



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

Succession Cause 2710 of 2003

**IN THE MATTER OF THE ESTATE OF FRANCIS KAMAU NJUGUNA
(DECEASED)**

RULING

FRANCIS KAMAU NJUGUNA whom I shall henceforth refer to as ‘the deceased’ died on 20/6/2000.

His son OBADIAH KARIUKI KAMAU, who identifies his seven siblings, petitioned this court for letters to administer the estate and he managed to obtain the grant on 4/12/2003, which he now seeks to have confirmed and simultaneously to distribute the estate which comprises of several parcels of land in Kiambu, Kenya, namely KIAMBU/ KIHARA/2360, KIAMBU/ KIHARA/2361, KIAMBU/ KIHARA/2362, KIAMBU/ KIHARA/2363, KIAMBU/ KIHARA/2364, KIAMBU/ KIHARA/2365, KIAMBU/ KIHARA/2366, KIAMBU/ KIHARA/2368. The estate also comprises of parcels known as Plot numbers 130,132,133,134 and 135 all held in Nyemuka Development Company. I shall refer to all the parcels as ‘the estate property’. Kariuki proposes in his application, that the estate property be distributed as follows:

CHARLES NJUGUNA KAMAU - KIAMBU/ KIHARA/2362,

TO HIMSELF - KIAMBU/ KIHARA/2360 and 2363,

SAMMY KAMAU- KIAMBU/ KIHARA/2365

GODFREY KAMAU AND HIMSELF KIAMBU/ KIHARA/2366 jointly

CHARLES KAMAU and SAMMY KAMAU - KIAMBU/ KIHARA/2368.

GRACE GATHOGO, SERAH KAMAU, RACHAEL KARANJA and MARY MUKUNYA - KIAMBU/ KIHARA/2364, jointly

The plots in Nyemuka Development Company would be distributed as follows:

GRACE GATHOGO - Plot numbers 130 and 135,

SERAH KAMAU - Plot number 132

RACHAEL KARANJA - Plot number 133

MARY MUKUNYA - Plot number 134

His siblings SAMMY MBUGUA KAMAU and CHARLES NJUGUNA KAMAU have however lodged protests to the proposed mode of distribution, and it is their contention that though they consented to the confirmation of the grant, they however do not support the proposed mode of distribution as it was not in compliance with the wishes of their late father. They make special reference to KIAMBU/ KIHARA/2363, KIAMBU/ KIHARA/2366, and they depose that while the former was to be shared between all the four sons of the deceased, the latter was to be inherited by Sammy Kamau on account of the fact that he had he had borrowed money on his father's behalf from a financial institution.

Though served with hearing notices, the two protestors did not deem it fit to appear in court, nor were they represented by counsel. The matter thus proceeded in their absence, and it was the submission of the applicant that the protests by his two siblings ought to be dismissed for want of merit.

I have nevertheless considered the application and the protests thereto, all the pleadings and the submissions herein and I need not re-emphasize the fact that it imperative that an applicant such as the one before me provides the court with adequate proof that all the adult survivors of the deceased and all the adult beneficiaries of the estate have consented not only to the confirmation of the grant, but to the proposed mode of distribution of the estate.

In matters of this nature, I am guided by rule 41 of the Probate and Administration rules of the Succession Act Cap 160 of the Laws of Kenya which provides that:

(1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.

(2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.

(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.

Though the applicant deposes that the two had consented to the application for confirmation in full, the two were not availed in court to confirm that neither has he availed their written consents to the proposed mode of distribution. This is a major issue, and in view of the above provisions of the law, I would tend to agree with the sentiments of the two whose consent ought to have been availed by this applicant, that their consents must as a matter of necessity be availed.

As I discern it from their protests, the two are only concerned with the two aforementioned parcels of land. They do not oppose the confirmation of the grant in their brother's favour. I do also note that the other beneficiaries support this applicant. It would therefore only be proper that the distribution of parcel numbers KIAMBU/ KIHARA/2363 and KIAMBU/ KIHARA/2366 be stayed pending the hearing and determination of who should inherit the two properties. The applicant shall thus be required to move the court in an application in line with the above provision of the law.

Otherwise I confirm the grant in Kariuki's favour. In view of the fact that all the others are in agreement with Kariuki, I feel that further delay in granting their share of the estate would not only be unfair, it would occasion them injustice. I do thereby do allow the distribution of the rest of the estate to the specified beneficiaries. I do order that pending the determination of how parcel numbers KIAMBU/

KIHARA/2363 and KIAMBU/ KIHARA/2366 shall be distributed, they shall be preserved and further that the administrator shall be responsible for their maintenance until further orders of this court.

The upshot of all this is that Kariuki's application to dismiss the protest is therefore struck out with costs otherwise the costs of the confirmation shall be borne by the estate.

Dated and delivered at Nairobi this 18th day of November 2008.

JEANNE GACHECHE

Judge

Delivered in the presence of: