



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Succession Cause 161 of 2006
ESTATE OF GITONGA GICHANGI alias
GITONGA S/O GICHANGI - DECEASED
AND
RAPHAEL MUNENE GITONGAPETITIONER
AND
LAWRENCE KANYINA GITONGA.....OBJECTOR

RULING

On the 1st day of July 2008, this court granted letters of administration intestate to Raphael Munene Gitonga in respect of the estate of Gitonga Gichangi, deceased. Raphael Munene Gitonga, took out a summons for confirmation of grant wrongly dated 7th January 2009. The aforesaid application is supported by the affidavit of Raphael Munene Gitonga hereinafter referred to as the Petitioner. The Petitioner's scheduled of distribution indicates as follows:

(a) ***That L.R. No. Thegenge/Karia/476 to be shared in equal portions of 0.088 Acres by Raphael Munene Gitonga, Lawrence Kanyina Gitonga and John Ndegwa Gitonga.***

(b) ***L.R. No. Thegenge/Karia/876 to be shared as follows***

(i) ***Paul Karaya Gitonga - 0.09 acres.***

(i) ***Virginia Wanjiru Gitonga 0.02 acres.***

Lawrence Kanyina Gitonga, hereinafter referred to as the objector filed an affidavit to protest the confirmation of grant under rule 40(6) of the Probate and Administration Rules. It was directed that the application for confirmation of grant plus the protest be determined by oral evidence.

The Objector testified without summoning the evidence of independent witnesses to support his objection. He stated that the acreage of the two parcels of land stated in these proceedings do not tally with those stated in the official searches attached to the affidavit in protest. The objector urged this court not to confirm the grant until the anomaly was corrected. He proposed that the two parcels of land i.e. Thegenge/Karia/476 and Thegenge/Karia/876 be shared equally by Raphael Munene Gitonga, Lawrence Kanyina Gitonga, John Ndegwa Gitonga, Paul Karaya Gitonga, Virginia Wanjiru Gitonga and the late John Njigua Gitonga. The objector claimed the Petitioner did not consult them before taking up letters of administration.

The Petitioner on his part urged this court to dismiss the protest and proceed to confirm the grant. He testified and further summoned the evidence of two independent witnesses. The Petitioner (D.W.1) told this court that the late John

Njigua Gitonga was given 0.9 acres comprising in plot No. 136, hence he was not omitted in the inheritance. He told this court that the deceased owned three properties namely:

- i Thegeenge/karia/476 to be shared equally between himself, the Objector and John Ndegwa Gitonga.***
- ii Thegeenge/Karia/876 to be shared in equal portions between Paul Karaya Gitonga and Virginia Wanjiru Gitonga.***
- iii Thegeenge/Karia/136 to be given to the late John Njigua Gitonga and Virginia Wanjiru Gitonga.***

D.W.1 admitted that L.R. No. Thegeenge/Karia/136 was registered in the name of Carumella Gitonga, deceased. It measures approximately 1 acre. D.W.1 alleged that the parcel of land was transferred to John Njigua Gitonga when Carumella Gitonga was still alive. John Ndegwa Gitonga (D.W.2), being one of the beneficiaries testified in support of the evidence of the Petitioner. He claimed the clan elders had distributed the property. Joseph Maina Wanyeki (D.W.3), a village elder, told this court that he was part of the elders who arbitrated the dispute between the beneficiaries. He produced in evidence a copy of the schedule of distribution arrived at by the elders and agreed upon by the beneficiaries.

I have considered both the oral and affidavit evidence. The Objector raised three main issues to oppose the confirmation of grant. First, is that the land acreage stated in the schedule of distribution do not tally with those in the official records kept by the Land Registrar. Secondly that the estate of John Njigua Gitonga, deceased had been excluded. Thirdly that the family had not been consulted by the Petitioner before taking up letters of administration.

I have carefully considered the evidence tendered in support of the aforesaid allegations and the evidence given to counter the same. It is obvious that all the beneficiaries were consulted by the petitioner and by the clan elders before the application for confirmation of grant was made. It would appear from the evidence of D.W.3 that the Objector fully participated in the clan meetings which culminated into the schedule of distribution adopted by the petitioner. It has also been alleged that the late John Njigua Gitonga was excluded from benefiting from the deceased's estate. It is clear from paragraph 5 of the affidavit of the Petitioner, that John Njigua Gitonga was not included as a beneficiary in sharing parcels Nos. Thegeenge/karia/476 and 876. The Petitioner has explained the reason behind this move. He stated that the late John Njigua Gitonga was given the parcel of land known as Thegeenge/Karia 136.

I have carefully perused the document produced by D.W.3. It is apparent that the clan elders came to the following conclusion in sharing the estate:

- (a) Thegeenge/Karia/476 measuring 2.7 acres to be shared between the Objector, the Petitioner and John Ndegwa Gitonga in equal portions of 0.9 acres.***
- (b) Thegeenge/Karia/876 measuring 1.9 acres: 0.2 to Virginia Wanjiru and the rest to Paul Karaya Gitonga.***
- (c) Thegeenge/Karia/136 measuring 1.1. Acres: 0.2 acres to be given to Virginia Wanjiru and the rest to John Njigua Gitonga.***

It is not in dispute that Thegeenge/Karia/136 is registered in the name of Carumella Gitonga, deceased. I agree with the Petitioner that since the parcel of land given to the late John Njigua Gitonga does not form part of the estate of Gitonga Gichangi, deceased, then his name cannot appear in this cause. I am convinced the late John Njigua Gitonga was not disinherited.

It has been stated that the acreage stated in the application for confirmation of grant vary from that possessed by the land registry. I am convinced that is a valid objection. It is not however a fatal mistake. This court has a wide discretion to have the arithmetic error corrected under rule 73 of the Probate and Administration rules. In the end the protest is ordered dismissed and the grant of letters of administration intestate in respect of the estate of Gitonga Gichangi alias Gitonga s/o Gichangi, deceased given to Raphael Munene Gitonga on 1st July 2009 is confirmed on condition that the acreage due to each beneficiary stated in the schedule of distribution stated in paragraph 5 of the affidavit in support of summons for confirmation sworn by Raphael Munene Gitonga is ascertained by a Government Surveyor. Each party to meet his own costs of the protest and the summons for confirmation of grant. The estate to meet the cost of survey or in the alternative the beneficiaries to contribute in equal measure.

Dated and delivered this 11th day of November 2009.

J.K. SERGON

JUDGE