



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Misc Appli 298 of 2002

IN THE MATTER OF THE ESTATE OF FREDRICK GATIMU KABIRU - DECEASED

JOSEPH PETERSON MURIITHI GATIMU 1ST APPLICANT

GEORGE STANLEY GITHINJI GATIMU 2ND APPLICANT

Versus

EDITH MUTHONI GATIMU 1ST RESPONDENT

JOHN MUNENE GATIMU 2ND RESPONDENT

CICILIA NYAGUTHII GATIMU 3RD RESPONDENT

NANCY KARIMA GATIMU 4TH RESPONDENT

JUDGMENT

The summons for revocation of grant dated 22nd November 2002 has been brought by two sons of the deceased namely Joseph Peterson Muriithi Gatimu and George Stanely Githinji Gatimu. In that application the two sons deponed that their mother Edith Muthoni Gatimu petitioned for grant of letters of administration intestate in the lower court being Kerugoya Succession Cause No. 78 of 1998. In so doing they alleged that she excluded them amongst the listed number of beneficiaries. On perusal of the lower court file and particularly the petition it is clear that the two sons were not included as beneficiaries of this estate. Neither were they cited before the petition was filed. In the replying affidavit the petitioner, the mother of the applicants and the wife of the deceased, stated that the applicants were directed by the lower court to refer to her for her to effect the transfer of their portions of land to them. It is pertinent to note that in the replying affidavit the petitioner did not deny the allegation that the applicants were excluded from the list of beneficiaries. During the pendency of the summons for revocation the petitioner proceeded to sub-divide the estate property namely MUTIRA/KAGUYU/698 and sold one portion thereof. In the affidavit sworn in response to the application for revocation of grant by Nancy Karimi Gatimu it was stated that the revocation application was made in bad faith with the intention of frustrating the process of administration of the estate. The deponent stated that on the grant being confirmed all the family members which included the applicant's sat down and agreed on the mode of distribution as follows:-

1. JOSEPH PETERSON MURIITHI GATIMU – LR MUTIRA/KAGUYU 3685 – 0.30 Hectares

2. GEORGE STANLY GITHINJI GATIMU - LR MUTIRA/KAGUYU 3686 – 0.30 Hectares
3. EDITH MUTHONI GATIMU - LR MUTIRA/KAGUYU 3682 – 0.35 Hectares
4. JOHN MUNENE GATIMU - LR MUTIRA/KAGUYU 3687 – 0.30 Hectares
5. CECILIA NYAGUTHII GATIMU - LR MUTIRA/KAGUYU 3683 – 0.30 Hectares
6. NANCY KARIMA GATIMU - LR MUTIRA/KAGUYU 3684 – 0.30 Hectares
7. EDITH WAINOI KINYUA – 0.50 Hectares (bona fide purchaser)

The deponent went on to deny that the said subdivision was done in secret as stated by the applicants. He stated that the applicants only began to raise objection when the succession cause was nearing the end. Before considering the arguments that were raised before me it is important to deal with the respondent's arguments that the summons for revocation are supported by an affidavit a dated earlier than the application which respondent argues that date makes the affidavit to be defective. The respondent argued that the affidavit was incurably defective and prayed that the application be dismissed on that ground. My response to that argument is that Order XVIII rule 9 of the Civil Procedure Rules does allow an affidavit which is dated earlier than the action to be relied upon unless the court otherwise directs. That rule is in the following terms.

“unless otherwise directed by the court an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned.

It is clear from that rule that the dating of an affidavit does not render a suit or an action to be defective. Accordingly the respondent's argument in that regard is rejected. The respondent in the affidavit sworn by Nancy Karimi Gatimu contradicts the distribution provided for in the confirmed grant. The confirmed grant of the Kerugoya Magistrate's Court provided distribution of the estate property as follows:-

1. EDITH MUTHONI GATIMU - MUTIRA/KAGUYU/698 - 0.90 HECTARES
2. JOHN MUNENE GATIMU - MUTIRA/KAGUYU/698 – 0.30 HECTARES
3. CECILIA NYAGUTHII GATIMU - MUTIRA/KAGUYU/698 0.30 HECTARES
4. NANCY KARIMA GATIMU - MUTIRA/KAGUYU/698- 0.30 HECTARES

It is clear on that confirmed grant that the applicant were not given land. Further the mutation forms attached to the affidavit of Nancy Karimi Gatimu also does not show that the applicants were to benefit from the subdivided property of the deceased. In the affidavit of Nancy it was argued that one plot was sold to Edith Wainoi Kinyua to enable the petitioner to finance this succession cause. There however was no evidence of such sale other than the bare statement in the affidavit. It also is not clear how a portion of the property could have been sold to Edith Wainoi Kinyua when she was not one of the beneficiaries listed on the confirmed grant. On the whole it is doubtful whether the property was sold to her. The just decision of this matter in view of the anomalies, for example, the exclusion of the applicants in the list of the beneficiaries, failure to cite them not to mention failure to provide for their entitlement can only lead the court to revoke the grant issued herein. Accordingly the judgment of this court is that the grant issued by Kerugoya Magistrate's Court Succession Cause No. 78 of 1998 confirmed on 6th September 2000 is hereby revoked. As a consequence of that revocation the court declares the subdivision of MUTIRA/KAGUYU/698 as null and void and the District Land Registrar Kerugoya is hereby ordered to cancel the new numbers more specifically;

1. LR MUTIRA/KAGUYU 3685 – 0.30 Hectares
2. LR MUTIRA/KAGUYU 3686 – 0.30 Hectares

3. LR MUTIRA/KAGUYU 3682 – 0.35 Hectares
4. LR MUTIRA/KAGUYU 3687 – 0.30 Hectares
5. LR MUTIRA/KAGUYU 3683 – 0.30 Hectares
6. LR MUTIRA/KAGUYU 3684 – 0.30 Hectares

The District Land Registrar Kerugoya shall thereafter revert back to parcel no. LR MUTIRA/KAGUYU 698. The applicants' costs shall be paid by the petitioner.

DATED AND DELIVERED THIS 18TH DAY OF DECEMBER 2008

MARY KASANGO

JUDGE