



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1355 OF 2010

IN THE MATTER OF THE ESTATE OF GEOFFREY KAMAU GATHU (DECEASED)

ALICE NJERI MAINA.....APPLICANT

VS

ALICE WAIRIMU MAINA.....1<sup>ST</sup> RESPONDENT/ADMINISTRATOR

RUTH WANJA GICHUKI.....2<sup>ND</sup> RESPONDENT/ADMINISTRATOR

RULING

1. The deceased herein Geoffrey Kamau Gathu died intestate on 25<sup>th</sup> January 2010 leaving behind a widow Alice Wairimu Maina (1<sup>st</sup> respondent) and two sons then minors namely; L G K (aged 15 years old) and T M K (aged 11 years). Listed as the assets to the estate were, 1½ acres of L.R. Muguga/Muguga/235 and 0.373 Ha. of Kwale/Mobokani/677 which were allegedly bequeathed to the deceased by her late mother vide HC Succession Cause No. 2435/2008.

2. On 7<sup>th</sup> July 2010, Alice Wairimu Maina (widow) and Catherine Wanjiru Mbaya petitioned this court for grant of letters of administration intestate. The same was subsequently made and issued on 27<sup>th</sup> January 2011. Consequently, the petitioner moved this honourable court on 13<sup>th</sup> May 2010 for confirmation of the grant vide a summons dated 2<sup>nd</sup> April 2010. The application is supported by an affidavit in support sworn the same day by Alice Wairimu Maina. Hereunder are the prayers sought in the said application :

**(1) That the grant be confirmed.**

**(2) That the court do consent to 0.5 acres out of the deceased's 1 ½ acres share of the inheritance in the L.R. Muguga/Muguga/235 belonging to the estate of Leah Wariara Gathu in P & A Cause No. 2435/2008 to be sold to James Mbaya Maina for purposes of meeting school fees and maintenance of the minor children and the balance of 1 acre be registered in the joint names of the applicant and Ruth Wanja Gichuki in trust for the children of the deceased namely LG K and T M K subject to the life interest of the minor's mother Alice Wairimu Maina.**

**(3) That Ruth Wanja Gichuki do substitute Catherine Wanjiku Mbaya then residing in Rwanda as a co-administratrix.**

3. Following that application, the grant was confirmed on 13<sup>th</sup> June 2012. According to the certificate of the confirmed grant, ½ acre out of LR Muguga/Muguga/235 was to be sold to meet school fees expenses for the minor children and their upkeep. Unfortunately, the certificate of confirmation did not mention specifically on how the remaining one acre was to be shared despite the application requesting the same to be registered in the name of the applicant Alice in trust for the minors.

4. Following that court order, Alice Maina the Administratrix entered into a sale agreement with one James Mbaya Maina who bought the ½ acre at a purchase price of Kshs.1,153,000 receipt of which she acknowledged as Kshs.995,000 vide bankers cheque No. 26125 and Kshs.158,900 vide bankers cheque No. 221087.

5. That despite the sale and full payment of the purchase price, the petitioner has refused to transfer the ½ acre in compliance with the certificate of confirmation. Following the death of Mbaya Maina the purchaser, his legal representative Alice Njeri Maina the applicant herein filed a notice of motion dated 17<sup>th</sup> April 2018 and filed the same day seeking orders that;

**(a) Application be certified urgent and be heard exparte.**

**(b) An order do issue compelling the respondents to execute transfer documents and transfer title documents thereto for purposes of transferring the ½ acre out of LR Muguga/Muguga/235 to the applicant.**

**(c) The court do issue any other relief it may deem fit.**

**(d) Costs of the suit.**

6. The application is predicated upon the grounds on the face of it and affidavit in support sworn by the applicant on 17<sup>th</sup> April and filed the same day. Basically, the applicant averred that she is the legal representative of the late James Mbaya Maina who bought from the petitioner ½ an acre to be excised out of LR Muguga/Muguga/235. She attached a sale agreement marked (Ex.ANM-3) and certificate of confirmation (Ex. ANMB-4) as proof of the said transaction as sanctioned by the court.

7. In response, the respondent filed a replying affidavit denying ever filing the current succession case in respect of the estate of her late husband. She averred that she and her son L G K have filed a Succession Cause No. 649/2018 in respect of the estate of her late husband Geoffrey Kamau Gathu and that she has nothing to do with this file.

8. She further stated that it was her late husband who sold the land and that she was not party to the sale nor was her son L. They denied filing the Succession Cause herein and that the orders before this court were fraudulently obtained. She further attached an affidavit sworn by Ruth Wanja Gichuki who denied petitioning as a co-administrator of the estate.

9. To counter the respondent's response, the applicant filed a further supporting affidavit sworn on the 5<sup>th</sup> October 2018 and filed on 9<sup>th</sup> October 2018 thereby denying committing any forgery.

10. During the hearing, Mrs. Morara appearing for the applicant reiterated the contents of the affidavit in support of the application and a further affidavit sworn on 5<sup>th</sup> October 2018 urging the court to find that the petitioner had sold the land in question and that the claim of forgery is neither here nor there. Counsel wondered why no application for revocation has been filed.

11. Mrs. Muigai counsel for the respondent submitted that his client did not sell any land and that the succession case herein was a forgery. She indicated that the 1<sup>st</sup> respondent has already filed a succession cause in respect of the estate of her late husband.

12. I have perused the pleadings herein, affidavit in support of the application and replying affidavit. The issues before me are; whether this succession case was filed by the petitioner jointly with Ruth Gichuki pursuant to Section 56 of the Law of Succession by virtue of the resulting trust due to the minor beneficiaries. Whether the ½ acre land out of L.R Muguga/Muguga/235 was sold as per the certificate of confirmation herein.

13. According to the applicant, it was James Maina Mbaya who bought the land from the petitioners. She attached a sale agreement dated 13<sup>th</sup> June 2012 the same day the certificate of confirmation was granted. However, the respondent stated that it was her husband who sold the land and that the money received from the applicant was a friendly advance which is refundable.

14. In her a foresaid further affidavit, the applicant attached two bankers cheques payable in the name of Alice Wairimu the 1<sup>st</sup> respondent. The two cheques marked Ex.AWN6 issued on 13<sup>th</sup> June 2012 for a sum of Kshs.158,900/= and Kshs. 995,000/= dated the same day were payable to the 1<sup>st</sup> respondent receipt of which is not denied. It is the respondent's contention that the money was an advance made to her which she can refund any time.

15. When the petition for the grant was filed, a letter from the area Chief was attached. There is no claim that the Chief's letter was forged. The application (petition) was filed by the firm of Kamonde and Co. Advocates acting for the petitioner. Curious enough is the fact that there is a sale agreement between the 1<sup>st</sup> respondent and the applicant with payment made by bankers cheques which the 1<sup>st</sup> respondent acknowledged but claimed that it was a friendly allowance which is refundable.

16. From the sequence of events, I am least convinced that the succession cause herein was a forgery for me to order investigations. When the grant was confirmed, Mr. Kamonde Advocate was appearing for the petitioner. The application clearly stated the purpose for the sale of the land.

17. It is my finding that the claim of forgery is farfetched. The respondents are running away from the truth. There is no dispute that the late James Mbaya Maina bought ½ acre to be excised from LR Muguga/Muguga/235 for purposes of raising funds to educate the 1<sup>st</sup> respondent's children then in school. The respondent cannot have her cake and eat it.

18. If the claim of forgery is genuine, the respondents should have filed an

application for revocation of the grant or even reported to the police for necessary criminal action. The sale of ½ acre land was sanctioned by the court hence a court order which must be obeyed. By the respondent filing afresh succession case in respect of the same estate is to say the least an abuse of the court process.

19. It is my finding that the applicant as the legal representative to the estate of James Mbaya Maina the buyer is entitled to ½ acre out of land parcel No. Muguga/Muguga/ 235. It is obvious and clear from the face of the record that by an oversight, the remaining 1 acre out of the said land was not shared out. The same( one acre) should be registered in the name of the 1<sup>st</sup> respondent(petitioner) Alice Wairimu in trust for her two sons L G K and T M K with the 1<sup>st</sup> respondent having life interest as per the application for confirmation's prayer and affidavit in support.

20. Accordingly, the application herein is allowed with orders as follows:

(a) That the respondents be and are hereby directed to facilitate and sign all necessary documents to transfer of ½ an acre out of LR Muguga/Muguga/235 to the name of Alice Njeri Maina being the legal representative of the late James Mbaya Maina the purchaser within 60 days from the date of delivery of this ruling.

(b) That the certificate of confirmation made on 13<sup>th</sup> June 2017 be amended to read one acre out of LR Muguga/Muguga/235 to be registered in the name of Alice Wairimu Maina in trust for her two sons L G K and T M K and Alice Wairimu Maina to hold life interest.

(c) Costs awarded to the applicant.

Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF DECEMBER, 2018.

J.N. ONYIEGO

JUDGE