



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Application 50 of 2005

IN THE MATTER OF THE ESTATE OF NDEGWA KURIA (DECEASED) AND
IN THE MATTER OF DISTRIBUTION OF L. R. NO. NDARUGU/GATHAITE/444
AND

IN THE MATTER OF CONFIRMATION OF GRANT OF LETTERS OF
ADMINISTRATION INTESTATE OF THE ESTATE OF NDEGWA KURIA (DECEASED)

J U D G E M E N T

The appeal before the court is contained in a Memorandum of Appeal filed on 13th July, 2005 but dated the 13th July, 2005. It was filed with the leave of court since time for filing had expired. The orders appealed from as far as the court can understand are dated 10th July 2002 made by the Senior Resident Magistrate. M Kiptoo, of Thika. The orders divided the land known as L. R. No. Ndarugu/Githaite/444 into four equal portions of three acres each and a fifth portion of 1.5 acres. The appellant disagrees with this mode of distribution.

Perusal of the lower court records, i.e. Thika Chief Magistrates Court Succession Cause No. 215 of 1993 shows that the deceased Ndegwa Kuria died on 5th August, 1993. By 17th September, 1993 Succession Cause had been filed in that court with one Joseph Mundia Ndegwa as the Petitioner. The latter died in 1998 and the applicant herein was substituted as the Petitioner later.

It is clear from the records that the applicant had always wanted that distribution be carried out in such a way that the applicant got a larger share of the state due to the explained facts that he was nearer socially to the deceased, had lent some animals to the deceased to assist him purchase some part of the estate, and that the deceased, in any case had subdivided the land in such a way as to give him a larger share which he wanted to retain as so divided.

The record would also tend to suggest that the applicant had throughout the process of the court of obtaining the grant, insisted on the distribution which he believed was as per the wishes of his late father. To that end the lower court record and this High Court file record are rampant with his affidavits and attempts to make his wishes clear to the court.

There is however, evidence on record also, that his brother, wanted the estate to be distributed in such a manner as to give each son of the deceased, an equal part.

On 17th July, 2001 the applicant applied for a confirmation of the grant which had earlier been issued to his deceased brother Joseph Mundia, although his affidavit is clear that he wanted distribution done according to his own wishes. The record shows that the applicant requested court that the grant of letters of administration should be confirmed as per his application dated 17th July, 2001. His brothers who were in court also wanted a confirmation but in such a way that the land be divided into four equal shares, of 3 acres each with the balance of 1.5 acres going to their mother.

What is surprising however, is that the record shows that the applicant agreed with this suggestion of equal division which is not consistent with his persistent requests throughout the relevant periods. Indeed even soon after the lower court made an order for equal distribution, the applicant fought against it and has always done so to date.

The applicant had deponed that the Honourable Magistrate of the lower court deliberately wrote down an untruth that the applicant had agreed that the land, L. R. No. Ndarugu/Githaite/444 be divided into four equal parts. He argued that he had stood for a different kind of distribution contained in all his documents and pleadings and would not have suddenly changed in court. The applicant also stated that he did not know that the lower court magistrate had decided in a ruling that the land be divided equally. He accordingly challenged the correctness of the lower court dated 10th July, 2002.

He said order of 10th July, 2002 distributed the land in the following manner: -

- | | |
|---------------------------------------|------------|
| 1. Muthoni Ndegwa (mother) | 1.5 acres |
| 2. Michael Karanja Kamaru (applicant) | 3.00 acres |
| 3. Agnes Njeri | 3.00 acres |
| 4. Veronica Wangui Mundia | 3.00 acres |
| 5. Daniel Maingi | 3.00 acres |

I have carefully perused the record. I observe that the lower court confirmed the grant of Letters of Administration and issued a Certificate dated 10th July, 2002. Thereafter the record confirms that the applicant by his application to this court filed on 2nd October, 2002 applied that this Honourable court do issue orders to survey the L.R. No. Ndarugu/Gathaite/444 and enforce the distribution as contained in the certificate of grant. The applicant in the said application did not demand any departure from the mode of distribution shown in the certificate. Had the distribution been completed as shown in the said certificate, it seems to the court that no further dispute would be persisting in this matter.

However as things stand and as the applicant persistently pursued this matter with numerous applications; the applicant appears to have gained more and more confidence to alter the mode of distribution confirmed in the Certificate of Confirmation.

On 31st October, 2004 the applicant filed a Chamber Summons dated 6th October, 2004 seeking distribution which clearly attempted to modify the distribution in the Certificate of Confirmation. He wanted to have a share measuring 3.86 acres instead of the 3 acres in the certificate.

On 5th January, 2005 the Applicant again filed another Chamber Summons seeking a portion measuring 3.9 acres justifying it on various reasons which although having been always raised were ignored by the lower court in its final order of confirmation.

On 19th September, 2005 the Applicant got leave of this court through Koome, J, to file an appeal out of time. The appeal was filed on 13th July, 2005 through a Memorandum of Appeal dated 13th July, 2005.

In the memorandum of appeal the applicant/Appellant attacked the lower court's order of equal distribution which he claimed to have not been sought in court by the other beneficiaries. Reading the memorandum of appeal and all the affidavits of the appellant before and after the appeal was filed this court finds that his greatest complaint is about the court's decision making an order equalizing the shares when the applicant felt that he was entitled to more.

As earlier stated the applicant denied accepting a proposal purportedly originating from one of his brothers that the land L.R. No. Ndarugu/Gathaite/444 should be equally distributed to the beneficiaries of the estate of Ndegwa Kuria.

I have carefully examined the original record. I observe that the applicant who was petitioner in the lower court sought that confirmation of the grant of letters of confirmation be made on terms of his application dated 17th July, 2001. The magistrate then recorded that all the four sons of the deceased stated that they had no objection, except the record shows that they all four, all at once with one voice so to say, modified what the Petitioner/Appellant wanted by stating that the land should be divided into 4 portions of 3 acres for the four sons and one of 1.5 acres for the mother. More strangely, the court then records Muthoni Ndegwa as stating that she had no objection.

It would not need a lot of imagination to conclude that all the four sons did not speak simultaneously as they were recorded. This leads this court to conclude that it is improbable and unlikely that what is recorded is what indeed happened. It is likely therefore that what the applicant is stating to the effect that he did not accept the kind of distribution recorded by the lower court magistrate, is probably true. The likelihood is that the Honourable Magistrate recorded what formed in his mind to be fair rather than what the parties, including the appellant, said.

Furthermore all the comments recorded were clearly stated without an oath to state the truth. This is concluded because the record of the lower court does not show the parties were at any stage sworn.

It is also clear from the record that the court considered the comments from the beneficiaries including the Petitioner, as an agreement or consent, between or among them. If so, the court should have requested their signatures or thumb-prints so that they would be bound.

Finally, the lower court does not seem to have taken much time to consider the evidence of the parties, if evidence it can be called, before making a ruling. Nor can the ruling or determination considered as based on any specific evidence on record.

In my view and finding the court should write a reasoned-out determination or ruling. It did not do so.

For the above reasons, I am inclined to set aside the lower court's determination of this matter by allowing this appeal. Thereafter what would be probably proper to do is to refer this matter to the lower court for proper hearing and final determination.

Having considered the length of time this cause has lasted in the courts, I find that the best course would be to determine the matter here and now upon the evidence on record. Fortunately, the appellant's evidence is plenty on the record. There is also an affidavit sworn by one Joseph Mundia Ndegwa who is now deceased but was the original petitioner.

I notice that Joseph Mundia suggested that the land be distributed into four equal shares of 3 acres to go to each son while the balance of 1.5 acres would go to their mother. On the other hand the Appellant has always stuck to the evidence that the deceased had divided the land before he died to give each son his portion as marked on the ground.

Taking into account all the evidence on record however, it is not denied at any stage of the proceedings that the appellant had assisted the deceased by giving him a goat and a pig. While the court is not inclined to change the equal distribution of L.R. No. Ndarugu/Gathaite/444, it observes that the share of 1.4 acres which remained with mother of the four children, is one which was left for parents. To compensate the appellant, I find and hold that 0.9 of an acre of mother share of 1.5 acres should go to the Appellant when mother Muthoni Ndegwa leaves this world. The rest of the land of the original 1.5 acres measuring 0.6 acres will go to Maingi Kaniaru or his family, Peter Kiarie Ndegwa or family and Joseph Mundia Ndegwa or his family.

The end result is as follows: -

1. Michael Karanja Kaniaru - 3 acres plus 0.9 acres from mother
2. Joseph Mundia Ndegwa – 3 acres plus 0.2 acres from mother
3. Maingi Kaniaru - 3 acres plus 0.2 acres from mother
4. Peter Kiarie Ndegwa - 3 acres plus 0.2 acres from mother

Orders are made accordingly.

Dated and delivered at Nairobi this 7th day of April 2010.

.....

D A ONYANCHA

JUDGE