



IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO.495 OF 2008

IN THE MATTERS OF THE ESTATE OF ZACHARIA NUNU GATHIGI – (DECEASED)

MARY MUTHONI THEURI.....1ST PETITIONER

REBECCA MWERU.....2ND PETITIONER

VERSUS

SAMSON GATHIGI NUNU.....OBJECTOR

RULING

Without going into the background of this dispute suffice to state that the disagreement the subject of this ruling involves two dependants of the late Zacharia Nunu Gathigi, namely his eldest son, Samson Gathigi Nunu (the objector) and the deceased's daughter-in-law, Tabitha Njambi Theuri, (the protestor). The latter is one of the two widows of the late James Theuri (the late James) the other son of the deceased who passed away after him (the deceased). James Theuri's second wife is Mary Muthoni Theuri. It may also be noted that the deceased also had a daughter, Margaret Wangui who has since also died but is survived by four (4) children, according to the protestor.

The objector applied for the confirmation of the grant which had been issued to him and Rebecca Mweru. Only one property was proposed to be distributed, namely NYANDARUA/KIRIMA/293. The objector in the application for confirmation had proposed that the property be shared equally between himself (2.7 acres) and his late brother's widows, the protestor and Mary Muthoni (2.7 acres).

The protestor filed an affidavit of protest complaining among other things, that:

- i) the objector has concealed material facts that the property is 5.4 acres while it is 5 acres;
- ii) the land was subdivided before James passed away and shared between James (3 acres) and his sister, the late Margaret (2 acres);
- iii) the portion distributed to the late Margaret is occupied by her children;
- iv) the late Margaret was buried on the property in question;
- v) the objector has also concealed the fact that he had been given parcel of land NO.THEGENGE/GATHUTHI/141 by the deceased, which the objector occupies;
- vi) the proposed distribution by the objector would amount to eviction of the late Margaret's children.

In what is headed "*further affidavit*" the objector has responded to the above allegations as follows:

- i) that the property in question is indeed 5.4 acres;
- ii) that at no time was the property sub-divided between the late James and the late Margaret; beside no consent to subdivide it was obtained;
- iii) the late Margaret's children do not occupy the suit property and that the late Margaret was not buried on the property;
- iv) that the late Margaret was buried on parcel No.NYANDARUA/KIRIMA/588, which is contiguous to the suit property, which is occupied by her children
- v) that parcels No.THEGENGE/GATHUTHI/141 has never been the property of the deceased; that the objector purchased it from previous owners;
- vi) that only the deceased and his wife (also deceased) lived on the suit property and none of their children lived on the property;
- vii) that upon the death of the deceased and his wife, the late James and his family invaded the suit property claiming ownership;
- viii) that the late James and the protestor have been leasing the property to third parties.

Counsel for both parties have filed submissions which I have duly considered along with the two authorities relied on by counsel for the protestor, **In the Matter of the Estate of the late Waweru Kabiru (Deceased)** H.C.SUCC. Cause No.1446 of 1999 and **In the Matter of Maria Wanja Njaungiri alias Wakahu Muthara (Deceased)** H.C. Succ. Cause No.2442 of 1995; in which the grants of representation were revoked for lack of consent of some of the dependants. The protestor pursuant to **Rule 40(6)** of the **Probate and Administration Rules** has filed this affidavit to protest the confirmation of the grant. I have already reproduced her grievance in the previous paragraph.

It is important to note that out of the eight (8) dependants, it is only the protestor who has filed affidavit of protest. There is no doubt, however, that when the objector brought the application for confirmation no consent in the prescribed form or at all was annexed to the application.

Learned counsel for the protestor has relied on **Rule 40(8)** of the **Probate and Administration Rules** to argue that without written consent, the grant cannot be confirmed. Learned counsel for the objector on the other hand has argued that the applicable provision is **Rule 41** of the **Rules**. The combined effect of the two rules is that where no protest has been filed, the summons for confirmation together with written consents of the dependants may be placed before the court and the court without requiring the attendance of the dependants may confirm the grant. But where there is a protest, the court has the duty to hear the protestor and all other interested parties before it can confirm the grant.

Indeed proviso to **section 71(2)** of the **Law of Succession Act** is explicit that the court must satisfy itself as to the actual identities and shares of each dependant before confirming the grant. As a matter of practice, the court ensure that the dependants are either present before it or have filed written consents before confirming the grant. The accusation by the protestor that the dependants have not consented in my view is premature, as there will be an opportunity to confirm whether or not the dependants have consented.

Regarding the size of the property, the protestor has not produced any evidence in support of her contention that the property is 5 acres. The objector on the other hand has exhibited a copy of certificate of official search clearly showing the acreage as 2.2 Hectares which translates to 5.4 acres. The protestor has not explained how 2 acres of the property was granted to the late Margaret. If it was so granted after the death of the deceased, as is suggested, then that is irregular and annulity as the grant has not been confirmed.

Secondly, the objector has deposed without being challenged that the late Margaret lived on NYANDARUA/KIRIMA/588, where she was buried and even her son who predeceased her was buried and where her children live.

The late Margaret's children have not complained. They had not sworn an affidavit in support of the protest. The court has not been told if they were under any disability or whether they are minors. Regarding THEGENGE/GATHUTHI/141, the protestor has once more failed to satisfy the court that it indeed belonged to the deceased before it was given to the objector. The objector for his part has demonstrated that he has been the registered proprietor of the property since 1958.

The proposal by the protestor that 2 acres be awarded to the late Margaret's children while the rest be inherited by her and her co-wife is unconscionable in view of the facts explained above, namely that the objector and the protestor's husband were the only sons to the deceased; that THIGENGE/GATHUTHI/141 did not belong to the deceased.

For these reasons, the protest fails and is dismissed.

I make not orders as to costs.

Dated, Signed and Delivered at Nakuru this 7th day of March, 2012

**W. OUKO
JUDGE**