



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO. 198 OF 2004
IN THE MATTER OF THE ESTATE OF JOSEPH GICHOHI KIGUTA - (DECEASED)
RULING

This Ruling relates to an application dated 8th March 2011 by Esther Muthoni one of the beneficiaries of the Estate of the late Joseph Gichohi Kiguta (*the deceased*), against Michael Kiguta Gichohi, her brother, the administrator of their father's estate, for the following orders -

- (1) that the Certificate of Confirmation of Grant to the estate of the late Joseph Gichohi Kiguta issued to MICHAEL KIGUTA GICHOHI on 20th April 2007 be reviewed, corrected, altered, and/or amended/rectified in the following respect -***
 - (a) that the sub-division and distribution of Plot Land Title Number NAKURU MUNICIPALITY/BLOCK 2/259 in favour of ESTHER MUTHONI GICHOHI should be strictly in conformity with the consent on the mode of sub-division/distribution dated 18th May 2005 and signed by all the parties/beneficiaries herein, and filed in Nakuru High Court Succession Cause No. 174 of 2004 on 20th May 2005.***
 - (b) that the Administrator MICHAEL KIGUTA GICHOHI should forthwith cause to be effected the survey/subdivision of the said Plot Title Number Nakuru Municipality Block 2/259 in conformity with the aforesaid consent, and he should immediately transfer or cause title to be issued to the Applicant ESTHER MUTHONI GICHOHI for her rightful portion of the said plot.***
 - (c) that the costs of the application be borne by the Administrator/Respondent.***

The Application was supported by the Applicant's Affidavit sworn on 8th March 2011 and these grounds -

- (1) The sub-division/distribution of the estate/plot as appears in the Certificate of Confirmation of Grant differs from the mode of sub-division/distribution consented to by all the parties/beneficiaries and filed in court,***
- (2) the mode of distribution in the said Certificate of Confirmation of Grant contradicts the mode of distribution of the said property in the Certificate of Confirmation of Grant issued in Nakuru High***

Court Succession Cause No. 174 of 2004,

(3) the mode of sub-division/distribution of the plot in question in the said Certificate of Confirmation of Grant dated 20th April 2007 deprives the Applicant of the larger portion of her share of the said plot, and particularly the portion on which she resides and which has been developed by herself,

(4) the mode of distribution in the said Certificate of Confirmation of Grant dated 20th April 2007 is not equitable and is tilted against the applicant.

The substance of these grounds is reiterated in the Applicant's Supporting Affidavit aforesaid, and were reiterated further in the submissions of Ms. Magana, learned counsel for the Applicant.

In opposition to the application, the Respondent filed a Replying Affidavit sworn on 27th May 2011 and filed on the same day together with a Notice of a Preliminary Objection of even date therewith which I directed be heard and determined together with the main application.

As this matter (*application*) touched upon the interests of one Edward Mwangi Gichohi, one of the beneficiaries, I on an oral application of Mr. Kahiga his counsel, allowed him to file a Replying Affidavit sworn on 13th June 2011, and had it filed on the same day.

The first issue to dispose of in this application is the Respondent's Preliminary Objection dated and filed on 27th May 2011. The Respondent opposed the application by raising three issues in the Preliminary Objection -

(1) that the Applicant filed a similar application in Nakuru High Court Succession Cause No. 174 of 2004 which was canvassed and a Ruling thereon was delivered on 22nd June 2007,

(2) that the application is *res judicata*,

(3) that the application is redundant, inept and a gross abuse of the process of the court.

I have perused the application herein together with the Affidavit and grounds in support thereof together with all the annexures thereto. I have also perused the Replying Affidavit of the Respondent and of Edward Mwangi Gichohi, the beneficiary directly affected by the prayers sought by the Appellant. I have also considered the submissions of counsel for the Applicant, the Respondent and the affected beneficiary.

I have in particular considered the annexure MKG1 (*being copies of the Applicant's application dated 20th November 2006 and the Ruling dated 22nd June 2007 by Hon. Lady Justice Koome*). The said application is an exact copy of the application herein, and it was determined by the learned Judges' Ruling aforesaid and is therefore *res judicata* in terms of Section 7 of the Civil Procedure Act, (*Cap. 21, Laws of Kenya*).

A judicial decision is conclusive between the same parties litigating under the same title in a court of competent jurisdiction, and this court has no jurisdiction to determine the same matter between the same parties. The application is to that extent incompetent.

Mr. Karanja, learned counsel for the Respondent however introduced a different dimension to the application herein. His submission was that the parcel of land known as Title Number Nakuru Municipality Block 2/259 was held by the parents of the Applicant and the Respondent as joint proprietors, so that upon the demise of Elizabeth Wanjiku Gichohi, one of the joint proprietors, her share was vested in her husband, Joseph Gichohi Kiguta the other joint proprietor. That means, counsel submitted, her share merged with that of her surviving husband and would not be subject of distribution upon her death, except with the consent of the said Joseph Gichohi Kiguta.

I, with respect, agree with Mr. Karanja's argument, because it is in accordance with Section 102(1) of the Registered Land Act (*Cap. 300, Laws of Kenya*), which says -

"102(1) where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land and consequently -

(a) disposition may be made only by all the joint proprietors; and

(b) on the death of a joint proprietor, his interest shall vest in the surviving or the surviving proprietors jointly."

There was no evidence or submission that the joint proprietors transferred their interest to become proprietors in common. In the absence of such evidence, or submission to that effect, this means that upon the death of Elizabeth Wanjiku Gichohi, certain consequences followed. **Firstly**, the interest of the said Elizabeth Wanjiku Gichohi vested by operation of law in the surviving joint proprietor, Joseph Gichohi Kiguta. **Secondly**, it means that the suit land was not available for distribution in the estate of the said Elizabeth Wanjiku Gichohi, and could not therefore be subject of any consent and any such consent in relation thereto would be a nullity. **Thirdly**, the suit land was only available for distribution as part of the estate of Joseph Gichohi Kiguta, and that such distribution was subject to the rules of distribution in terms of Section 38 of the Law of Succession Act, (*Cap. 160, Laws of Kenya*), which says -

"38. Where an intestate has left a surviving child or children but no spouse, the net intestate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be one, or be equally divided among the surviving children."

Section 41 of the Act provides for holding in trust of any estate for the benefit of minor children. Section 42 provides that the court will in any distribution of an estate take into account any previous benefits made to the beneficiaries or any of them.

The application herein is premised upon the provisions of Sections 47 and 74 of the Succession Act, and Rules 43, 49 and 73 of the Probate and Administration Rules. Section 47 is a jurisdictional provision which confers upon this court the power to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders as may be expedient.

Rules 43 and 49 of the Probate and Administration and procedural rules which govern the manner in which application for rectification of a Grant may be made. Rule 73 reinforces the inherent power of the

court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Section 74 on the other hand is a substantive provision. Along with rule 43 of the Probate and Administration Rules, it provides the basis upon which a Grant may be rectified. These grounds are errors in the Grant either as to the names or description of any person or thing or as to the time or place of the death of the deceased or, in the case of a limited grant the purpose for which the Grant was made.

The Application herein is for none of those purposes. The application herein is for re-distribution of the estate to be in accordance with the applicant's desires.

In this regard therefore, I have examined and considered both the Summons for Confirmation of the Grant dated 26th March 2007, and the Affidavit of Michael Kiguta Gichohi in support of the Confirmation of Grant of Administration of the estate of Joseph Gichohi Kiguta, and the Certificate of Confirmation of Grant dated 20th April 2007, and I do not find any error in either the description of the names of any person or thing or as to the time or place of the death of the deceased.

For those reasons, I find no merit in this application, and I dismiss the same with costs to the Respondent.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 12th day of October 2011

M. J. ANYARA EMUKULE
JUDGE