



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 2685 OF 2011

IN THE MATTER OF THE ESTATE OF GEORGE

GITHINJI KAMWAKI (DECEASED)

RULING

1. The deceased herein died on 15th November 2010. According to a letter from the Chief of Kandisi Location dated 8th June 2011, he died a polygamist having married two wives during his lifetime, being Mary Wairimu Githinji, herein referred to as the first wife, and Regina Wambui Githinji, herein referred to as the second wife. The first wife had eight children, namely Mercy Muthoni, Maina, Wamuyu, Mwangi, Ndegwa, Mugo, Kibe and Njoki. He begat Anthony, Evans, John, Alex and Joyce with the second wife.

2. A petition was lodged herein on 6th December 2011 by David Ndegwa and Charles Mwangi, in their purported capacities as sons of the deceased, for representation in intestacy to the estate of the deceased. The deceased was expressed to have been survived by two widows, who had borne him thirteen (13) children, one of whom was by then also deceased. The deceased was said to have died possessed of three assets, being Ngong/Ngong/25935, Ngong/Ngong/25938 and 2.9 hectares in Muthambi-Githi Location, Mukurweini Division.

3. While the petition for full grant in intestacy was still pending, and just three days after its filing, the petitioners lodged another petition herein, dated 8th December 2011, on 9th December 2011, for letters of administration *ad colligenda bona*. The petitioners in the petition of 8th December 2011 describe themselves as the executors and trustees of the deceased's estate. The affidavit in support is sworn by David Ndegwa Githinji, who avers that the deceased had died intestate having not made a will. He mentions that the deceased had allegedly made a will, which he has annexed to his affidavit, but he states that the same is disputed by a majority of the members of the family. The second petition is meant to enable the petitioners manage and preserve the estate pending the making of a full grant. He claims that a section of the family, that is to say the second household of the deceased, was exclusively collecting rent from some of the assets of the estate.

4. In response to the petition for limited grant an answer was filed by the second widow, Regina Wambui. The said answer is fashioned as an affidavit, sworn on 10th February 2012. The respondent asserts that the deceased had died testate, having made a valid will. Although the deponent purports that she has attached a copy of the will to her affidavit, the said affidavit has no annexures. She denies collecting rent from the assets sitting on the Ngong properties. Regina Wambui went on to file, on 5th April 2012, a cross-application for representation based on the alleged will of the deceased made on 14th May 2010.

5. On 9th July 2013, the petitioners filed a Motion, of even date, seeking orders to restrain the respondent, Regina Wambui, from dealing with the Ngong properties. The matter was placed before me on 10th July 2013 and I granted preservative orders pending *inter partes* hearing. The order was formally extracted on 12th July 2013. Thereafter, the petitioners moved the court vide a Motion dated 23rd August 2013, seeking to have the respondent cited for contempt of court. They filed another Motion dated 21st July 2015, seeking to have the Kajiado County public authorities directed to enforce the order of 10th July 2013. The two applications were placed before Achode J., who heard the parties and dismissed the applications on 14th November 2015.

6. The petitioners then filed another application, dated 24th January 2017, seeking to have the court appoint a manager for the estate of the deceased, the respondent restrained from doing certain acts on the subject lands and to account for the rental income she had collected from the property. That application was heard by Achode J, who appointed the Public Trustee the administrator of the estate of the deceased. Orders were also made for preservation of the estate and accounts by the respondent.

7. There are two applications that are still pending and which I am called upon to determine, both filed subsequent to the orders of Achode J of 3rd March 2017. The first is dated 20th November 2017 and is at the instance of the petitioners who would like the respondents cited for contempt of court and a valuation of the assets at Ngong. They claim that the respondent has not obeyed the orders made Achode J on 27th February 2017, for preservation of the estate and accounts. The second application is by the respondent, and is dated 9th February 2018. It seeks that the petitioners be restrained from dealing with the assets within Muthambi-Githi Location, Mukurweini Division. She also seeks

that the said petitioners be called upon to account in respect of the income from actives carried out on the Mukurweini property.

8. The matter was placed before me on 11th April 2018. I directed that both applications be disposed of simultaneously, by way of written submissions. The parties have complied with the directions by filing their respective written submissions, which I have read through and noted the arguments made therein. I have gone through the record before me and the impression that I have of the issues that I should be determining is whether I should cite the respondent for contempt of court, whether I should make orders for preservation of the Mukurweini property and whether the petitioners should render accounts with respect to the said assets, and whether valuations ought to be carried out of the assets.

9. It is not disputed that the deceased died a polygamist. He had two wives and several children. He had property at Mukurweini Division, which I presume is in Nyeri County, and Ngong of Kajiado County. It has been clearly articulated by both sides where the deceased had settled his two families. The sense I have from the papers filed herein is that the family of the first wife was settled at Muthambi-Githi, Mukurweini; the second family was settled at Ngong, Kajiado. or, to put it in more politically correct language, the first wife and her children lived at Mukurweini, while the second house lived at Ngong. It would appear to me that the Ngong assets are the more valuable of the two sets of assets, given that the dispute appears to revolve around them.

10. The first family, if the petitioners speak for the entire first appears to take the position that the deceased died intestate, without having made a will, and therefore all the assets of the estate should be up for distribution amongst all the survivors of the deceased in terms of Part V of the Law of Succession Act, Cap 160, Laws of Kenya. The second house, if the respondent speaks for the whole of that section of the family, says that the deceased died testate, having made a will on 14th May 2010, in which he bequeathed the Mukurweini property to the first wife and the Ngong property to the second wife. The petitioners acknowledge the will, but have stated that the same is disputed by a majority of the family members. The petitioners and the respondent filed rival applications for representation, one in testacy and the other in intestacy. The court resolved the issue of representation on 24th February 2017 when it appointed the Public Trustee the administrator of the estate. However, the issue as to whether the deceased died intestate or testate is still out there. It is a matter that will require resolution one way or the other so that the court settles it once and for all. I believe the same can be addressed at confirmation of grant once the Public Trustee mounts an application therefor as directed in the orders of 24th February 2017.

11. From the record before me it is clear that orders have been made with relation to the Ngong property, but not the Mukurweini property. The Ngong property appears to be where the respondent resides or the one she occupies, so the preservation orders are directed against her. Nothing has been said so far about who occupies the Mukurweini property and whether similar preservatory orders ought to be made. It would work injustice, in my view, if one side of the family is restrained with respect to the property it has control of while the other side of the family is not similarly restrained with regard to the property of the estate that it possesses or is in control of. There must be equity and fair play. I believe both sides should be heard comprehensively on the matter before final coercive orders are made. A hearing on these issues can be during the confirmation of the Public Trustee's grant.

12. Tied up with the above is the issue of accounts. I note that the respondent has previously been ordered to account for her dealings with the Ngong property. I have scrupulously perused through the record and noted that she has not filed any accounts so far. I have noted too that the order of 24th February 2017 on accounts did not have a time stipulation as to compliance. The application dated 9th February 2018 seeks that the petitioners similarly account for the handling of the Mukurweini property by the first family. The respondent is ostensibly in possession of the said property, hence her call to have accounts rendered with respect to it. No doubt both sides are entitled to accounts with respect to assets that they are not in control of. The ideal situation should be that the said accounts be rendered by both sides of the family at the hearing of the confirmation application.

13. The issue of valuation of the Ngong property has been raised. The value of the estate's assets is critical at distribution, particularly where the deceased has died intestate. It is only fair that all the assets of the estate be valued prior to confirmation of the grant, to facilitate equal distribution, for that is what is envisaged in Part V of the Law of Succession Act. The valuation would guide the court at distribution should it turn out that the deceased died intestate, or should it turn out that he died testate it would help the survivors to decide whether or not seek reasonable provision.

14. The deceased died in 2010 and the cause herein was initiated in 2011 yet the matter has not moved an inch. The parties have resorted to filing multiple applications on matters that do not advance the matter towards distribution of the estate. The principal mandate of the probate court is the distribution of the estate of a dead person, not its micro-management. The court has already taken a step towards having this matter move forward, by appointing the Public Trustee as administrator of the estate of the deceased. The appointment was made on 24th February 2017. Six months have expired since. The grant is ripe for confirmation, for the Public Trustee has had sufficient time to ascertain the survivors of the deceased and the assets available for distribution. The orders that I shall make in resolution of the two pending application shall be move the matter to the next level, confirmation of the administrator's grant. At the said confirmation hearing all the issues raised by the parties in their two applications shall be canvassed for final determination by the court.

15. The applications dated 20th November 2017 and 9th February 2018 are disposed of in the following terms;

(a) That the Public Trustee is hereby directed to file and serve her application for confirmation of the grant made to her on 24th February 2017 within ninety (90) days;

(b) That for the purpose of the said confirmation application, the Public Trustee shall presume that the deceased died intestate;

(c) That the respondent, Regina Wambui, upon being served with the said confirmation application, and if she shall not agree with the terms that the Public Trustee shall propose on distribution of the assets, shall be at liberty to file an affidavit of protest founded on, among other things, her allegation that the deceased had died testate so that the court can determine the question as to whether the deceased died testate or not;

(d) That the petitioners, David Ndegwa and Charles Mwangi, are hereby directed to file, within thirty (30) days, a true and accurate report of their handling of the Mukurweini property from the date of the deceased's death to date;

(e) That the respondent, Regina Wambui, is hereby directed to file, within thirty (30) days, a true and accurate report of her handling of the Ngong property from the date of the deceased's death to date;

(f) That the Public Trustee is hereby directed to cause a valuation of all the assets of the estate and a report thereon to be filed herein within thirty (30) days;

(g) That the Public Trustee shall only file the confirmation application after the valuation reports and the accounts have been filed and served on all the parties;

(h) That in the meantime, the registry is hereby directed not to accept any other or further applications by the parties, save for the confirmation application, without leave of the Judge;

(i) That the matter shall be mentioned before the Presiding Judge after ninety (90) days of this order for compliance and further directions; and

(j) That any party who is aggrieved by the orders that I have made herein shall have the liberty to move the Court of Appeal appropriately within the next twenty-eight (28) days to challenge the same.

16. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2018

W. MUSYOKA

JUDGE