



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO 386 OF 2004

In the Matter of the Estate of Chabari Rukaria (Deceased)

BETTY MAITHA DUNCAN.....PETITIONER

Versus

GILBERT MURIUKI CHABARI.....OBJECTOR

HUMPHREY MUGAMBI M.....PURCHASER

JUDGMENT

Protest and confirmation

[1] I have been called upon to consider Summons for Confirmation of Grant dated 8th May 2017. As commanded under rule 41 of the Probate and Administration Rules, the court will examine carefully the affidavits and any written protests which have been filed as well as viva voce evidence tendered by the applicant and each protester and any other person interested. See the rule below:-

41. Hearing of application for confirmation

(1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.

(2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.

(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.

(4) In proceedings under sub-rule (3), unless the court otherwise directs, the personal representative of the deceased shall be the applicant seeking determination of the question, and the person claiming so to be beneficially interested together with the residuary legatee or other person to be appointed by the court to represent the residuary estate shall be the respondents; and the court in such proceedings shall give all necessary directions relative to the prosecution thereof including the safeguarding of the share or estate so appropriated and set aside and the provision of costs.

(5) Where the court in exercise of its power under section 71 (2) (a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and shall appoint a date not more than six months ahead, by which time the accounts of the completed administration shall be produced to the court for its approval. (6) Where the court, in exercise of its power under section 71 (2) (b) of the Act, instead of confirming a grant already issued directs the issue of a confirmed grant, this grant may be in Form 55. (7) On production of the accounts in court any person beneficially entitled and any creditor may appear and be heard before the court's approval is given. (8) The approval of the accounts in court may be dispensed with if all persons beneficially entitled have signed as consenting to the accounts as produced. (9) On the date for approval of the accounts and on any adjourned date application may be made for an adjournment

to a fixed date not longer than three months away.

[2] Gilbert Muriuki Chabari, the objector herein filed a protest to confirmation. He is the son of the deceased. The petitioner is his step-sister. He filed a replying affidavit on 28th of March 2018 stating his objection. He also testified in court in support of his objection. According to the Objector, he is entitled to the entire original land parcel number IGOJI/KIANGUI/75 on which he claimed to have constructed his dwelling houses in 1982 when he completed school and has lived and used for 42 years. He stated that the original number 75 is no longer in existence as it was subdivided into 8 portions running from NO. 2160-2167. He claimed the subdivision was done on paper as there is no demarcation on the ground. He says that he only claims the entire original parcel now represented by the 8 subdivisions. This is the property that the petitioner is keen on snatching from him and selling to purchasers herein. He complained that the agreements for sale were done by his sisters but purported them to be made by the deceased. He testified that the date stated to be the date of agreement between the deceased and Julius is when his father had been admitted to hospital critically ill, and was not in a position to transact as alleged. He was categorical that he has no other claim. He only stated that the properties which had been left out of these proceedings are number IGOJI/KIANGUA/1859, 1860 and 1861 and which stands in the name of the deceased and they belong to the other beneficiaries.

[2] The basis of his claim was that the deceased shared his properties to his two houses; the house of Harriet Karanga and of Grace Ngáa. According to him, the deceased had two pieces of land namely;-

1. LR. NO IGOJI/KIANGUI/75; and

2. LR. NO. IGOJI/KIANGUI/805; he subdivided this property into No. 1428 and 1429. He subsequently subdivided No. 1429 into No. 1859, 1860 and 1861.

[3] In his evidence the objector claimed that in a meeting of 16 people convened by the deceased, but whose minutes he did not produce, the deceased shared his properties as follows:-

1st House

a. No. 1859 and

b. 1861; total 5 acres.

2nd House

a. No. 75 and

b. 1860; total 5 acres.

[4] He belongs in the 2nd house and that is how he became entitled to No. 75. He also claimed No'1860 which he said belongs to his brother. The rest of the property should go the daughters who are not married for according to him; married daughters are not entitled to partake of the estate. The objector filed affidavit on mode of distribution on 28th July 2017 and reiterated all the above issues. He did not file submissions as was directed by the court.

Petitioner's claim

[5] The Petitioner in her an affidavit on mode of distribution filed on 9th May 2017, stated that the deceased had two wives namely; Harriet Karanga and Nau Muchai. The children of each house are as below:-

1st House

a. Margaret Mkawereri

b. Dorothy Gatakaa

c. Speraza Kaari

d. Lucy Kanjiro

e. Betty Maitha and

f. Alice Kainyu

2nd House

a. Mercy Karimi (deceased)

- b. Gilbert Muriuki
- c. Poline Muthoni (deceased) and
- d. Lawrence Mugambi

[6] She averred that the deceased had the following properties:-

- a. LR. NO. IGOJI/KIANGUA/75: After earlier confirmation of grant (now revoked) this land was subdivided into LR. NO. IGOJI/KIANGUA/2160-2167.
- b. LR. NO. IGOJI/KIANGUA/1859
- c. LR. NO. IGOJI/KIANGUA/1869; and
- d. LR. NO. IGOJI/KIANGUA/1861.

[7] According to her, the deceased gave 1 acre out of the original LR. NO. IGOJI/KIANGUA/75 to one Julius Mbaabu M'Arachi. The said one (1) acre is represented by LR. NO. IGOJI/KIANGUA/2166. She proposes this land to go to the said Julius. Gilbert should get LR. NO. IGOJI/KIANGUA/2167 measuring 1 acre and where his dwelling house stands. She also proposed that the family of the deceased sister, Speranza should get LR. NO. IGOJI/KIANGUA/1861. According to her, her late sister and her husband bought this land from the deceased and her family lives on the land. Her father had during his lifetime given it to the family after the purchase. She attached agreement to that effect. Shares due to Margaret, Lucy, Dorothy and Betty were sold to Humphrey Mugambi and she proposes to distribute them to him. She acknowledged that LR. NO. IGOJI/KIANGUA/1860 had been given to Lawrence Mugambi by the deceased and that he lives on that land. Ultimately, she proposes the following sharing:-

- a. LR. NO. IGOJI/KIANGUA/2160 (0.051Ha) to go to BETTY
- b. LR. NO. IGOJI/KIANGUA/2161 (0.051Ha) to go to HUMPHREY MUGAMBI MUGA
- c. LR. NO. IGOJI/KIANGUA/2162 (0.051Ha) to go to HUMPHREY MUGAMBI MUGA
- d. LR. NO. IGOJI/KIANGUA/2163 (0.051Ha) to go to HUMPHREY MUGAMBI MUGA
- e. LR. NO. IGOJI/KIANGUA/2164 (0.051) to go to HUMPHREY MUGAMBI MUGA
- f. LR. NO. IGOJI/KIANGUA/2165 (0.051Ha) to go to Beatty Maitha
- g. LR. NO. IGOJI/KIANGUA/2166 (1 acre) to go to Julius Mbaabu M'Arachi
- h. LR. NO. IGOJI/KIANGUA/2167 (0.601Ha) to go to GILBERT MURIUKI CHABARI
- i. LR. NO. IGOJI/KIANGUA/1859 (0.405 Ha) to be held in common in equal shares by Lucy Kanjiru John, Dorothy Gatakaa, Sophia Gatwiri for late Alice Kainyu, Margaret Mukwereri, Zipporah Wambui, Catherine Kathoni for late Pauline Muthoni, Sophia Kathambi for late Mercy Karimi.
- j. LR. NO. IGOJI/KIANGUA/1860 (0.83Ha) to go to LAWRENCE MUGAMBI CHABARI
- k. LR. NO. IGOJI/KIANGUA/1861 (0.54Ha) to go to Joah Njoroge in trust for Samuel, Chege, Morris Kinoti John, Zipporah Wambui, Haron Mwandihhi and Alex Kaimenyi.

[8] She filed submissions substantially reiterating her above averments and proposals. She however submitted that the subdivisions of parcel No 75 to remain as is in order to avoid unnecessary costs. She also sought to justify the sale by her sisters of land to Humphrey Mugambi.

[9] The interested party also filed submissions. He defended his acquisition of LR NO IGOJI/KIRANGUA/2161, 2162, 2163 and 2164 which he said was lawful having been from the administratrix of the estate of the deceased. He wore the shield of section 93 of the Law of Succession Act. He cited judicial decisions on this.

ANALYSIS AND DETERMINATION

[10] Two matters are clear. One; that LR. NO. IGOJI/KIANGUA/1860 measuring approximately 0.83 ha was bequeathed as gift inter vivos to Lawrence Mugambi. The objector and the petitioner agree with this fact. Therefore, the said property belongs to Lawrence Mugambi except I shall take it into account in determining his ultimate entitlement in the estate under section 42 of the Law of Succession Act which provides as follows:-

42. Previous benefits to be brought into account Where

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house

[11] Two, from the evidence adduced, the late Speranza Kaari, her husband and children lives on LR. IGOJI/KIANGUA/1861. They lived on that land during the lifetime of the deceased. This is a pointer that the deceased allowed them to be on the land and permitted them to establish a home there. There is a claim that the deceased gave them the said land after they had purchased it. But, that is neither here nor there. In the circumstances, I will treat this property as gift inter vivos to SPARANACE KAAARI by her late father, the deceased. Thus, it shall also be taken into account in determining her ultimate share in the estate. See section 42 (ibid).

[12] As for claim that Julius Mbaabu was given 1 acre, I have perused the agreement. It is apparent that Julius was assisting the welfare of the deceased and was buying him medicine during his illness. The objector stated that at the time of the agreement, his father was very ill and he could not have made the transaction. He confirmed that his father was ill. The agreement between Julius and the deceased shows that he rendered assistance to the deceased and that was sufficient consideration to make a gift to him. I am astonished that the objector did not tell the court how the deceased raised funds for his treatment and care. He is merely engaged in denting the agreement by Julius. But, I should say that it is not uncommon to find children being concerned more about the inheritance their ailing parent will leave behind for them than the welfare and wellness of the ailing parent. Again, the agreement states that the deceased had notified his family of this gift to Julius for helping him and that none had any objection. No evidence to the contrary has been adduced except the bare denial of the agreement by the objector without proof. He was not truthful when he referred to Julius as a stranger in the estate. There was no evidence to show that the deceased was not in the right health, physical and mental to enter into such agreement. The objector has not shown that the property is estate property. I find that this property is not estate property. It shall be registered to Julius Mbaabu.

[13] As for Humphrey Mugambi, he bought the property from the administrator. Of importance, those who sold him the properties are admitting that fact. I will therefore make a penultimate order that he gets equivalent of what he bought from the shares of the persons who sold him the land.

[14] I have considered the allegations by the objector and the averments by the petitioner. I have also considered the submissions filed by the petitioner in support of her arguments in court. The petitioner claimed that the deceased shared his properties to his two houses and LR. NO. IGOJI/KIANGUA/75 was given to his mother. He is basing his claim on the alleged sharing of the estate by the deceased. The objector claimed that he erected dwelling houses on the said land. The petitioner denied these claims and stated that the objector started to deposit building stones and other building material during the pendency of these proceedings. She annexed photographs to that effect in her application to restrain the said activities. She also stated that the objector has not been using the said land as he claims. I have looked for anything tangible other than mere statements by the objector which proves that the land was given to the mother of the objector but I find none. He alleged some meeting was convened by the deceased when he shared his properties to his two houses. He did not provide minutes or evidence to prove the meeting took place, and most importantly, that the deceased shared his estate as alleged. I therefore, dismiss his claims.

Estate property

[15] From the foregoing, the estate consists in the following property:-

a. **LR. NO. IGOJI/KIANGUA/75:** Contrary to the submissions by the petitioner, I order all subdivisions below shall be amalgamated and revert into the name of the deceased:

i. LR.NO. IGOJI/KIANGUA/2160

ii.LR. NO. IGOJI/KIANGUA/2161

iii.LR. NO. IGOJI/KIANGUA/2162

iv.LR. NO. IGOJI/KIANGUA/2163

v.LR. NO. IGOJI/KIANGUA/2164

vi.LR. NO. IGOJI/KIANGUA/2165

vii.LR. NO. IGOJI/KIANGUA/2166

viii.LR. NO. IGOJI/KIANGUA/2167

b. **LR. NO. IGOJI/KIANGUA/1859**

Children of the deceased

[16] The deceased had two wives namely; Harriet Karanga and Nau Muchai. The children of each house are as below:-

1ST HOUSE

- i. Margaret Mkawereri
- ii. Dorothy Gatakaa
- iii. Speraza Kaari
- iv. Lucy Kanjiro
- v. Betty Maitha and
- vi. Alice Kainyu

2ND HOUSE

- i. Mercy Karimi (deceased)
- ii. Gilbert Muriuki
- iii. Pauline Muthoni (deceased) and
- iv. Lawrence Mugambi

Distribution

[17] I have considered the proposal by the petitioner and the objector. From the onset, I wish to state that, on the basis of my findings that Spreza and Lawrence benefitted through gifts inter vivos made to them by the deceased, and in light of the size of the remaining properties, I find that the two will not partake of the estate. Having stated that, the deceased was polygamous. Accordingly, the applicable law shall be section 40 of the Law of Succession Act which provides that:-

40. Where intestate was polygamous

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

[18] Parties seem not to agree at all. Therefore I will be guided by the principle of equality in section 38 of the Law of Succession Act and order that the estate properties listed below:

1. LR. NO. IGOJI/KIANGUA/75 (after amalgamation)

One acre shall be given to Julius Mbaabu M'Arachi. And balance shall be shared equally by children of the deceased listed in (b) below.

b. LR. NO. IGOJI/KIANGUA/1859

Shall be divided equally amongst the children of the deceased listed below:

i. Margaret Mkawereri

ii. Dorothy Gatakaa

iii. Lucy Kanjiro

iv. Betty Maitha

v. Alice Kainyu

vi. Mercy Karimi (deceased)

vii. Gilbert Muriuki

viii. Pauline Muthoni (deceased)

[19] The share of the deceased beneficiaries shall devolve upon their respective children in equal shares. The grant herein is confirmed in the foregoing terms. Each party shall bear own costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 13th day of December, 2018

F. GIKONYO

JUDGE

In presence

Mrs. Ntarangwi for petitioner

Muriuki for Interested party

Ondieki for objector – absent

F. GIKONYO

JUDGE