



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 548 OF 2007**

**IN THE MATTER OF THE ESTATE OF JOSEPH KIBERA GITURO (DECEASED)**

**ESTHER WAIRIMU KIBERA.....ADMINISTRATOR/APPLICANT**

**VERSUS**

**JULIUS KIBERA GITURO.....ADMINISTRATOR/PROTESTOR**

**AND**

**ESTHER MUTHONI GITARI.....CO-ADMINISTRATOR**

**BEATRICE WANGUI MWANGI.....CO-ADMINISTRATOR**

**RULING**

1. The Applicant, in her capacity as a co-administrator of the estate of the deceased herein filed an application for confirmation of grant via summons dated 4<sup>th</sup> February, 2019. The court had on 30<sup>th</sup> July, 2018 issued a grant of letters of administration intestate to the parties hereto being Esther Wairimu Kibera, Esther Muthoni Gitari, Julius Kibera Gituro and Beatrice Wangui Mwangi the parties herein. The application is supported by an affidavit sworn by the Applicant on 4<sup>th</sup> February, 2019.

2. On 21<sup>st</sup> March, 2019 Julius Kibera Gituro filed an affidavit of protest in objection to the application for confirmation of grant stating that the application is an abuse of court process having been filed without consultation between the Administrators of the deceased's estate. He urged that the court appointed four (4) administrators, himself included, but who are yet to convene a meeting to agree on the mode of distribution. That the application is therefore filed prematurely and ought to be struck out.

3. Julius states that it is suspect that the affidavit in support of the summons and the consent are signed by Esther Wairimu Kibera when to his knowledge, the applicant uses her thumbprint in place of a signature. Further that the consent annexed to the application is unsigned meaning that it was not approved by the beneficiaries of the deceased's estate.

4. The Applicant filed a supplementary affidavit on 8<sup>th</sup> April, 2019 and which affidavit was sworn by herself on 2<sup>nd</sup> April, 2019. She deposed that contrary to the Protestor's allegations, it is she who swore and signed the affidavit in support of the summons for confirmation. That in any case, the Protestor has no authority to complain on her behalf in the event the genuineness of the signature or the impression therein was questionable.

5. On 8<sup>th</sup> April, 2019 the court directed that the Protest be disposed of by way of written submissions. Learned Counsel Mr. Kiboy filed written submissions dated 15<sup>th</sup> April, 2019 on behalf of the Applicant. He urged the court to hold that the only asset comprising the estate of the deceased is the property known as Gikondi/Thimu/366, which ought to be distributed equally amongst the beneficiaries of the deceased. Counsel stated that the mode of distribution proposed by the Protestor is discriminatory and cannot be allowed to stand.

6. In opposition, learned Counsel Ms. Murugi filed written submissions dated 25<sup>th</sup> April 2019 on behalf of the protestor in which she submitted that the application for confirmation of grant is not a proper case to be disposed of by way of written submissions without hearing the parties and subjecting their testimony to cross-examination.

7. Ms. Murugi asserted that this cause is not ripe for confirmation of grant and distribution of the estate in light of the uncertainty of assets and identity of shares of each beneficiary. Counsel urged the court to dismiss the application with costs to allow the parties some time to consult and come up with a consensus in terms of the schedule of assets, list of beneficiaries, mode of distribution and identification of shares.

8. Upon considering the pleadings and submissions filed in this cause and the rival arguments advanced by both the Protestor and the Applicant, the issue that emerges for determination is whether the summons for confirmation of grant as filed is premature and if not, how the net estate of the deceased ought to be distributed amongst the beneficiaries.
9. According to the Protestor Julius Kibera Gituro, the deceased had two (2) declared assets: Gikondi/Thimu 321 measuring two (2) acres and Gikondi/Thimu 366 measuring six (6) acres both of which the deceased acquired in the year 1959. However, because of the restriction on the acreage an African could own at the time, the deceased registered Gikondi/Thimu 321 in the name of his younger son Simon Gitari Kibera who is now deceased. On Simon attaining the age of majority, the deceased let him retain Gikondi/Thimu 321. The land parcel is registered in the name of Esther Muthoni Gitari, the widow of Simon having devolved to her upon Simon's death.
10. With regard to the property known as Gikondi/Thimu 366, Julius stated that the deceased had during his lifetime given four (4) acres out of the property to his son Charles Gituro Kibera (deceased). The remaining two (2) acres were to be set aside for any of the deceased's daughters who remained unmarried. The late Charles Gituro Kibera is the father to Julius Kibera Gituro, the Protestor herein. A grant of letters of administration of all the intestate estate of the deceased herein had been made to Charles Gituro on 5<sup>th</sup> December, 2008 before his demise. Upon his demise, the grant was made to the present four (4) administrators.
11. Julius averred that the mode of distribution proposed in the application is driven by greed and is intended to disinherit the beneficiaries of his late father Charles Gituro Kibera. He proposed a mode of distribution in which the beneficiaries of the late Charles Gituro inherit four (4) acres out of Gikondi/Thimu 366 and the remaining two (2) acres are shared amongst the four daughters of the deceased.
12. According to the Applicant, the mode of distribution proposed by the Protester is discriminatory against the daughters of the deceased and is based on retrogressive customs. She asserted that in recognizing children of a deceased as dependants, the **Law of Succession Act** does not classify those children on account of their gender or marital status. She urged that **Article 27** of the **Constitution** prohibits any form of discrimination based on sex, marital status or culture, and the estate of the deceased should therefore be distributed equally amongst the beneficiaries.
13. In her affidavit sworn in support of the summons, the Applicant deposed that the identification and shares of all persons beneficially entitled to the deceased's estate had been ascertained and determined. The Applicant asserted that the only asset comprising the deceased's estate is Gikondi/Thimu 366. It is noteworthy that in paragraphs 9 and 16 of her supplementary affidavit, the Applicant alludes to there being other assets comprising the deceased's estate. This raises doubt as to whether the deceased's net intestate estate has been ascertained.
14. The Applicant went ahead to state that there was consensus that the property ought to be shared equally amongst the deceased's beneficiaries. At the time of his death, the deceased was survived by six (6) children and no spouse. The consent annexed to the affidavit however bears only the Applicant's signature.
15. The Protester on the other hand insists that neither the beneficiaries nor the administrators of the estate of the deceased have met to agree on the mode of distribution. He however pointed out that the parties had previously consented to a mode of distribution similar to the one he has proposed in his affidavit filed in protest to the application.
16. Annexed to the affidavit of protest is a consent prepared by Mutisya and Company Advocates on 19<sup>th</sup> August, 2010 in relation to the deceased's estate. The consent proposes that Simon Gitari (deceased) then an Objector in this cause, would retain parcel number Gikondi/Thimu/321 and Charles Gituro Kibera would receive four (4) acres out of Gikondi/Thimu/366. The remaining two (2) acres out of Gikondi/Thimu/366 would be shared equally amongst the daughters of the deceased. Whereas the record shows that the court had on 19<sup>th</sup> July, 2010 allowed the parties to record a consent, there is nothing on record to show that the consent prepared and which the Protester makes reference to, was adopted as an order of the court. In fact, when the matter came up for mention on 27<sup>th</sup> September, 2010 the Objector, through his counsel, disputed the consent filed in court.
17. **Section 71** of the **Law of Succession Act** provides *inter alia* that upon expiration of a period of six months from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of capital assets. The grant of representation herein was made to the Applicant and her co-administrators on 30<sup>th</sup> July, 2018 and the six (6) month period has therefore lapsed.
18. However, **section 71(2)** of the **Law of Succession Act** further states that a grant of letters of administration in cases of intestacy, as in the instant case, shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled. In the present case, while there appears to be consensus that the property known as Gikondi/Thimu/366 forms part of the deceased's net intestate estate, there are contentions in relation to the properties known as Gikondi/Thimu/321 and Plot No. 19 Nduma which according to the Applicant belong to the deceased's estate but were held in trust by Simon Gitari Kibera (deceased) and Charles Gituro Kibera (deceased).
19. It is evident from the above that the deceased's assets have not been ascertained, neither have the respective identities and shares of the beneficiaries of the estate been ascertained. It is also noteworthy that while there are four (4) named administrators, there is nothing to show that save for the Protestor, the other two (2) are agreeable to the mode of distribution proposed by the Applicant.
20. There are also issues of trust raised by the Applicant and issues of previous benefits alluded to by the Protestor. I note that these are issues at the core of the distribution of the estate of the deceased and which ought to be canvassed at a hearing during which time the parties can be subjected to cross-examination. These are vital issues the nature of which demands that they are canvassed and determined by way of evidence under trial and not solely by way of affidavits.
21. In the premise, I find that without the consent of the other administrators or beneficiaries and in light of the nature of the arguments raised in the affidavit of protest, and those alluded to by the Applicant in her supplementary affidavit, this court cannot grant the application for confirmation of grant as sought at this juncture. The matter shall henceforth be set down for hearing.

22. Accordingly, the application for confirmation of grant filed via summons dated 4<sup>th</sup> February, 2019 is hereby dismissed for lack of merit. The Protest is allowed but only to the extent that the application for confirmation of grant was filed without consultation and consensus on the mode of distribution despite the fact that the statutory six (6) month period has lapsed. Each party shall bear their own costs.

It is so ordered.

**SIGNED DATED** and **DELIVERED** in open court this **17<sup>th</sup>** day of **September, 2019**.

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of .....Advocate for the Administrator/Applicant.**

**In the presence of .....Advocate for the Administrator/Protestor.**