



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 1057 OF 2009

**IN THE MATTER OF THE ESTATE OF THE LATE JOHN RENNIE CARRIE GORDON ALIAS GORDON RENNIE CARRIE
(DECEASED)**

CHRIS GITHINJI PETITIONER/APPLICANT

-VERSUS-

SPERANZA NJOKI GITHINJI

NYAGA GITHINJI

MARY MUTHONI KARIUKI

MARGARET WANJIKU KARWE

MUTHEE KARIUKIPROTESTORS

AND

GREEN AFRICA INTERNANTIONAL LIMITEDCAVEATOR

JUDGMENT

The succession cause herein relates to the **ESTATE OF JOHN RENNIE CARRIE GORDON alias GORDON RENNIE CARRIE (DECEASED)** who died at Consolata Mathari Hospital on the 1 September, 2009; he was at the time domiciled in Kenya and his last known place of residence was Kiganjo in Nyeri County.

On 27 November 2009, the applicant petitioned for grant of probate of the deceased's will in which he was named as the executor. The grant was issued on 1 April 2009.

There is evidence on record that despite the grant of probate, the petition for this grant was contested by some of the objectors who went further to file their own petition for grant of letters of administration intestate by way of cross-application. They effectively disputed the will allegedly left behind by the deceased.

Meanwhile, by a summons for confirmation of grant dated 4 May 2012 the applicant sought to have the grant made to him confirmed; in the affidavit in support of the grant, he sought to have the estate distributed largely in accordance with the deceased's written will except for one property which had been gifted to his widow but which the applicant sought to have devolve upon the widow and the deceased's children in varied shares.

Undeterred the objectors protested against the scheme of distribution of the estate as proposed by the applicant and filed an affidavit of protest to that effect.

While the summons for confirmation of grant and the protest were pending for determination the first objector filed a chamber summons dated 26 July 2017 seeking, inter alia, an order against one Evanson Githinji Kinyanjui who was described in that application as trading as Green Africa International Limited to restrain him from interfering in any manner whatsoever with some of the assets comprising the deceased's estate, in particular, parcels of land known L.R. No. 8343/4, 8343/5, 8343/6 and 8343/7 pending the determination of the petition.

Green Africa International Limited responded to the chamber summons and described itself in the replying affidavit it filed as the 'caveator'. The affidavit was sworn by Evanson Githinji Kinyanjui who described himself as the managing director of Green Africa International Limited. In summary, he laid claim on part of the deceased's estate as a purchaser.

On 2 November 2016 the court directed that the summons for confirmation of grant and the protest be heard by way of oral evidence. And on 9 November 2017 I directed further that the estate be preserved in terms of one of the prayers of the chamber summons dated 26 July 2017 pending the determination of the protest.

When the protest came for hearing on 25 July 2018, the applicant's and the protestors' respective representatives brought to my attention a consent which they filed in court on 19 March 2018 according to which they agreed that protestors' protests be withdrawn and the grant made to the applicant be confirmed; and, accordingly, the deceased's estate be distributed in terms stipulated in the consent.

The consent effectively determined the dispute between the applicant and the protestors. The only outstanding issue was the caveator's claim to the deceased estate and in this regard, Mr. Chege, the learned counsel for the caveator sought for and was granted time to respond to the summons for confirmation of grant.

In the replying affidavit which was eventually filed by Evanson Githinji, the latter contented that the caveator had been omitted from the scheme of distribution of the deceased's estate yet some of its beneficiaries had acknowledged him as a purchaser. In particular, the first protestor, Speranza Njoki Githinji had sworn an affidavit in support of a summons for confirmation of grant in Nyeri High Court Succession Cause No. 396 of 2000 in respect of the estate of Waruguru Ngondoni, the applicant's and the protestors' mother, acknowledging Evanson Githinji as a purchaser and thus entitled to a share of the deceased's estate.

Mr Githinji deposed further that by an agreement dated 17 February 2012 the caveator entered into a sale agreement with Nyaga Githinji, Mary Muthoni Kariuki, Moses Muthee Kariuki, Speranza Njoki Githinji and Margaret Wanjiku Karua, all of whom are deceased except Njoki and Karua, for the sale of 100 acres of land out land parcels LR Nos 8343/5-7, 7387/16-22 together with all the developments thereon. Following the agreement, the caveator proceeded to make various payments to the sellers' respective bank accounts in part settlement of the purchase price.

A further agreement dated 19 August 2013 was made according to which the 'vendors' agreed to sell to the caveator another 176 acres of land bring the total acreage to be purchased to 276 acres at the purchase price of Kshs. 110,400,000/=. To cater for the legal costs in succession Cause No. 396 of 2000, the caveator paid the legal charges through what deponent described as the caveator's sister company, Cocorico Investment Limited, the total sum of Kshs. 10,800,000/=. He deposed further that according to the sale agreement, it was agreed that the caveator would take immediate possession of the parcels of land upon execution of the agreement.

For these reasons, the caveator urged that the grant should not be confirmed in the manner agreed upon by the deceased's children lest it would be prejudiced.

At the hearing of what in effect was the caveator's protest, Mr Githinji reiterated and adopted the depositions in his replying affidavit as his evidence. He added that the caveator has paid more than Kshs. 40,000,000/= towards the purchase price and that it was ready and willing to pay the balance upon delivery of the transfer documents.

He admitted, however, that none of the persons to whom he paid his money was the registered proprietor of any of the parcels that the caveator was purportedly buying and at no time did he ever deal with the executor of the deceased's will or the administrator of his estate.

At the very outset it appears that the caveator's claim has no valid or any valid foundation in law.

In the first place, the purported claim is presented as having been either against the estate of Waruguru Ngondoni or the beneficiaries of her estate in High Court Succession Cause No. 396 of 2000. It is that succession cause that it is alleged that one of the protestors, Speranza Njoki Githinji recognised, Evanson Githinji Kinyanjui, as a purchaser entitled to share of the estate of the late Ngondoni.

But the present estate has nothing to do with the estate of Ngondoni; it is the estate of her husband, John Rennie Carrie Gordon that is the subject to this succession cause. Simply, put, based on the deponent's own depositions, his claim, if any, should have been lodged in Succession Cause No. 396 of 2000.

The other problem with the caveator's claim is that it is Evanson Githinji Kinyanjui who has all along been presented as the claimant to the estate of Ngondoni; this is clear from Mr Githinji's own affidavit where he states in paragraph 7 as follows:

THAT in succession Cause NO. 396 of 2000; in the matter of the Estate of Waruguru aliad(sic) Waruguru Ngondoni alias Waruguru Ndei(deceased), one of the beneficiaries of the deceased's estate herein, one SPERANZA NJOKI GTHINJI, swore an affidavit in support of the summons for confirmation of grant where she acknowledged me as a purchaser and entitled to a share of the estate.

He went further to exhibit a copy of the summons of grant referred to; in paragraph 3 of the affidavit in support of the summons, Speranza Njoki Githinji had sworn that Evans Githinji Kinyanjui was another of the deceased's dependants but at the same time he was described as a 'purchaser'.

If that is the position, then question that emerges is, where does Green Africa International Limited which, for all practical purposes is presented as a distinct and separate legal entity come in? Being a juridical person, the company is obviously separate from Evans Githinji Kinyanjui and the latter cannot even purport to trade as that company. It follows that the caveator's claim has neither factual nor legal basis.

Finally, the purported sale agreements executed between Green Africa International Limited and the deceased's children are void for the reason that none of the purported vendors had any proprietary interest or any interest capable of transfer in any of the parcels of land they purported to sell. As at the time of the agreements, and even to date, those parcels of land have not been transferred to their names, a fact

that has been conceded by the caveator himself; they were effectively purporting to sell and the caveator, on the other hand, was purportedly buying what the 'vendors' did not have.

In any case section 55 of the Law of Succession Act forbids distribution of the estate before a grant of representation has been confirmed in accordance with section 71 of the same Act; section 55 states:

55. (1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided under section 71.

And section 45. (1) of the Act is also clear that *'except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased.'*

According to subsection (2) of this section any person who contravenes subsection (1) is guilty of a criminal offence besides being answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled.

The proviso to section 82 of the Act is also clear that as much as the personal representatives of the deceased may sell any assets of the estate, ***'no immovable property shall be sold before confirmation of the grant.'***

So, until such time that the grant is confirmed and the deceased's estate distributed his children cannot have assumed ownership of any part of the estate to such extent that they could purport to dispose of it. If they ever sold it as alleged by the caveator, they contravened the provisions of the law that I have set forth and to that extent, their purported contract with the caveator would be illegal.

It follows that if the caveator was to be recognised as a rightful beneficiary of the deceased's estate by virtue of its contract with the deceased's children, this court would effectively be perpetuating an illegality. This court cannot enforce the purported agreement and even if it was a valid agreement, I doubt a court of probate and administration is the proper forum to seek its enforcement.

I am inclined to come to the conclusion that no valid reason has been given why the grant made to the applicant should not be confirmed; I allow the summons for confirmation of grant dated 4 May 2012 and further direct that the deceased's estate be distributed in accordance with the consent dated 19 March 2018 and filed in court on the same date and which, for that very reason, is hereby adopted as the order of the court. It is so ordered.

Dated, signed and delivered in open court this 20th day of September, 2019

Ngaah Jairus

JUDGE