



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 8 OF 2016

IN THE MATTER OF THE ESTATE OF KEZIAH WAMAITHA WAWERU (DECEASED)

RULING

The Summons

This Ruling relates to Summons for confirmation of the grant issued by the Principal Magistrate's Court in Kikuyu on 2nd April 2015 in respect of the Estate of Keziah Wamaitha Waweru, deceased, in Succession Cause No. 16 of 2014. The deceased died on 9th December 2010. The matter was transferred to the Family Division, High Court Nairobi following an application to transfer the Succession Cause from Kikuyu Law Courts to Nairobi High Court brought by Stanley Mungai Waweru.

The Summons for confirmation is dated 17th September 2019. It is supported by the Affidavit sworn by the Administrator on the same date. The administrator filed a Supplementary Affidavit sworn on the 6th December 2019. There is an Affidavit of Protest to the Summons for Confirmation dated 20th April 2021 by Stanley Mungai Waweru. Through the directions of this court on 28th April 2021 the Summons and the Protest were canvassed by way of written submissions. The Administrator's Submissions are dated 5th of May 2021 and those by the Protestor are dated 17th May 2021. The following orders are sought in the Summons:

1. That the grant of Letters of Administration Intestate made to Suzanne Nyambura Nungi on 10th January 2014 which was transferred from Kikuyu Law Courts to Nairobi High Court be confirmed as per the mode of distribution annexed herein.
2. That before distribution of the estate and the property L.R No. KARAI/KARAI/818 the beneficiaries should not built any permanent structures other than what is there or transact in any sale or part of the land to third parties.
3. That costs of the Application be in the cause.

The Applicant has sworn an Affidavit in Support of the Summons in which she deposed that the parcel of land the subject matter of these proceedings belonged to their late father David Waweru Wanuna now deceased. That their late father transferred the parcel of land to their mother the deceased in these proceedings. That their mother died on 9th December 2010. That all beneficiaries are children and grand children of the deceased. That the estate should be shared out in the mode of distribution proposed in the schedule attached to the Affidavit.

The Affidavit in Support of Summons for Confirmation lists the following as the beneficiaries of the estate to the deceased:

1. Stanley Mungai Waweru - son
2. Medrine Wanjiku Waweru - daughter
3. Suzanne Nyambura Nungi - daughter
4. Jane Nyokabi Waweru - daughter (deceased) survived by:
 - (i) Stanley Mungai
 - (ii) David Waweru
 - (iii) Beatrice Stella Ngina
5. Wilfred Miingi Waweru - son (deceased) survived by:

- (i) Wamaitha Miingi
- (ii) Josephine Wanjiku Miingi
- (iii) Nyokabi Miingi

6. Josephine Wambui Waweru - daughter (deceased) survived by:

- (i) Linda Wamaitha Waweru
- (ii) Jacqueline Nyokabi Waweru
- (iii) Emma Wanjiku Waweru

It is proposed that each child gets an equal share of the estate. The share of the deceased children shall be inherited by their children as shown in the Supporting Affidavit.

In her Supplementary Affidavit dated 6th December 2019, the Administrator, Suzanne Nyambura Nungi, deposed that the proceedings in this Succession Cause had been stayed pending the finalization of ELC Case No. 614 of 2009 on account of an application brought by Stanley Mungai Waweru; that the ELC Case has since been dismissed and that there is no other pending application or appeal; that it is the wish of beneficiaries, other than Stanley Mungai Waweru, to have the grant confirmed; that it is fair and just to have the grant confirmed to enable this matter to come to a close and to have each beneficiary take possession of their respective shares; that the protestor who has refused to sign consent for confirmation of the grant is delaying this matter and that the proposed mode of distribution is just and equal for all the beneficiaries. It is further stated that the Protestor has been uncooperative and has been absent in all family meetings claiming that he had been given 2 acres by their late father while there is no will. Minutes of the family meeting are attached to the Supplementary Affidavit.

The Protest

Stanley Mungai Waweru has filed a Protest against the Summons for Confirmation. In his Affidavit of Protest dated 20th April 2021, he states that he is a beneficiary in the estate subject of these proceedings; that in the Summons for Confirmation of Grant dated 17th September 2019, the Administrator failed to equally distribute the estate comprised in KARAI/KARAI/818 amongst all the beneficiaries in accordance with the wishes of their late father who was the previous owner of the land before it was transferred to their late mother, deceased in these proceedings. He states that before their late father transferred the subject property to the deceased in this Cause, he had been diagnosed with early Parkinson Disease and therefore his capacity to transfer the subject property is in question. That before their father died there was an agreement to transfer 2 acres from KARAI/KARAI/818 to the Protestor and a consent had been obtained. He has attached the said consent as a document marked "SMW1". He states that four of the beneficiaries namely Wamaitha Miingi, Nyokabi Miingi, Jacqueline Nyokabi and Josephine Wanjiku Miingi, who live outside the country have not signed the consent and that the mode of distribution and the making of consents for confirmation and distribution was not communicated to him hence his protest.

Submissions

The Administrator submitted that she and the Protestor are brother and sister while the other beneficiaries are either direct beneficiaries as children of the deceased or grandchildren of the deceased. She submitted that the Protest has no basis because the Protestor has not tendered proof that he had been given 2 acres out of KARAI/KARAI/818 or that the parcel of land had been subdivided. It was submitted that the beneficiaries mentioned by the Protestor have signed the consents although they were not supposed to sign since their interest in the property is derived from their deceased mother or father who were the children of the deceased; that all the beneficiaries except the Protestor are not objecting to the confirmation and distribution. It is submitted that the issues being raised here have been raised and adjudicated before other courts and the only thing remaining is the distribution of the estate. It is submitted that one cannot obtain consent from the land control board to transfer unsubdivided land. The Administrator urges that the estate be distributed in the manner she has proposed since the Protestor has not filed his own proposed mode of distribution.

The Protestor has identified the following as the issues for determination:

- (i) Whether two (2) acres should be excised from the title KARAI/KARAI/818 before the final confirmation of Grant over the remaining parcel of property.
- (ii) Whether the mode of distribution of the property as stipulated in the consent to distribution dated 17th September 2010 is proper and in accordance with the law.
- (iii) Whether the Consent of distribution was properly executed.

In respect of the 1st issue it is submitted that their late father David Waweru Wanuma gave the Protestor two (2) acres out of the title under reference and a consent to transfer was obtained. However their father got sick with early Parkinson disease. That it is at the time when he was sick and not in good mental capacity that he was made to transfer the land to their late mother the deceased in these proceedings with the aim of denying the Protestor his claim of two acres. He submits that this court should therefore excise two acres from KARAI/KARAI/818 and have the two acres transferred to him before confirming the grant.

On the 2nd issue it was submitted that the mode of distribution proposed by the Administrator is incorrect because it does not take into

account the two (2) acres from the estate that belongs to the Protestor. He submits that the mode of distribution should be amended to take into account the 2 acres so that what is left for distribution is the remaining acreage.

On the 3rd issue it is submitted that the consents for distribution and confirmation are not properly executed because four (4) of the beneficiaries live outside Kenya and are alleged to have signed the consents yet there is no power of attorney tendered in court as proof of such signing. He cited the following cases to support his submissions:

1. *In re Estate of Kezia Njoki Gitau (Deceased) [2018] eKLR*
2. *In re Estate of Evans Ngugi Wanjau (Deceased) [2020] eKLR*
3. *Rosemary Njeri Njamura v Samuel Kimani Njamura & 4 others [2017] eKLR*

Determination

The issues raised in the matter before me are clear to me. The Protestor has raised an issue with the Summons for Confirmation of the grant issued at the Principal Magistrate at Kikuyu Law Courts on 2nd April 2015. Central in all the issues raised by the Protestor in respect of this estate, whether before the Probate and Administration Court or before the ELC are the same that out of the estate of the deceased comprised in parcel number KARAI/KARAI/818 there is a portion measuring two (2) acres that belongs to him after the same was given to him by his later father David Waweru Wanuma before the parcel was transferred to their late mother, the deceased whose estate these proceedings relate. The grant was issued in 2015. There has been no application to revoke it. The Protestor and the Administrator are siblings and all the beneficiaries are children or grandchildren of the deceased. The Administrator has proposed mode of distribution which has been consented to by other beneficiaries except the Protestor. The Protestor has not filed a proposed mode of distribution. His Affidavit of Protest, other than claiming two (2) acres allegedly given to him by his late father, it does not propose how the estate ought to be distributed. The mode of distribution he prefers comes out during his submissions to the effect that he gets his two (2) acres and the balance of acreage be distributed to the beneficiaries. It is trite that a party is bound by his/her pleadings.

The contention by the Protestor revolves around the issue of two (2) acres he claims his father gave him. He claims his father was sickly with early Parkinson disease and therefore was not in a good frame of mind to transfer the land to their late mother. Without spending a lot of time of the issues raised by the Protestor on the two (2) acres he claims, I wish to state that the issue has been the subject matter in ELC Case No. 614 of 2009. The Protestor did not prosecute that matter to the conclusion. It is instructive to note that the ELC case was against the Administrator and the deceased in this matter. I have read the ruling of the ELC court dated 27th June 2019. It shows that the ELC Case was dismissed on several occasions for lack of prosecution. It was also reinstated several times following applications by the Protestor. That ruling was handling such application to reinstate the suit. The court ruled that the Plaintiff (Protestor) had failed to persuade the court to exercise its discretion in his favour. In fact the court referred to him as an indolent litigant. The application to reinstate the suit was dismissed sealing the fate of the ELC Case. The case stood dismissed for want of prosecution.

This court is not aware that the Protestor has appealed against that dismissal. I therefore agree with the Administrator that there is nothing to stop this court from proceeding to determine this Summons.

The upshot of the dismissal of the ELC Case for want of prosecution is that the issue of two (2) acres having been given to the Protestor by their late father was left in limbo. This court declines the invitation by the Protestor to engage in a matter whose jurisdiction it does not possess to determine. The purported consent attached is not legible. Even if it was legible, this is a matter the Protestor ought to have followed through with the ELC Court. He was not interested in prosecuting that case. Consequently, as far as this court is concerned, the estate of the deceased comprises of the entire portion of KARAI/KARAI/818 and it is the entire portion that should be distributed as proposed by the Administrator.

Turning on the issue of consents and contested signatures, I wish to state that there is no other person other than the Protestor who contests the signatures on the consents. The Protestor has cited authorities to support his claim that the signatures of four of the beneficiaries were not obtained as claimed because they live outside Kenya. In the authorities cited, the issue before the court in each case was revocation of the grant based on the alleged forged signatures. The parties whose signatures were purported to have belonged moved the court. The Protestor has not shown any evidence that he has authority to act on behalf of the four beneficiaries.

I have read the minutes of the meeting in respect of this estate held on 6th July 2019. The Protestor did not attend. The issue of the beneficiaries who were outside Kenya was discussed and it was agreed that the consent will be sent to them to sign after which the beneficiaries who are within Kenya would sign. I have noted that the consent for confirmation of the grant has been signed by all the beneficiaries except the Protestor. However the consent for distribution is signed by two of the surviving children of the deceased with the Protestor refusing to sign.

The mode of distribution proposed is equal for all beneficiaries, that is all the children of the deceased. Where the child has passed on the share meant to go to him/her is given to his/her children. To my mind that mode of distribution has taken into account all the beneficiaries. It is an equitable distribution and I have no reason to fault it.

In conclusion, it is my considered view that the Protestor's Protest must fail for failure for the reasons given in this ruling. Consequently, the Summons for Confirmation of the Grant issued on the 2nd April 2015 is hereby allowed in terms of prayers 1 and 2. For avoidance of doubt I grant the following orders:

1. **That the Grant of Letters of Administration intestate made to SUZZANE NYAMBURA NUNGI on 2nd April 2015 is hereby confirmed in terms of the mode of distribution proposed by the Administrator with each of the children of the**

deceased getting equal share of the property known as KARAI/KARAI/818.

2. That before the distribution of estate and the property L.R. NO. KARAI/KARAI/818 is completed the beneficiaries are restrained from building any permanent structures on the property other than what is already there or to transact in any sale of any part of the property to third parties.

3. That costs shall be in the cause.

Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 7TH DAY OF JULY 2021.

S. N. MUTUKU

JUDGE