuant to certificate of confirmed grant issued by this honourable court on dated 21st day of November 2008.

2. That the 2nd Petitioner Salome Muthigio Wamugunda who has refused to comply with the court order be compelled to surrender the land title Nos. TETU/IHURURU/69 and Nyandarua/Pesi/112 to the Land Registrar's Nyeri and Nyandarua respectively and or in the alternative production of the titles be dispensed with and the same be canceled in order to effectuate the subdivisions and transfer of the said lands and new titles be issued.

3. That costs of this application be provided for.

4. The application was supported by the affidavit of MERIOTH KEGA WAMUGUNDA in which she deponed that Title Reg. No. TETU/IHURURU/69 was charged to serve a sum of Ksh. 30,000/- by the deceased with Barclays Bank International Ltd and that said sum was cleared and there is therefore no outstanding balance.

5. The applicant therefore prays that the Bank Manager be authorized to execute the discharge of charge in land Title No. TETU/IHURURU/69.

6 That the respondent has refused to execute the subdivision and transfer documents and has refused to surrender title documents in respect of Tetu/Ihururu/69 and Nyandarua pesi/112 to the Lands Registrar Nyeri/Nyandarua for cancellation.

7. In reply to said application DAVID MWANGI WAMUGUNDA filed an affidavit of protest on 24th

November 2011. He deponed that he did not sign the document in form P&A 38 on 2nd October 2007 before an advocate in Nyeri consenting to the filing of the petition and the signature thereon is not his and that his brothers and sisters did also not sign any documents in respect of the petition.

8. That he does not agree to the distribution of the property since the deceased had indicated how he wished his land Nyandarua/Pesi/112 to be shared out and had in deed caused subdivision to be carried out and that the deceased held a meeting with his children wives, relatives and friends and had his wishes written down.

9. He further stated that his mother the Respondent did not consent/sign the summons for confirmation dated 2nd October 2008. He further stated that Nyandarua land was to be shared by the children of the deceased.

10. In reply thereto the applicant filed a further affidavit wherein she deponed that the said DAVID MWANGI WAMUGUNDA on 21st October 2008 and other beneficiaries in the estate of GILBERT WAMUGUNDA THUITA swore a consent to confirmation of grant and consented to grant being made to their respective mothers.

11. The respondent on 11th December 2011 filed a replying affidavit wherein she deponed that after the grant of representation was issued to her jointly with the applicant she has heard little about the administration of the estate.

12. She further deponed that she never contested to the distribution of the estate and that the address used Box 255 Nyeri is not hers.

13. Parties herein by consent agreed that L.R. TETU/IHURURU/69 be shared equally between the petitioners and that issue of L.R. No. Nyandarua/Pesi/112 be determined by way of written submissions which have now been filed.

SUBMISSIONS

14. It has been submitted by the applicant that the deceased had two wives namely MERIOTH KEGA WAMUGUNDA 2nd wife with her seven children and SALOME MUTHIGIO WAMUGUNDA with her eight children.

15. That the beneficiaries consented to the confirmed grant and that the deceased directives as to inheritance does not amount to a will unless the same satisfies the conditions of an oral will/or written will.

16. It was further submitted that unless the confirmed grant is revoked through a substantive application an oral application concerning some directives of the deceased cannot be invoked.

17. On behalf of the Respondent it was submitted that on 20th August 2005 the deceased gathered his children relatives and friends and local administration where his wish on Nyandarua/Pesi112 was expressed and reduced into writing. This said wish was expressed by subdivision thereof and mutation forms filed to express his will as to upper and lower parts of the said land.

18. It is therefore submitted that the deceased had indicated how his said land known as NYANDARUA/PESI/112 should be shared.

ISSUES

19. From the submissions herein the affidavit evidence and the application the only issue for the courts determination is the subdivision of NYANDARUA/PESI/112 in which the applicant proposes that it be shared equally between the two widows whereas the respondent proposes that it be shares as per the deceased wish as expressed through the mutation form and the family meeting of 20th August. 2008.

20. To my mind this disagreement explain why the respondent has refused to execute the documents herein.

21. I have looked at the mutation form and note that the same is signed by the deceased on 30th May 2003 I have also looked at the family meeting of 20th August 2005 and note that the applicant has not denied the existence of the said meeting.

22. To my mind the intention of the deceased as regards Nyandarua/Pesi/112 is very clear and it has not been controverted. I therefore agree with the submissions by Mr. Mindo that the said land be shared out as per the wishes of the deceased herein and should the petitioners children wish that their parcels go to their mother they are at liberty to do so.

23. I therefore rectify the grant herein as regards Nyandarua/Pesi/112 only to be shared as per the wishes of the deceased and direct the respondent to execute documents in respect of the transmission thereof within 21 days from the date of presentation.

24. I further order that the Manager Barclays Bank execute the discharge of charge documents herein to enable the petitioners transmit the same.

25. This being a family dispute each party shall bear their cost.

Dated and delivered at Nyeri this 16th day of May 2013.

J. WAKIAGA

JUDGE

Mr. Muguku for the applicant.

Mr. Mindo.

for the Respondent.

Court: Ruling is read in open court in the presence of Mr. Muguku and in the absence of Mr. Mindo.

J. WAKIAGA

JUDGE