



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 52 OF 2003

IN THE MATTER OF THE ESTATE OF THE LATE GACHIGUA

WANG'ONDU aka WAMITHI WANG'ONDU (DECEASED)

JAMES MUNYARI WANG'ONDU

JOHN NDIRITU WANG'ONDU.....APPLICANTS

VERSUS

WILLIAM WAMITHI WANG'ONDU.....RESPONDENT

RULING

1. The estate relates to the late **GACHIGUA WANG'ONDU aka WAMITHI WANG'ONDU (DECEASED)** who died on the 13th February, 1977;

2. The Grant in this dispute was issued on the 15/11/2007 to the respondent herein one William Wamithi Wang'onde (**'William'**) appointing him as the sole administrator after his co-administrator Susan Wanjiru Wamithi had passed on; the Grant had previously been confirmed on the 15th February, 1995; thereafter William had applied for rectification of the confirmed Grant so as to include and distribute the contentious subject property Ruguru/Gachika/216 which had been omitted;

3. The applicants filed the application on the 10/04/2012 under the provisions of Section 76 of the Law of Succession Act and Rule 44 of the Succession Rules stating that they were brothers of the respondent; in the application they claim that the respondent had obtained the Grant to the deceased's estate fraudulently by making a false statement and/or by concealment from the court of something material to the case; and they sought for the revocation of the confirmed Grant on the following grounds;

(a) That the Certificate of Confirmation of Grant was fraudulently obtained by the making of a false statement and/or by concealment from the Court of something material to the case in that the Applicants who are step brothers to the Administrator were deprived of their entitlement to Title Number **RUGURU/GACHIKA/216** as he got himself registered solely and absolutely, yet they ought to have shared equally as brothers.

(b) That the confirmed Grant is contrary to the express provisions of Section 38 Law of Succession Act, Cap 160, Laws of Kenya as the administrator has disinherited his brothers.

4. To support their claim the applicants relied on their Supporting Affidavit sworn by the 2nd applicant and made on the 11/04/2012; the respondent (**William**) filed his response to the application on the 3rd December, 2015 and on the 17/11/2015 respectively; directions were taken on the 2/07/2018 that the matter proceed for hearing by way of **'viva voce'** evidence; and all the parties were directed to file and exchange their respective witness statements;

5. The matter proceeded for hearing and the applicants were represented by learned counsel Ms Muthoni whereas the respondent was represented by learned counsel Mr. Wamahiu; hereunder is a summary of the applicants' case and the petitioner's response;

APPLICANTS' CASE

6. The 2nd applicant John Ndiritu Wangonde (**'John'**) stated that he had sworn an affidavit for himself and on behalf of his brother who was his co-applicant; his authority given to him to make the affidavit was given orally and not in writing; the applicants' prayer was that they

wanted the court to re-distribute the property known as parcel number **Ruguru//Gachika/216**;

7. The reason given was that this parcel of land was distributed fraudulently by making false statements and in a manner that was not authorized; that the respondent had concealed from the court something material; and had registered the subject property solely in the name of the administrator instead of in the joint names of the mother of the applicants and William; that William was not entitled to it absolutely and he had therefore disinherited his brothers, the applicants herein;

8. Under cross-examination the applicant was referred to a family agreement (**'WW6'**) which was the outcome of a family meeting held on 2/06/2002 to which he confirmed both applicants had attended, participated and were also signatories; they confirmed that the mode of distribution was agreed at the meeting and an agreement was duly signed by the parties herein;

9. The applicants prayed for the revocation of the Grant and prayed that a fresh one be issued where the subject property is shared equally amongst the brothers and for the partitioning of the property in the method agreed upon;

RESPONDENTS CASE

10. The respondent William opposed the application; he confirmed that the only contentious issue was the distribution of the subject property which was formerly known as Ruguru/Gachika/216 and was now known as Ruguru/Gachika/1569 and he annexed copies of the Certificates of Title in support of his evidence; otherwise the Grant had been confirmed on the 15/02/2008 with the consent and full participation of the beneficiaries; and that none of the beneficiaries filed any protest;

11. He denied the allegations of having obtained the Grant fraudulently or having made a false statement and concealment from the court of something material to the cause;

12. That the applicant's grounds were unfounded as he had never had any intentions of depriving any of the beneficiaries of their shares in the subject property; and he had always sought to sub-divide and to distribute the nine portions of the land fairly to the applicants and the other beneficiaries; he annexed assorted documents to support the actions he had taken;

13. His contention was that the applicants had not come to court with clean hands and were the only beneficiaries who were not content with their portions; that they had fraudulently sub-divided their portions and in the process created an access road that had "***eaten into***" the other beneficiaries' portions; and were now attempting to alter the agreed subdivisions to satisfy their own commercial interests;

14. The applicants were also aware of the un-written Will made by the deceased that the parcel be divided amongst the two households;

15. The respondent prayed that the application be dismissed as it was an abuse of the court process.

ISSUES FOR DETERMINATION

16. After hearing the evidence of the parties and upon reading their respective written submissions this court has framed the following issues for determination;

(i) Whether the applicants have made out a case for Revocation of the Confirmed Grant relating to parcel number Ruguru/Gachika/216;

(ii) Distribution of this parcel of land number Ruguru/Gachika/216 .

ANALYSIS

17. In this instance it is not in dispute that the deceased died on the 13/02/1977; and that a Grant was issued on the 15/02/1995 in the joint names of William Wamithi Wang' Ondu (the respondent herein) and Susan Wanjiru Wamithi; the Grant was then confirmed on the same date and that the property that was distributed was parcel number Aguthi/Gatitu/446; and that the mode of distribution was to the two administrators in equal shares; by a subsequent application for rectification dated the 20/02/2003 and made by the respondent he was allowed to rectify and correct the parcel number to read Aguthi/Muruguru/446;

18. The 2nd administrator then died on the 27/08/2001 and with her demise the Grant became inoperative; and as it was impossible for the respondent to effect the Grant he then moved the court by an application for the rectification of the Grant dated the 16/05/2006 so that he be appointed the sole administrator of the estate of the deceased; the application was allowed and a fresh Grant was issued on the 15/11/2007;

19. In the same application the respondent included a prayer for the contentious subject property parcel number **Ruguru/Gachika/216** seeking an order for its inclusion as part of the deceased's estate as it had been omitted when the initial application for confirmation of Grant was made;

20. The respondent's prayer was granted and he was appointed as the sole administrator and the omitted parcel was included as comprising part of the deceased's estate;

21. On the 29/11/2007 the respondent made an application for the confirmation of the Grant and in his Supporting Affidavit sworn in support he applied for the parcel numbers Aguthi/Muruguru/446 and Ruguru/Gachika/216 to be distributed to him; and at paragraph 5 of his supporting affidavit it reads as follows;

“ AGUTHI/MURUGURU/446 & RUGURU/GACHIKA/216 currently registered in the name of the deceased be transferred to WILLIAM WAMITHI WANGONDU-ABSOLUTELY”;

22. The supporting affidavit lists the names of all the beneficiaries but this court noted that the court record and the application is devoid of the requisite consent from the beneficiaries as required by Rule 26 of the Probate Administration Rules;

23. Rule 26(1) of the Probate and Administration Rules provides as follows;

“Letters of administration shall not be granted to any applicant without notice to every person entitled in the same degree as or in priority to the applicant.”

24. It is trite law that the respondent knowing that the applicants as members of the second house had an interest as beneficiaries he ought to have notified or involved the applicants and any of the other beneficiaries at all stages and obtained their written consent to the rectification of the Grant and distribution of the subject property;

25. There is absolutely no evidence on the court record that demonstrates that the respondent duly notified the applicants or the other beneficiaries before filing the application for rectification of the Grant appointing him as the sole administrator; neither is there any evidence that the respondent sought and failed to obtain the applicants’ consent when making any of the applications made after the demise of Susan, his co-petitioner and administrator; and it goes without stating the obvious that the respondent did not comply with the provisions of Rule 26 aforesaid;

26. This court also makes reference to paragraph 5 of the respondent’s supporting affidavit made on the 29/11/2007; the contents of the averments made therein amount to a fraudulent statement; notwithstanding being aware that there was a previous confirmation of the parcel number Aguthi/Muruguru/446 the respondent still went ahead and made this false statement purporting that it was still available for distribution;

27. Further the respondent in his testimony made reference to a family meeting held on the 2/06/2002; this court has had the occasion to peruse the same and it sets out the manner in which the subject property was to be distributed; and it reads as follows;

“On 2/6/2002 the below family members have agreed as follows:-

The land Ruguru/Gachika/216 there is a portion belonging to William Wamithi which will not be affected by any surveying layout, but only the survey will adjust the main boundary separating his portion from the main land Ruguru/Gachika/216 which is being subdivided”

28. When applying for the confirmation it is noted that the respondent distributed the subject property to himself **‘absolutely’** which was not in accordance with the contents of the agreement which sets out the mode of distribution; that after excising his portion it was to be **“equally between the two houses”**; therefore by stating in his affidavit that the subject property be distributed to him absolutely the respondent made a fraudulent statement and also concealed from the court material and pertinent facts relating to the mode of distribution;

29. This court is therefore satisfied that the applicants have demonstrated that the application satisfies the requirements as set out in Section 76 (a) and (b) of the Law of Succession Act in that the Grant and its subsequent confirmation were obtained in a manner that renders it defective;

30. The Grant dated 15/11/2007 and the Confirmation shall be revoked and a fresh Grant shall issue in the names of William the respondent and Esther Wangui Wamithi (to represent the second house) are hereby appointed as joint administrators to the deceased’s estate;

Distribution of this parcel of land number Ruguru/Gachika/216 .

31. This court is tasked with the distribution of the estate; there is evidence that there was an agreement on the manner in which the subject property was to be divided which was that William was to excise his portion within the subject property; and then the net was to be divided into two equally between the two houses;

32. In this instance the letter from the Chief dated 29/3/93 describes the beneficiaries as grandchildren of the deceased; the Petition for Letters of administration also describes the current surviving beneficiaries as the grandchildren of the deceased;

33. The grandchildren cannot inherit the grandparents’ property directly and can only do so through their parents; but in this instance there is no evidence of any surviving spouse and or surviving children; from the pleadings filed it is apparent that the parents in both houses are deceased; therefore the grandchildren can thus take the share that ought to have gone to their parents;

34. It is not disputed that there are three houses; but one widow didn’t have any issues; therefore technically there are only two houses; the application of Section 41 of the Law of Succession would have been the most appropriate section in distributing the estate as it deals with households; this court would have proceeded to apportion the subject property into units and ratios; but this court is unable to apply this section as there was no evidence adduced on the composition and or membership of each of the two houses;

35. In the absence of such evidence this court shall revert to the Family Agreement made on the 2/06/2002 as it is found to contain the most equitable and appropriate mode of distribution; there was evidence that was adduced that it was deliberated upon by the parties and they accepted its contents and in so doing appended their signatures or thumb-prints thereto;

36. For those reasons this court is satisfied that it is the most appropriate mode of distribution and shall adopt it; and after William's portion has been excised then the net of the subject property shall be divided into two equal shares as between the first and second house; one half portion shall be held in the name of Esther Wangui Wamithi on her own behalf and in trust for the house of Susan Wanjiru in equal shares and the other half portion shall be held in the name of William Wamithi Wangondu in trust for his brothers in equal shares;

FINDINGS & DETERMINATION

37. In the light of the forgoing this court makes the following findings;

- (i) The application for Revocation of the Grant and the Confirmed Grant is found to have merit and it is hereby allowed;
- (ii) The Grant dated 15/11/2007 and the Certificate of Confirmation of Grant dated 15/02/2008 are found to have been obtained in a manner that renders both defective;
- (iii) The Grant and the Certificate of Confirmation of Grant dated the 15th February, 2008 are hereby revoked;
- (iv) A fresh Grant to issue in the joint names of William Wamithi Wangondu and Ester Wangui Wamithi;
- (v) Any titles issued and touching on parcel number Ruguru/Gachika/ 216 are hereby cancelled; and this title shall revert back to the estate of the deceased;
- (vi) Distribution of the Parcel No. Aguthi/Muruguru/446 remains the same; and is to be held in the names of Esther Wangui Wamithi on her own behalf and in trust for the house of Susan Wanjiru and William Wamithi Wangondu in trust for his brothers in equal shares; likewise distribution of parcel No. **Ruguru/Gachika/ 216** its net shall also be distributed between the two houses as set out in paragraph 36 hereinabove;

38. Parties are at liberty to apply for further directions;

39. This being a family matter each party shall bear its own costs;

It is so ordered accordingly.

Dated, Signed and Delivered at Nyeri this 3rd day of October, 2019.

HON. A. MSHILA

JUDGE