



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2225 OF 2008

IN THE MATTER OF THE ESTATE OF KEZIA WANJIKU GITAU (DECEASED)

JUDGMENT

1. On 26th October 2016 I delivered a ruling where I directed the Deputy Registrar to call for the court file in Thika CMCS No. 170 of 1982 to facilitate disposal of the pending application dated 16th March 2015. The lower court was averted and the said application was disposed of by way of *viva voce* evidence. The application said to be dated 16th March 2015 is in fact dated 1st February 2013, but was amended on 16th March 2015. It is premised on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. It seeks revocation of the grant made herein on 9th February 2009 and cancellation of the certificate of confirmation of grant issued on 1st November 2010. There are subsidiary prayers relating to distribution of certain assets as per orders made by the lower court from where the matter emanated.

2. The reason that I had called for the file in Thika CMCS No. 170 of 1982 was because the two causes are intertwined. The cause in Thika CMCS No. 170 of 1982 related to the estate of the husband of the deceased herein known as Gitau Muigai. He died possessed of a property known as Githunguri/Githunguri/400. He had been survived by two widows, the deceased herein and another Eunice Wambui. In Thika CMCS No. 170 of 1982 the property devolved upon the two widows in equal shares to hold during life interest. A certificate of confirmation of grant was issued on 28th February 1989. It is not clear from Thika CMCS No. 170 of 1982 whether the certificate of confirmation of grant was implemented by way of having Githunguri/Githunguri/400 transmitted to the two widows in the terms of the said certificate of confirmation of grant.

3. It transpired that Keziah Wanjiku Gitau died on 24th June 2008, and representation was sought to her estate by Maria Wangari Githere in her capacity as her daughter. She named the survivors of the deceased as herself, John Kuria Wagemu and Mary Nyakinyua Muricha. John Kuria was described as a son in law, while Mary Nyakinyua was said to be an interested party. The property said to comprise the estate was said to be Githunguri/Githunguri/400, the same property that had been distributed by the court in Thika CMCS No. 170 of 1982. A grant was made to Maria Wangari Githere on 9th February 2009, and letters of administration intestate issued to her on even date. She applied through a summons dated 11th January 2010 for confirmation of the said grant, proposing that the land Githunguri/Githunguri/400 devolve upon her. To that application, John Kuria Wagemu protested, saying that the estate of Keziah Wanjiku Gitau was only entitled to half of Githunguri/Githunguri/400 going by the certificate of confirmation of grant issued in Thika CMCS No. 170 of 1982 dated 28th February 1989. He proposed that the deceased's half share in Githunguri/Githunguri/400 be shared out between the administrator, himself and Mary Nyakinyua Muricha at the ratios of 1½:1½:½ acres, respectively. The application by the administrator was allowed and Githunguri/Githunguri/400 was devolved wholly upon her, a certificate of confirmation of grant in those terms was issued to her dated 2nd June 2010.

4. John Kuria Wagemu also filed a summons for revocation of grant dated 9th June 2010 on two principal grounds, that the administrator was seeking to inherit the whole of Githunguri/Githunguri/400 yet the deceased was entitled to only half of the same; and that he was married to a daughter of the deceased known as Rachel Nyambura who was also deceased and he was entitled to the share that was due to her. The administrator responded to that application by saying that she was only interested in the share that was due to her mother. She averred that the applicant was all along aware of what was going as he was the one who walked with her when she initiated the cause. Eventually, the application was heard orally and the certificate of confirmation of grant dated 2nd June 2010 was canceled and it was directed that a fresh certificate issue distributing Githunguri/Githunguri/400 in the manner proposed. The grant was confirmed on 1st November 2010, with the estate being shared out in the manner proposed by John Kuria Wagemu, a certificate of confirmation of grant in those terms was duly issued in those terms.

5. Another revocation application was filed in the cause on 15th February 2013, dated 1st February 2013, by members of the family of Eunice Wambui Gitau, the late co-wife of the deceased, and the person entitled to the other half share of Githunguri/Githunguri/400 going by the certificate of confirmation of grant dated 28th February 1989 issued in Thika CMCS No. 170 of 1982. The application seeks revocation of the grant made herein on 9th February 2009 to Maria Wangari Githere and cancellation of the certificate of confirmation of grant dated 1st November 2010. The application was amended on 1st March 2015 to include a prayer to effect that Githunguri/Githunguri/400 be distributed in accord with the confirmation orders made on 5th October 1988 in Thika CMCS No. 170 of 1982. The gist of the application is that the distribution of the estate in this cause did not reflect the spirit of the distribution ordered in Thika CMCS No. 170 of 1982.

6. The application was disposed of by way of *viva voce* evidence. Maria Wangari Githere, the administrator, was the first to take the witness stand. She stated that the property of Gitau Muigai was distributed in Thika CMCS No. 170 of 1982 between his two widows, Eunice Wambui Gitau and Keziah Wanjiku Gitau. She said that she came from the house of Keziah Wanjiku Gitau, and that she took Keziah's share of the land, and she wanted the share of the land due to Eunice Wambui to go to her children. She asserted that the distribution of the estate of Gitau Muigai was concluded in Thika CMCS No. 170 of 1982, and land was distributed amongst his two widows. She stated that the land was 7 acres, and each of them was to get 3.5 acres. She asserted that she was not staking a claim to Eunice Wambui Gitau's share of the land. In any event, according to her, the family of Eunice Wambui Gitau had already shared out what belonged to their mother.

7. John Wagemu Kuria testified next. He stated that he was after the share due to his late wife, a daughter of the deceased, from the estate of the deceased. He stated that the Thika court had given each of the widows 3.5 acres. After the deceased died, surveyors came on the ground and sought to subdivide the land. They curved out the deceased's land. Mutations were done but the applicant raised objections which then stopped the process. He stated that he had filed the mutation forms in court. He conceded that he did not involve the applicant in seeking representation to the estate of the deceased. He asserted that although the deceased did not have title to Githunguri/Githunguri/400, she held a certificate of confirmation of grant which had given her a portion of Githunguri/Githunguri/400. He said that it was the children of Keziah who were to inherit her portion of Githunguri/Githunguri/400.

8. Samuel Njora Gitau testified next. He stated that Gitau Muigai died in 1966. He had two widows, who bore him sons and daughters. The daughters eventually married. On his deathbed he told the witness that if he died he desired that the land goes to his four sons and his two widows. He confirmed what transpired at confirmation of grant in Thika CMCS No. 170 of 1982, but added that the widows of the deceased did not seek subdivision of the land in terms of the certificate of confirmation of grant. The widows eventually died. He stated that they did not take any steps towards subdivision of the land thereafter. He asserted that it was contrary to Kikuyu customs for daughters to inherit. He conceded that the administrator had gone to the land office and had sought excision of the 3.5 acres of Githunguri/Githunguri/400 that they had shared amongst three of them. His case was that the widows had no land that they could form part of their estates. He stated that John Kuria was not a son of the deceased, and the administrator was dead. He said that they were intent on selling the land after it is transferred to their names. He said that his side of the family had no intent to deny Keziah her share of the land. He stated that the Thika court gave the widows half share of the property during life interest, but the court did not state what was to happen to the same upon termination of the life interest. He stated that he preferred that Githunguri/Githunguri/400 reverted to the name of the deceased's husband, Gitau Muigai to facilitate distribution.

9. At the conclusion of the oral hearing the court directed the parties to file written submissions. There has been compliance. Both sides have filed detailed written submissions that I have read through and noted the arguments made therein.

10. The estate the subject of these proceedings is of Keziah Wanjiku, the mother of the administrator and mother in law of John Kuria Wagemu. She died in 2008, and therefore her estate falls for handling under the provisions of the Law of Succession Act, Cap 160 Laws of Kenya. It would appear that she died intestate as no will has been brought forward. John Kuria did talk of the deceased having died testate, however when he helped the administrator obtain representation to the estate the issue of testacy did not arise. Even when he brought his revocation application he did not raise the issue of the will. I shall therefore hold that she died intestate.

11. According to the material before me, the deceased had three daughters; the administrator herein, the late wife of John Kuria and another dead daughter whose details have not been clearly brought forth. These were her immediate family members. They were the persons who were entitled to share her estate going by the provisions of Part V of the Law of Succession Act. According to section 66 of the Law of Succession Act, the administrator had priority over anybody else to administration of her late mother's estate. She did not have to notify anybody else apart from the children of her sister and John Kuria, but John Kuria had taken care of their interests. I do not therefore find anything wrong with the manner the grant was obtained.

12. The next question for consideration is whether the deceased herein had any estate, in terms of having assets that her children could share out. The administrator asserts that her mother was entitled to half of Githunguri/Githunguri/400, while the applicant's assert that the deceased was entitled to a portion of Githunguri/Githunguri/400. Both sides base their arguments on the orders made on 5th October 1983 in Thika CMCS No. 170 of 1982. The administrator argues that the court had awarded her mothers equal shares in Githunguri/Githunguri/400; while the applicant argues that the mothers only got life interest, which terminated upon their deaths. The applicant's case appears to be that the right conferred on the mothers at confirmation was not absolute, and did not confer the property absolutely to them. It would appear to me that the answer as to whether the deceased herein had any estate lies with the interpretation that the court gives to the terms of the ruling in Thika CMCS No. 170 of 1982 on distribution of Githunguri/Githunguri/400.

13. In the ruling delivered on 5th October 1988, the trial court said as follows—

‘ ... Even on the question of what interests a widow had on her deceased's immovable property, I would state that whereas it is true that a widow had a life interest subject to the qualifications given in Page 13 of Cotran's Restatement of African Law, Volume 2, nevertheless if the deceased had more than one wife his estate was and still is distributed equally amongst surviving widows and then each widow would have a life interest on the portion which is distributed or given to her.

The issue in the instant case is one of distribution of the deceased's estate and it is not in dispute that he was survived by two widows, I would then in accordance with that age long custom distribute the deceased's estate equally among the two widows. It so hereby ordered that the deceased's estate which comprises land parcel Githunguri/Githunguri/400 be subdivided into two equal portions to be shared out between Keziah Wanjiku Gitau and Wambui Gitau, and each to a life interest on her portion ... ‘

14. My reading of the ruling is that the court intended to share out the land between the two houses of Gitau Muigai in accordance with customary law. The court did not use those exact words but that was clearly its intention. Rather than passing the property absolutely to the widows, it gave them life interest in the portions accruing to their respective houses. It is clear that the court intended that the land be subdivided into two and the portions given to the two widows. I agree, the court ought to have stated who was to have the portions upon the termination of life interests. What is clear is that the house of Keziah Wanjiku was entitled to a portion of Githunguri/Githunguri/400 which

she was to hold during life interest in trust for her children. Her estate therefore comprised of half share of Githunguri/Githunguri/400, which the parties agree amounted to 3.5 acres.

15. The next consideration would be who would be the children of the deceased for the purposes of succession. The applicant asserts that all the children of the deceased, who were all daughters, got married, and therefore, at customary law, they were not entitled to a share in the land. That cannot possibly be true. The deceased died after the Law of Succession Act had come into force. Distribution of her estate was subject to the Act, not customary law, which had been ousted by section 2(1) of the Act. According to Part V of the Act, and particularly section 38, the persons entitled to succeed to the rights of the deceased in Githunguri/Githunguri/400 were her children, that is to say the administrator herein, and her late sister who is represented in these proceedings by John Kuria. Stepchildren like the applicant and his siblings have a lesser right to inherit the estate of the deceased going by the provisions in part V of the Law of Succession Act.

16. I do not find any merit in the application dated 1st February 2013 and amended on 16th March 2015. The same is for dismissal and I hereby dismiss the same, with no order as to costs.

17. I have seen on record copies of mutations with respect to subdivision of Githunguri/Githunguri/400 on the side of Keziah's family to excise the 3.5 acres due to the estate and to have them shared out as ordered by this court. I see nothing wrong with the action by the administrator and John Kuria Wagemu, they should go ahead and give effect to the orders made herein and in Thika CMCS No. 170 of 1982. If the applicant and his siblings would like to distribute the half share of Githunguri/Githunguri/400 due to their mother, Eunice Wambui Gitau, they ought to obtain representation to her estate and process the matter in the usual way.

18. I had directed on 26th October 2016 that the file herein be transferred to the High Court at Kiambu, and the file was transferred to Kiambu. It was, however, brought back as Ngugi J. disqualified himself from the matter on account of conflict of interest. As I have disposed of the pending business, I hereby order that the file be returned to the High Court at Kiambu for final disposal.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS ...31st DAY OFJanuary....., 2019

W. MUSYOKA

JUDGE

DATED, SIGNED and DELIVERED at NAIROBI this15th DAY OFFebruary....., 2019

A.N. ONGERI

JUDGE