



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 301 OF 2007

IN THE MATTER OF THE ESTATE OF JOSEPHAT MAGIRI MWONGERA (DECEASED)

LUCY KATHURE JOSPHAT.....1ST PETITIONER

GACHERI NELLY MUTUA.....2ND PETITIONER

VERSUS

GILBERT MUTUA KIBANGA.....1ST OBJECTOR

JENNIFER N. KIAMBI.....2ND OBJECTOR

AND

ANN GAITI WANJOHI.....PROTESTOR

AND

MORRIS MWENDA MUTUA.....1ST INTERESTED PARTY

MUTUA DENNIS KIBANGA.....2ND INTERESTED PARTY

MARTIN KOOME KIBANGA.....3RD INTERESTED PARTY

RUTH NTINYARI KIBANGA.....4TH INTERESTED PARTY

J U D G M E N T

1. **Josephat Magiri Mwongera** (the deceased) died on 9th August, 2004 and was survived by a spouse and Seven children. **Lucy Kathure** and **Nelly Gaceri** (the petitioners) petitioned for letters of administration which was issued to them on 31st October, 2007.
2. On 27th May, 2008, they applied for the confirmation of grant but **Gilbert Mutua Kibanga** and **Jennifer N. Kiambi** objected to the same by way of an application for revocation of grant dated 6th June 2008.
3. After some lapse of time, the petitioners filed yet another Summons for confirmation of grant dated 28th April, 2017 proposing a complete different mode of distribution. This was protested to by **Ann Gaiti Wanjohi** (“the protestor”) vide her affidavit sworn on 16th July, 2018. The interested parties filed a replying affidavit in opposition to that protest and witness statements.
4. On 12/3/2019, the parties executed a consent that judgment be written on the basis of the materials on record. The parties were also directed to file their respective submissions. At the time of writing this judgment, only the interested parties had filed their submissions.
5. The 1st objector died while the matter was pending. He left behind three (3) sons and one (1) daughter who are the 1st to the 4th interested parties. The 2nd objector supported the position propagated by the interested parties.
6. I have carefully examined the record. I am alive to the fact that none of the deponents of the various affidavits or makers of the witness statements on record was cross-examined. The statements contained in those affidavits and statements therefore remain untested.

7. The deceased was survived by a widow, two sons and five daughters. The two sons have since passed on. The petitioners are daughters of the deceased. In their Summons for confirmation of grant dated 28th April, 2017, they annexed a Consent signed by all the beneficiaries save for the representative of the late **Gibert Mutua Kibanga**.

8. The protestor's case was that; **Jeniffer Ntibuka** had been incorrectly listed in the application for confirmation as a beneficiary while **Gilbert Gitonga**, a son, had been omitted; that the grandsons of the deceased who had been listed in the application for confirmation have not proved their dependence on the deceased hence they are not entitled to the estate of the deceased.

9. She contended that out of 27.4 acres of the estate, 3.72 acres had been apportioned to the five (5) daughters while the remaining 24.2 acres had been apportioned to the grandchildren of the deceased. She further contended that L.R. Abogeta/U-Chure/528 was the matrimonial home of the deceased which ought to be transferred to the widow of the deceased to hold in trust for the children of the deceased.

10. The interested parties opposed the protest. They contended that **Gilbert Mutua Kibanga (deceased)** was in occupation of **L.R. Abogeta/U-Chure/528** whereas **Kiamba Duati (deceased)** was in occupation of **L.R. Abogeta/U- Chure/863**. That these properties were granted to them by the deceased and they had substantially developed the same. **Jeniffer N. Kiambi** (wife to Kiambi Duati) contended that Kiambi Duati was given **Abogeta/U- Chure/527** by the deceased after he took care of his medical bills.

11. **Mutuma Kibanga** swore a replying affidavit to the protest and averred that he, **Morris Mwenda Mutua** and **Martin Koome Kibanga**, as children of Gilbert Kibanga had put up houses on L.R. **Abogeta/U-Chure/528**. That upon the filing of this cause, disharmony broke out within the family whereby, in or about December, 2009, the widow called a family meeting wherein it was agreed that the estate ought be distributed as follows:-

a) **Abogeta/U- Chure/863**

Duati Kibanga

b) **Abogeta/ U-Chure/528**

i) 2 acres to 5 daughters equally

ii) Balance to Gitonga Kibanga

c) **Abogeta/U- Chure/572**

Gitonga Kibanga

d) **Ntima/ Igoki/3142**

The 5 daughters equally.

12. The interested parties supported the mode of distribution proposed by the petitioners and averred that none of the daughters of the deceased have ever lived on or utilised any of the deceased parcels of land.

13. **Naftali. K. Mwenda**, a retired teacher and a nephew to the deceased stated that he attended the meeting called by the widow and confirmed the mode of distribution as set out by the petitioners. **Charles Kimathi Stephen**, a neighbour of the deceased, confirmed that Gitonga Kibanga and Kiambi Duati were settled by the deceased in the respective parcels of lands as stated by the interested parties.

14. **Mwenda Mugoi** a survey technician with M/S Geoland Surveyors stated that in the year 2010 his firm carried out survey works whereby it carved out 2 acres out of **Abogeta/U- Chure/528** for the daughters of the deceased. That the firm also subdivided **Ntima/Igoki/3142** into five portions for the said daughters. That a further 0.80 acres was carved out of **Abogeta/U-Chure/528** in 2014 to add to the said 2 acres earlier on carved out for the daughters.

15. **Mbugua Nicholas Nganga**, a registered valuer attached to M/s NI-Light Consultants Ltd stated that he was instructed to carry out valuation to the estate properties which he did. The open market value for the properties was as follows:-

- | | | |
|------------------------|---|-------------------|
| a) Ntima/Igoki/3142 | - | Kshs. 12 million |
| b) Abogeta/U-Chure/572 | - | Kshs. 7.5 million |
| c) Abogeta/U-Chure/528 | - | Kshs.7.2 million |
| d) Abogeta/U-Chure/863 | - | Kshs.13.5 million |

The Valuation reports were filed together with the other documents filed by the interested parties.

16. I have carefully considered the record and the contentions of the respective parties. As earlier on indicated, all the statements on record remain untested. Since that is how the parties wished their case to be settled, I will consider them and give them the necessary weight, if any,

taking into consideration the totality of the material on record.

17. The issue here is basically whether the proposed distribution is in accordance with the letter and spirit of **section 38 of the Law of Succession Act (“the Act”)** or whether there is any agreement by the parties to depart from the provisions of the Act.

18. The first issue, that I need to determine is the contention by the protestor that the grandchildren of the deceased are not entitled to inherit from him. That if the named grandchildren are entitled, then all the other grandchildren of the deceased should be listed.

19. It is correct that grandchildren are ordinarily entitled to a share of an estate through their parents. However, if grandchildren show that they lived with their respective parents on the land of a deceased during his lifetime and prove that they depended on it as grandchildren of the deceased, such grandchildren are entitled to be provided for.

20. **In the Matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR** Musyoka J held:-

“.....Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents. In this case, the applicant’s mother survived the deceased. She is the one entitled under Part V to inherit her mother, the applicant’s deceased grandmother. The applicant clearly has no claim under Part V so long as his mother survived the deceased.....”

21. In the present case, the sons of the deceased survived him. Their children will therefore be entitled to inherit from the shares due to their parents.

22. Under **section 38 of the Act**, the estate of a deceased is to be distributed equally or equitably unless the parties agree otherwise. This matter was filed way back in 2007. Gilbert Gitonga Kibanga and the widow of Daudi Kiambi objected to the same.

23. Thereafter, there was no action between 2008 until 2017 when the petitioners filed the application for confirmation. I note that it is during that period that they changed the mode of distribution from the one proposed in their earlier application dated 27th May, 2008.

24. I have noted that the petitioners are daughters of the deceased as is the protestor. They did not file any document in opposition to the protest. I note that the interested parties have contended that the fresh proposed distribution was arrived at after a meeting was called by the widow of the deceased.

25. Further to the foregoing, I note that the petitioners did not deny the existence of the alleged meeting. However, the alleged meeting was denied by the protestor who challenged the minutes that the interested parties sought to rely on.

26. The interested parties alleged that pursuant to the meeting called by the widow and the agreed distribution, a L.R. **Abogeta/U-Chure/528** was surveyed and 2 acres excised therefrom for purposes of being distributed amongst the 5 daughters of the deceased. A survey technician who carried out the exercise made a statement which is on record. He stated that the exercise was undertaken in the presence of all the daughters of the deceased. This is a fact that the protestor did not deny.

27. I note that in paragraph 9, the protestor states that on advice of her advocate, she denies the averments set out in the statement of oath made by **Mutuma Kibanga** in paragraphs 17 through 22. That denial is of no effect for two reasons. Firstly, the protestor cannot purport to deny matters of fact on the basis of advice by her Advocate. The facts are either correct or not. Secondly, the averment which is on oath is purported to be made in the alternative and without prejudice. That averment cannot stand. It is bad in Law. A statement on oath is not pleading that can be made in the alternative and without prejudice.

28. To my mind, I am convinced that a meeting or negotiations must have been undertaken within the family. That is why the petitioners changed their mode of distribution after a passage of close to 9 years. Further, all the beneficiaries including the protestor signed the Consent to distribution. A beneficiary cannot be allowed to resile from a position he/she has taken regarding distribution.

29. The consent that is signed to accompany the application for confirmation is a sacred act on the part of the executors thereof, which authorises a petitioner to propose to court a particular mode of distribution. Execution of such a consent constitute a binding agreement between the parties thereto once filed in court. One cannot execute such a consent and thereafter seek to retract his/her consent unless on circumstances under which one can resile from a contract, that is, if it is obtained by fraud, collusion, through misrepresentation, ignorance of material facts or contrary to the policy of the court.

30. If parties will give such consents and be allowed to easily resile therefrom, then such consents will lose their meaning and significance. A party is bound by such consent which he/she has willingly and knowingly executed. In my view, a consent that is executed willingly and then filed in court is a kin to a consent entered in court. The same principles applicable to a consent order are applicable to a consent executed in a succession matter and lodged in court.

31. The protestor did not deny having signed the consent dated 28th April, 2017. I saw the two administrators when they attended court on 12th March, 2019. They spoke fluent English. They looked polished, learned and well informed. They never struck me as ordinary rural folk ladies who could have been misled by their Advocate. The parties knew what they were doing. None of those who executed the said consent has denied it. They are bound by it.

32. Accordingly, I make a finding that the parties had agreed to the mode of distribution as presented by the petitioners. On that ground alone, the protest is for dismissal.

33. Apart from the foregoing, I have considered the values of the respective properties. The value of the properties being distributed to the daughters cannot be said to be so low as to constitute an injustice on them. It is valued at approximately Kshs. 14 million.

34. In view of the foregoing, I am satisfied that the protest has no merit and the same is dismissed.

35. Having dismissed the protest, the question that arise is whether I should order the removal of the names of the grandchildren and replace them with the Estates of their deceased fathers who are children of the deceased.

36. If the cause suggested by the protestor is adopted and, the shares of the sons of the deceased are distributed to their respective estates, it will behove their children, and therefore the named grandchildren and daughter in law of the deceased to take out fresh Succession Causes in the Matter of the Estate of the said sons to be able to inherit them. Is that convenient and less costly? I doubt.

37. To my mind, to save on precious judicial time and expense, I will, under **Article 159 of the Constitution, section 47 of the Act and Rule 73 of the Probate and Administration Rules**, approve the distribution as proposed by the petitioners as it is less cumbersome, it is expeditious and fair apart from concluding the matter once and for all.

38. Accordingly, the grant is confirmed in terms of paragraph 5 of the affidavit in support of **Lucy Kathure Josphat** sworn on 28th April, 2017.

It is so decreed.

DATED and **DELIVERED** at Meru this 16th day of May, 2019.

A. MABEYA

JUDGE