



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 169 OF 2007

IN THE MATTER OF THE ESTATE OF WAMBUI KURIA (DECEASED)

JUDGMENT

1. This judgment is in respect of the Summons for Confirmation of Grant dated 4/6/2012 to have the letters of administration issued jointly to Njoroge Gatheru and Riwel Mugo Kuria on the 17/2/2012 confirmed.

2. The uncontested fact is that Riwel John Mugo Gatheru is a son to Wambui Kuria (deceased herein) and was entitled to 4 acres of land within Nakuru/Rare/Gichobo/112 which forms the estate of the deceased.

3. Njoroge Gatheru, a co-administrator has lodged a protest stating that the mode of distribution proposed by the Applicant is unacceptable to him.

4. He proposes that the distribution should be as follows;

- 3 acres to Peter Kuria.
- 7 acres to Njoroge Gatheru i.e. 3 acres + 4 acres (belonging to the late Riwel Mugo Gatheru).

5. He avers that the affidavit sworn by Riwel John Mugo marked RMK III does not meet the legal threshold of an affidavit.

6. In a supplementary affidavit, the applicant annexes a properly commissioned affidavit.

7. In a supplementary affidavit sworn on 23/1/2013, the protestor avers that he has been using the 4 acres of land belonging to Riwel Mugo Gatheru since 1978. Of note is that the letter he annexes to this affidavit is a bitter remonstrance by the said Riwel Mugo Gatheru where, inter alia, he laments that despite allowing the protestor use of the land since 1978 for free, the protestor has, he states;

Yet you have clearly demonstrated over these 28 years a lack of common courtesy or any appreciation. You have never sent me a 'thank you' note or even a Christmas card during this long period".

8. I have considered the Summons for Confirmation of Grant, the Support Affidavit, the Supplementary Affidavits, the evidence on record and the ruling by this Court (**Justice R.V.P. Wendoh**) of 17/2/2012. I have considered the submissions by counsel.

9. Of determination is only the mode of distribution.

10. On the material before me, I am satisfied that Riwel John Mugo Gatheru was entitled to 4 acres from the estate of the deceased, John Njoroge Gatheru, the protestor to 3 acres and Peter Kuria or those claiming through him 3 acres from the estate of the deceased.

11. The only question for determination is how the 4 acres entitlement of Riwel Mugo should be dealt with.

12. The protestor's position is that Riwel Mugo Gatheru had children and he never intended to bequeath nephews that parcel of land but they were to hold it in trust for him. He urges that as an administrator, he wants to have quiet and uninterrupted possession and custody of the said land on behalf of his brother's children.

13. It is the Applicant's case that the 4 acres should be transferred as per the averment by Riwel John Mugo Gatheru's affidavit dated 28/11/2008 in which he states;

“ I do not want the petitioner to use or interfere with my four acres of land at Gichobo, Njoro, Kenya and that my sister, Wanjiku Mbugua in common with her two sons. Mr. Gabriel Gatheru Mbugua and Mr. Joseph Njuguna Mbugua, jointly and severally, should take custody or possession of my four acres of land at Gichobo, Njoro, Kenya without any further delay.”

14. It is urged that there has been no objection from persons duly entitled to benefit under Riwel Mugo Gatheru estate as to his position being vested in the persons named in his affidavit.

15. The protestor has no capacity to represent the interest of Riwel John Mugo. He is an administrator of the estate of Wambui Kuria and not a representative of Riwel John Mugo.

16. On the material before me. I find the claim by the protestor wanting in the following respects;

i) He purports to intend to hold the 4 acres of land in trust for the children of the deceased Riwel yet he does not name the said children, where they are and no explanation is given as to why they have not been joined in the proceedings or at least listed as beneficiaries. This Court cannot possibly issue an order for land to be held in trust by an individual for unknown persons.

ii) The protestor depones that he was a dependant of the deceased Riwel Mugo Gatheru since he was occupying the 4 acres since 1978. In addition to contradicting the trust alluded to in (I) above, this averment is not supported by law or fact. From the record, it is clear that the protestor sought and was granted permission by Riwel to use the land. Indeed, from Riwel own words, the Court gathers that despite this magnanimous act by his brother, the protestor did not treat him well. So does the protestor wish to hold the land in trust for the children or on the basis of being a dependant?

iii) The history of the matter casts serious aspersions on the intentions of the protestor. Initially, he had applied for grant and disinherited all beneficiaries having himself as the only heir. Yet now he has transformed from Saul to Paul and is offering himself to protect and hold in trust the interests of the children of Riwel John Mugo, children he does not even name. The bonafides of the Petitioner are questionable.

iv) Riwel John Mugo Gatheru lived in the USA for a long time. He has expressed his wish in the affidavit dated 28/11/2008. There are no objections by persons entitled to his estate. The protestor avers that the affidavit does not meet the threshold of the law. That is not entirely true. The affidavit is properly commissioned and indeed this Court (*Wendoh J*) relied on it in its ruling dated 17/2/2012. Of note is that the protestor is not a beneficiary of Riwel Mugo Gatheru. True, he is an administrator of the estate of Wambui Kuria in which Riwel is a beneficiary. If Riwel indicates to whom his share of the estate should go, the administrator cannot abrogate to himself the mandate to direct otherwise.

v) The only logical inference from the proposal by the protestor is that he would wish to continue using and possibly acquire the 4 acres of land under the pretence of holding it for some unnamed beneficiaries.

vi) Through his affidavit, Riwel has made his intent known and in so far as that decision is concerned, the protestor cannot possibly purport to be more suited to protect the interests of the children of his brother more than Riwel himself. I am persuaded that Riwel for his own reason(s) decided that his children were otherwise well catered for and he therefore wished that his share goes to his sister. The administrators have no choice but to transmit the share of Riwel as per his desire. The affidavit may not be a will but the intention of the particular beneficiary is clear.

17. From the foregoing, my unhesitating finding is that the protest lodged herein is not bonafide. It is a stealthily clothed attempt to take over by the protestor the right share of Riwel Mugo Gatheru for the personal gain of the protestor.

18. I am satisfied that the distribution of the estate as per paragraph 8 of the affidavit in support of summons for confirmation of grant sworn by Riwel Mugo Kuria on 14th day of June 2012 is just and appropriate.

19. I confirm the grant issued jointly to Njoroge Gatheru and Riwel Mugo Kuria in respect of the estate of the deceased Wambui Kuria comprising of LR. No. Nakuru/Rare/Gichobo/112 measuring 10 acres which estate shall be shared out as follows;

a) Riwel John Mugo - 4 acres which shall transmit to Wanjiku Mbugua, Gabriel Gatheru Mbugua and Joseph Njuguna Mbugua as joint owners.

b) Riwel Mugo

Godfrey Gatheru Kuria

George Gatheru Kuria 3 acres

Francis Njoroge Kuria

Ann Wangui Kuria

c) John Njoroge Gatheru - 3 acres

20. Each party to bear its own costs.

Dated and Signed at Nakuru this 16th day of May, 2018.

A. K. NDUNG'U

JUDGE