



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 786 OF 2015

**IN THE MATTER OF THE ESTATE OF SILAS GITUMA MUSA M'TWARUCHIU ALIAS SILAS GITUMA MUSA
MUTUARUCHIU- DECEASED**

MARGARET KANYUA GITUMA..... 1ST PETITIONER

JOHN WYCLIFFE MURITHI GITUMA..... 2ND PETITIONER

VERSUS

GEDION MWORIA..... INTERESTED PARTY

AND

JOAN KANANA GITUMA PROTESTOR

R U L I N G

1. This is a consolidated decision on the following applications that are on records: -

- a) a Summons dated 1/11/2016 for confirmation of grant;
- b) a Summons dated 4/2/2020 seeking the extension of the orders made herein on 6/4/2017 suspending the confirmation of grant for a further 18 months;
- c) a Summons dated 7/2/2020 by the objector/protestor seeking the revocation of the grant;
- d) a Protest filed on 10/6/2020 by the protestor;
- e) a Summons dated 17/8/2020 seeking leave to admit certain affidavits and submissions out of time.

2. I first propose to deal with those applications that are procedural in nature. First is the application dated 17/8/2020 that seeks the protestor's supplementary affidavit sworn on 20/7/2020 and the submissions filed on the same date to be allowed.

3. The court gave strict timelines 1/7/2020 on the filing of documents. The protestor was not able to comply with those strict timelines but nevertheless filed and served the documents by 20/7/2020 out of time. She gave her reasons for the failure to comply.

4. Under **section 47 of the Law of Succession Act, Cap 160 Laws of Kenya (hereinafter "the Act")** as well as **Rule 73 of the Probate and Administration Rules (hereinafter "the Rules")**, this Court has the discretion to make such orders that are geared towards affording justice to the parties before it.

5. Timelines are given for purposes of fair and expeditious dispensation of justice. Under **Article 159 of the Constitution**, this Court is enjoined to dispense justice without undue technicalities and expeditiously. Timelines given by Court are not technicalities. They can be extended if no prejudice is occasioned on the opposite party.

6. In the present case, although **Mr. Mwirigi**, Learned Counsel for the petitioners urged the Court to ignore the protestor's aforesaid documents, this Court sees no prejudice to be suffered by his clients were the Court to admit the said documents.

7. Accordingly, I allow the said application and admit the aforesaid documents as having been filed within time and/or with leave.

8. The second application is the Summons dated 7/2/2020 by the protestor seeking the revocation of the grant. That application did not raise any serious issues under **section 76 of the Act** that would warrant consideration. However, **Mr. Gikundi Anampiu**, Learned Counsel for the protestor discovered that the protestor had no good grounds on that application. Accordingly, he filed the Protest dated 9/6/2020 which subsumed the said application.
9. Accordingly, I strike out the said application dated 7/2/2020 with no order as to costs.
10. The third application is the one dated 4/2/2020, whereby **Gedion Mworia** (*the interested party*) sought the extension of the Orders made on 6/4/2017 for a period of 18 months. He also sought for the suspension of the hearing of the summons for confirmation of grant dated 1/11/2016 pending the hearing and determination of **Nairobi HCC No. 143 of 2015 Gedion Mugambi Mworia and Another vs. Mpuri Maize Millers & 3 others** (“**Nairobi HCCC. No 143 of 2015**”).
11. On 6/4/2017, the court had inhibited the estate properties and suspended the confirmation of the grant for a period of 24 months. This was to enable the interested party to prosecute his claim in **Nairobi HCCC No. 143 of 2015**. The said period lapsed provoking the said application.
12. In support of the application, the interested party set out the various steps he had undertaken to prosecute the matter. He averred that the trial court in Nairobi was aware of the orders of this Court and that the matter was due for hearing. He further stated that the parties were engaged in negotiations with a view of settling the matter out of court.
13. In opposition, **John Wycliffe Murithi Gituma** (*the 2nd petitioner*) swore that the interested party had engaged in meaningless applications in the Nairobi case thereby squandering the time given by this court. That the negotiations between the parties were headed nowhere because of the interested party’s insincerity. That because of delay, **Nichola Mutuma Gituma**, a son of the deceased, had died thereby denying him a chance of inheriting his father’s property.
14. The court has considered the parties’ averments and the submissions on record. The debt in **HCCC No. 1035 of 2014** relate to a claim arising from a sale agreement entered into between the deceased and the interested party for the sale and purchase of **Unsurveyed Plot B in Thika Municipality**. The interested party claims that he partly paid the purchase price but the deceased sold the said property to a 3rd party. In the premises, the interested party seeks a refund of the sums paid as purchase price totalling Kshs.2,503,000/=-, expenses of kshs. 2,624,310/= and loss of bargain amounting to Kshs. 60,000,000/=, respectively.
15. In its ruling of 6/4/2017, this Court gave the interested party a period of 24 months to prosecute his said claim. In the meantime, the confirmation of the grant was suspended. The said period has already elapsed and no meaningful steps have been taken to conclude the said suit.
16. The question that arises is, can the family Court hold its hands and suspend the administration of an estate indefinitely at the instance of a creditor. I think not. The life and business of the creditor goes on whether the pending suit is determined or not.
17. On the other hand, however, the lives of the beneficiaries of the deceased are held at ransom. They have to await the determination of a creditor’s claim before they can make any meaningful decision on their lives in relation to the estate. That cannot be just. The lives of the beneficiaries must be allowed to go on notwithstanding a creditor’s claim. In the present case, one of the beneficiaries has since died while awaiting the interested party to prove his claim against the estate.
18. This Court holds that, a claim such as the one by the interested party is not sufficient enough to hold the hands of the administrators from going on with the administration of the estate of the deceased including distribution. Moreso, having in mind that for 24 months the interested party did absolutely nothing to prosecute his claim. The alleged effort, in the view of this Court, was not enough considering the seriousness of the matter and the period given.
19. Under **section 83(d) of the Act**, the administrators of the estate of the deceased are required **“to ascertain and pay out of the estate of the deceased, all his debts.”**
20. **Rule 41(3) of the Rules** provides: -
- “Where a question arises as to the identity, share or estate of any person claiming to be beneficiary interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently be 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 or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1.... proceed to confirm the grant”.**
21. The view the Court takes of the above provision, as read with **section 47 of the Act** is that; in circumstances where the family Court can separate a portion of the estate and postpone its distribution, it can do so while it will proceed with the confirmation of the grant in respect of the rest of the estate.
22. The foregoing provision enables the court to deal with the estate without necessarily being bogged down by unverified claims against the estate. The free estate of the deceased should be dealt with in favour of the beneficiaries without necessarily waiting for such unverified claims to be established.
23. In the present case, the interested party’s claim is for the purchase price of Kshs. 2,503,000/- paid to the deceased before his demise and expenses of kshs. 2,624,310/=. He has also claimed in the aforesaid suit a sum of Kshs. 60,000,000/- alleged to be lost bargain. That is an

identifiable claim that can be dealt with separately from the rest of the estate.

24. In this regard, the view this Court takes is that, a proportion of the estate whose value is equal or approximate to the said claim should be set aside while the rest of the estate should be distributed. The Court cannot hold the administrators *ad infinitum*, at the instance of a claim that is still at large, while the beneficiaries are suffering.

25. The evidence on record is that the administrators were offering the interested party 12 acres in **Ntirimiti/Settlement Scheme/162** while the interested party was insisting on 15 acres. The said property measures 34 acres. That property is enough to take care of the interested party's claim and the balance be distributed to the beneficiaries equally.

26. Accordingly, I hereby set aside **Ntirimiti/Settlement Scheme/162** to await the outcome in the **Nairobi HCCC No. 143 of 2015**. The interested party must conclude that case within 24 months of the date of this ruling failing of which the entire of the said property shall stand distributed to all the beneficiaries equally.

27. The other issue for determination is the 1st petitioner's claim that she is entitled to half the estate. She claimed that she was married to the deceased in 1967 and that she was instrumental in the acquisition of all the estate property. She therefore claimed to be entitled to a bigger share.

28. That may be true however, the claim was wrongly raised in a supplementary affidavit. The first time it was raised was in her Supplementary Affidavit sworn on 7/7/2020. If she was serious in her said claim, she should have lodged the same under the **Matrimonial Properties Act, 2014** against the personal representatives of the estate of the deceased.

29. Accordingly, having failed to properly lodge such a claim, her interest merges with that of the rest of the beneficiaries and would be considered together.

30. The next issue is the protest by **Joan Kanana Gituma (the Protestor)** 9/6/2020. She contended that the proposal by the petitioners was unfair and inequitable. That they had failed to take into account that the deceased had bequeathed five (5) acres each to four of the beneficiaries and 10 acres to **Grace Karatuma Gituma**. That the acreage for **L. R. Ntirimiti/Settlement Scheme/162** had been underestimated by 2.824 acres. She further complained that **L.R. Ruiri/Rwarera/547** had been omitted. She proceeded to give her own mode of distribution which she invited the Court to adopt.

31. The petitioners opposed the protest. It was contended that **Ruiri/Rwarera/547** was not part of the estate as it was pending the determination of the Minister in a case the estate lost before the DLASO on 24/5/2018. That the protestor had failed to disclose that she equally benefitted from **L.R. Ntirimiti/Settlement Scheme/130** measuring 2.2 ha.

32. In a brief rejoinder the protestor filed a supplementary affidavit dated 20th July 2020. She attached copies of letters from the Ministry of Lands and Physical Planning dated 25/6/2019 and 10/8/2020, respectively. The letters show that the appeal by the administrators to the Minister was successful and the said property had been distributed to **John Gituma 11.86 acres and Isabera Karuguru 5.9 acres**. Of course the share of John Gituma was in respect of the claim by the estate on that property.

33. The Court takes a grim view of the conduct of the administrators. Despite swearing various affidavits on record, they failed to disclose that the appeal had been determined in favour of the estate. Of course when they lodged the protest before DLASO, they were acting not at their own behest but for and on behalf of the estate. I therefore find and hold that the share of 11.86 acres in the said property belongs to the estate and is available for distribution.

34. This now leads to the distribution of the estate. The following are the undisputed beneficiaries of the estate of the deceased; **Margaret Kanyua Gituma, John Wycliffe Murithi Gituma, Joan Kanana Gituma, Kellen Mwendwa Gituma, Grace Karatuma Gituma, Nicholas Mutuma Gituma (Kelvi-Koome)**.

35. The following constitute the assets of the estate of the deceased; **Nthimbiri/Igoki/42, Nthimbiri/Igoki/265, Nthimbiri/Igoki/361, Ntima/Ntarika/37, Ntima/ Ntakira/106, Ntirimiti/Settlement Scheme/162, Ntirimiti/ Settlement Scheme/ 249, Ntirimiti/Settlement Scheme/1836, Ruiri/ Rwarera/547 (11.86 acres), Shares for Cooperative Bank of Kenya, Kengen and Kenya Airways.**

36. The Court has considered the valuation report on record. It is the cardinal principle in **part V of the Law of Succession Act** is that all beneficiaries are entitled to a share in the estate of the deceased. The distribution should be equitable.

37. Having set aside **Ntima/Settlement Scheme/162**, the rest of the properties, including 11.86 acres in **Ruiri/Rwarera/547**, are available for distribution.

38. **Section 42 of the Law of Succession Act** enjoins this court to take into account any previous benefits to the beneficiaries of the estate.

39. **In re Estate of Marete Mbui alias M''Marete M'Mbui alias Justus Marete (Deceased) [2017] Eklr.** it was held that: -

“Section 42 of the Law of Succession Act serves two important purposes; one, it fends off selfish tendencies of human beings in seeking for double portions in the estate of the deceased; and two. It enables the court to attain equity in the sharing out of the estate property among the rightful beneficiaries ...”

40. I have taken into account the averment that the mother, son and daughters of the estate were granted 5 acres each, **Grace Karamuta**

f) L.R. Nthirimbi/Igoki/361 (3.5 Acres)

John Wycliffe Mureithi Gituma

g) L.R. Ruiri/Rwarera/547 (11.86 acres)

Joan Kanana Gituma - 3 acres

Kellen Mwenda Gituma - 3 acres

Grace Karamuta Gituma - 2 acres

Margaret Kanyua Gituma - 5 acres

h) Ntirimiti/Settlement Scheme/249 (23.7 acres)

Joan Kanana Gituma - 3.5 acres

Kellen Mwenda Gituma - 3.5 acres

Grace Karamuta Gituma - 2 acres

Margaret Kamau Gituma - 4 acres

Kelvin Koome - 5 acres

John Wycliffe Murithi Gituma - 5 acres

i) Shares at Cooperative Bank, Kengen and Kenya Airways to Margaret Kanyua Gituma

46. This being a family matter, I make no order as to costs.

SIGNED at Meru: -

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 8th day of October, 2020.

F. GIKONYO

JUDGE