



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CAUSE NO. 8 OF 2016

IN THE MATTER OF THE ESTATE OF THE LATE JOHN

WAINOHO KABIRU alias JOHN WAINOHO (DECEASED)

RULING

1. The deceased, whose estate this succession cause relates passed away on 29th October, 1979. The delay in obtaining orders to distribute this estate has contributed in the acrimony between the surviving three daughters of the deceased.
2. After deceased passed away, the wife of the deceased and mother of the surviving daughters, the late **Lilian Wanjiru Wainoho** applied for grant of letters of administration intestate in Kiambu Chief Magistrate's court Succession cause No. 316 of 2016. From the depositions of the affidavits filed in this matter, it is evident that a grant that was issued to the *Late Lilian Wanjiru Wainoho* was revoked by order of the court. The *Late Lilian Wanjiru Wainoho* died before concluding that Succession and accordingly, the property of the deceased herein remained registered in the deceased's name and was undistributed.
3. This cause was filed by **Sarah Waruchu Mbugua (Sarah)** the 2nd born of the deceased. Sarah, petitioned for grant of Letters of Administration but her petition was not gazetted.
4. By the summons dated 11th July, 2016, Sarah sought orders of injunction to restrain children of her older sister, **Anne Wanjiru Mbugua (Anne)** and her other sister, **Susan Wangari Mbugua (Susan)** from evicting her and threatening tenants on deceased's parcels **NDUMBERI/RIABAI/52** and **LIMURU/ BIBIRIONI/T.747**; from cutting down trees on those parcels of land; and from selling firewood, amongst other orders. The court issued an order on 29th July, 2016 for status quo to be maintained. On Sarah filing another application dated 12th June, 2017 and alleging that the respondents had acted in contempt of the court order, this Court made an order on 13th July, 2017 again ordering status quo to be maintained.
5. The three sisters jointly petitioned for Grant of Letters of Administration which petition was gazetted on 10th August, 2018 and a grant in the three names was issued on 3rd September, 2018.
6. By this Ruling, I am considering the summons dated 24th April, 2019 for confirmation of that grant. Sarah has filed an affidavit of protest to that summons.
7. The issues arising from that protest are two, namely, whether the *Late Kibugi Gichuki Kihui* is a beneficiary of this estate and secondly, the manner the property **NDUMBERI/RIABAI/52** (hereinafter, Ndumberi property) should be distributed amongst the three sisters.
8. Anne and Susan deponed that the *Late Kibugi Gichuki Kihui* (deceased) (hereinafter Kibugi deceased) purchased one acre of the Ndumberi property. There is no documentary evidence of that purchase. All the three sisters however do confirm that Kibugi deceased was in occupation of part of Ndumberi property and it would seem that on him passing away his family has continued to reside thereof.
9. Kibugi deceased filed before the Environment and Land Court, Nairobi **Civil Case No. 743 of 2013 (O.S.)** for orders that he had acquired one acre of Ndumberi property by adverse possession. It is not clear to this Court what the outcome of that case was. In all probability, the *Late Kibugi's* right of adverse possession of Ndumberi property remained undetermined before his death otherwise if it had been determined in his favour the same would have been brought to the attention of this Court because the beneficiaries of Kibugi deceased (whose identities were undisclosed) did not bring to this Court's attention any such determination. Those beneficiaries are represented by *Njuguna John Kamau Advocate*.
10. If indeed the Environment and Land Court has not determined the claim of Kibugi deceased, his claim is then beyond this Court sitting as a probate court. This has been so held severally by the courts and a case in point is **In re ESTATE OF SOLOMON MWANGI WAWERU (DECEASED) (2018) eKLR** as follows:-

“12. The duty of the Probate Court is to oversee the transmission of the estate of the deceased to his beneficiaries. Its jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime and its purpose is to ascertain the assets, liabilities, if any, the beneficiaries and the mode of distribution of the estate. (See MURIUKI MUSA HASSAN VS. ROSE KANYUA MUSA & 4 OTHERS). In ALEXANDER MBAKA VS. ROYFORD MURIUKI RAUNI & 7 OTHERS [2016] eKLR the Court held that:-

“It is only where one has an established claim against the estate that has already crystallised that he can litigate it before a family court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the family court can entertain it.”

13. Therefore, claims by third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased are determined through settlement or where inapplicable through suits against the administrator(s) of the estate and not through an objection like the one before court.”

11. It follows that this Court’s determination of the first issue is in the negative, that is Kibugi deceased is not a beneficiary of this Estate and he is not entitled to be awarded one acre.

12. On the second issue I have noted the affidavit evidence and the proposal made by Sarah in her sketch plan and by Anne and Susan in their sketch plan. I tend to agree with the dispositions of Anne and Susan that to have the many fragments suggested by Sarah may render the land of low value and apparently may lead to displacement of those who are already in occupation. I will therefore order that the Ndumberi property be divided equally between the three sisters and such division shall take into account the occupation on the ground.

13. Before concluding the Ruling, I need to make mention of acts of destruction that took place on the Ndumberi property. I have considered the affidavit evidence and it is clear that Anne (or her children) and Susan cut down mature trees and continued to do so in disobedience of the subsistence court orders. The court take a serious view of such acts. Anne and Susan need to be reminded that they are, like everyone else, expected to obey a court order. This Court will cite the case of AMOS MATHENGE KABUTHU VS. SIMON PETER MWANGI (2015) eKLR where this obligation to obey court order was discussed, as follows:-

“The general rule governing the obligation of persons to obey court orders was enunciated in the case of HADKINSON V. HADKINSON [1952] ALL ER 567, in which Romer LJ stated at page 569 as follows:-

‘It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made against by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.’ (emphasis added).

9. Further, Lord Donaldson MR said in JOHNSON –V- WALTON (1990) 1 FLR350 at 352 stated that:-

“It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted in the first place.”
(Emphasis added).”

14. This Court will not hastate to act and make orders against a party who disobeys its orders.

15. Although Sarah prayed that the court do order Anne and Susan to account for the trees they felled I am unable to make such an order in the absence of valuation of the loss the estate incurred following the felling of those trees. It also has not escaped my attention that Sarah has benefited from the rental income of some structures, on Ndumberi property to exclusion of Anne and Susan. This Court wishes to sound a warning that it will not condone disobedience of its orders.

DISPOSITION

16. Having made the determinations hereinabove. I make orders that the Grant issued by this Court dated 3rd September, 2018 be and is **hereby confirmed** in the following terms:-

(a) NDUMBERI/RIABAI/52 shall share equally by **Anne Wanjiru Mbugua, Sarah Waruchu Mbugua and Susan Wangari Mbugua**. The subdivision shall take into account the occupation of the beneficiaries.

(b) LIMURU/BIBIRIONI/T.747 shall be registered equally in the names of **Anne Wanjiru Mbugua, Sarah Waruchu Mbugua and Susan Wangari Mbugua**.

(c) There shall be no orders as to costs.

17. Orders accordingly.

RULING DATED AND DELIVERED AT KIAMBU THIS 7TH DAY OF OCTOBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

For Sarah Waruchu: Ms. Rono holding brief for Waigwa

For Anne Wanjiru and Susan Wangari: Mr. Wambu Holding brief for

Ms. Wainaina

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE