



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 125 OF 2009

IN THE MATTER OF THE ESTATE OF MBURU MWANIKI (DECEASED)

MARGARET WAIRIMU.....1ST APPLICANT

MURIGI GITAU.....2ND APPLICANT

VERSUS

ETHAN MBAU GITAU.....RESPONDENT/PETITIONER

RULING

The applicants are seeking a review of the orders made by this honourable court on 13 October 2017 in a ruling on a summons for revocation of grant which the applicant's themselves had filed. The application was drawn and filed by the applicants in person and is stated to have been made under Rule 59 of the Probate and Administration Rules and order 44 rule 1 of the Civil Procedure Rules. They must have meant Order 45 which was previously numbered as 44 in the former Civil Procedure Rules; that order provides for applications for review of orders or decrees where an appeal has not been preferred against them.

In their affidavit in support of the summons, they have complained that although I recognised them in my ruling as amongst the rightful beneficiaries of the estate of Mburu Mwaniki, I still directed that the estate be distributed as per the schedule to the certificate of confirmation of grant dated 2 October 1998 yet their interests are not catered for in that schedule; in other words, going by the scheme of distribution in that schedule none of them has been provided for. Although they have not specifically stated so, I understand the applicants to be saying that there is an error apparent on the face of record.

The respondent opposed the application and swore that the order of this court has already been complied with; however, all he attached to his affidavit in proof of this fact is a green card showing the registration of the deceased's estate has reverted to his name. There is no evidence that the estate has been transferred to the respective beneficiaries; this being the case, only part of the order has been complied with.

A brief background of this matter is that the respondent is the grantee of the letters of administration of the estate of Mburu Mwaniki. He petitioned for the grant in his capacity as the grandson of the deceased. In the affidavit in support of the petition, he listed the following as having survived the deceased:

1. Ethan Gitau Mburu (the respondent himself)
2. Gitau Mburu
3. Njeri Mburu
4. Njogu Mburu
5. Gitau Mburu

Apart from the respondent, I gather the rest were the deceased's children; the respondent is the son of one of the two persons named as Gitau Mburu. The duplication of names, I understand, arises from the fact that the deceased had four wives and some of his children bore similar names the only difference being their respective houses.

The respondent's proposed scheme of distribution of the estate was endorsed by the court; however, he somehow managed to transfer the

entire estate to himself and thereby effectively disinherited the rest of the survivors of the deceased's estate, mainly the three other houses of the deceased. It has also emerged that the approved scheme of distribution did not cater for all the houses.

Now in my ruling I noted, inter alia, as follows:

The respondent admitted in his replying affidavit that the applicants were his first cousins since their respective fathers were brothers whose father was the deceased. Accordingly, they were all the deceased's grandchildren.

Noting that the respondent had no better right to the estate than the applicants and at any rate, the other beneficiaries from the rest of the deceased's houses, I held further that;

As I have noted before, the applicants may not have made out a case under section 76 of the Law of Succession Act, but it is quite clear that the administrator who was entrusted with the administration and the distribution of the estate abused his powers and transferred the deceased's entire estate to himself; he thereby effectively disinherited the rest of the deceased's heirs including the applicants. In the face of such manifest injustice, the court cannot watch helplessly, fold its hands and sit back simply because the procedure the applicants adopted to approach the court is not the appropriate one. If the court was to take that course, it would effectively be abdicating its sacrosanct duty to administer substantive justice under the cover of procedural technicalities.

In a nutshell, although I acknowledged the applicant's entitlement to the deceased's estate, I proceeded to order the execution of the distribution of the estate in accordance with the confirmed grant yet the applicant's house had been left out. With this omission, I am bound to agree with the applicants that there is an error which is apparent on the face of the record.

As much as the respondent opposed the applicants' application and filed a replying affidavit in that respect, he did not dispute the applicants' claim that they were left out in the distribution of the estate. As a matter of fact, he had earlier admitted in his submissions that like the applicants, he was deceased's grandchild and they were all beneficiaries to his estate. To quote him, he stated:

Your Lordship, the deceased herein was my grandfather. Before his demise he had four wives and had divided out his land into four equal shares. Each piece was one acre. Through the process of succession all the beneficiaries each (sic) got the share of the estate that they were entitled to.

Thus, it is not in dispute that the distribution of the estate should be such that each house should get an acre of the four acres comprising the deceased's estate. Accordingly, the estate being Title No. Loc. 6/Munguini/39 shall be distributed as follows:

1. Ethan Mbau Gitau shall get one (1) to hold for himself and in trust of the rest of the children from his grandmother's house.
2. Margaret Wairimu and Murigi Gitau shall get one (1) acre which shall be registered in their names as owners in common as children of Gitau Mburu.
3. Elias Njogu and Simon Njogu shall get one (1) acre which shall be registered in their names as owners in common.
4. Wanjiku Njogu representing her husband, Njogu Mburu shall get one (1) acre subject to life interest.

My order of 13 October 2017 is reviewed and varied accordingly. The applicant's application dated 13 November 2017 is allowed in those terms. Parties will bear their respective costs.

Signed, dated and delivered this 12th day of July, 2019

Ngaah Jairus

JUDGE