



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
SUCCESSION CAUSE 3430 OF 2007

IN THE MATTER OF THE ESTATE OF OBED WAWERU GITHENDIE (DECEASED)

PETER KARIUKI WAWERU 1ST APPLICANT

JOHN KIIRU WAWERU 2ND APPLICANT

VERSUS

JOSEPH NJOROGE WAWERU RESPONDENT

R U L I N G

Both the two Applicants and the Respondent in this matter are all brothers. The three of them are also the joint administrators of the estate of their late father, Obed Waweru Githende. The grant of letters of administration intestate was made on 5th May, 2008 and confirmed on 29th April, 2009.

By an application by summons for rectification of grant of letters of administration dated 7th June, 2010, the Applicants pray for orders that the Certificate of Confirmation of grant of letters of administration intestate issued in the above matter on 29th April, 2009 be rectified. They also pray that the costs of the application be provided for.

The application is supported by the annexed affidavit sworn on 7th June, 2010 by Peter Kariuki Waweru and John Kiiru Waweru, the Applicants herein. It is based on the grounds that –

- (a) The certificate of confirmation of grant did not reflect the position actually agreed by all the administrators/beneficiaries.***
- (b) The certificate does not reflect the wishes of the deceased.***
- (c) The applicants signed the affidavit in support of the summons for confirmation of grant out of a misrepresentation by JOSEPH NJOROGE WAWERU, the co-administrator.***
- (d) It is otherwise in the interests of justice that this application be allowed.***

Opposing the application, the Respondent filed a replying affidavit sworn on 15th March, 2011. In that

affidavit, he deposed that the grant was procedurally confirmed as nobody raised any objection at the time of confirmation. He therefore urges the Court to dismiss the application with costs and the Certificate of Confirmation be executed in equal shares as confirmed.

During the oral canvassing of the application, Mr. Gachichio for the Applicant argued that the Applicants entrusted the Respondent to prosecute the cause. This was especially because the Respondent had sold part of his bequest to some third parties and he was in a hurry to process the relevant title documents. As a result, the Applicants had hurriedly signed the consent and mode of distribution, only to discover later that the mode of distribution was not in consonance with the agreement made among the Applicants, thereby precipitating this application. He urged the Court to rectify the Certificate of Confirmation issued on 24th April, 2009 so that distribution is effected in terms of paragraph 8 of the affidavit sworn by Peter Kariuki and John Kiiru Waweru.

In his response, the Respondent argued that all the three brothers had agreed to get a surveyor. On 17th December, 2009, the surveyor came but did not complete his work and Peter Kariuki and John Kiiru refused to accept what the surveyor had advised. During the confirmation before the Judge, his co-administrators did not object to the confirmation. However, because they are brothers the parties sat down to discuss the issue but did not come to a definite conclusion. He prayed that the confirmation be revoked and then the parties can share afresh.

After considering the application and the submissions of both sides, I find that the main issue for determination is whether the mode of distribution was in accordance with the agreement which had been reached among the parties. According to the Applicants, the parcel of land No. MUGUGA/GITARU/164 was not to be inherited equally among the administrators. On the contrary, the two Applicants were each to get 0.525 acres whereas the Respondent was to get 0.35 acres, and there was a credible explanation for that disparity. The father of the parties (the deceased), had made a will in which he gave some land to two of his grandsons who were named after him. They were the respective sons of the 1st and 2nd Applicants herein. However, the will lacked validity as it was not witnessed. Nevertheless, in order to give effect to the intentions of the deceased, the parties agreed that each Applicant's share would be consolidated with that of his son. This arrangement culminated in each Applicant having 0.525 acres whereas the Respondent was to inherit 0.35 acres as none of his children had been given a share of land by the deceased. The Applicants therefore accuse the Respondent of having had the grant confirmed for sharing the land equally whereas that was not the intention of the parties.

In a bid to implement the sharing according to that agreement, all the three parties had a sketch made on 19th April, 2006 by one James M. Chege, a surveyor, on the subdivision of the plot in question into three portions. The document was duly signed by the three administrators and, in my view, that sketch plan lends credence to the averments by the Applicants that parcel of land No. MUGUGA/GITARU/164 was not to be inherited equally among the three administrators. Instead, it was meant and intended to be shared in the proportion set out in paragraph 8 of the Applicants' supporting affidavit which was in accordance with the sketch drawn by the surveyor and signed by all the beneficiaries including the Respondent himself. The fact that the Respondent urged the Court to revoke the confirmation in unison with the Applicants so that all the three brothers could sit down and share afresh is ample admission that the grant was not shared in terms of the agreement among the parties.

For the above reasons, I find that the Applicants have made out a case for the grant of the orders as prayed and I accordingly grant prayer 1 for rectification of the Certificate of Confirmation of Grant. Since the parties had all agreed on a specific mode of distribution before the grant was confirmed, I find it fair and proper to order that the said mode of distribution be honoured in observance rather than in breach. I accordingly order that the estate be shared in accordance with the mode of distribution set out in paragraph 8 of the supporting affidavit in this matter.

It is so ordered.

Costs will be in the cause.

DATED and DELIVERED at NAIROBI this 16th day of March, 2012.

L. NJAGI
JUDGE