



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERUGOYA
SUCCESSION CAUSE NO. 119 OF 2013
**IN THE MATTER OF THE ESTATE OF JOHN WARUI alias JOSEPH WARUI NDAI...
DECEASED**

AND

CHARLES NJIRAINI WARUI.....1ST PETITIONER

JAMES KARAGU WARUI.....2ND PETITIONER

VERSUS

GRACE WAWIRA.....OBJECTOR

RULING

1. This matter relates to the estate of Joseph Warui Ndai alias Joseph Warui (deceased), who died on 21st January, 1998 intestate. A petition for the Grant of Letters of Administration Intestate to the estate of the deceased was filed by **James Kiragu Warui** and **Charles Njiraini Warui** in their capacity as sons of the deceased.

2. A grant of Letters of Administration to the two petitioners James Kiragu Warui and Charles Njiraini Warui was made on 19th April, 2012. The petitioners filed an application for the confirmation of the grant which was amended on 23rd July, 2013 proposing the mode of the distribution of the estate of the deceased follows:

Land Parcel No. **KIRINYAGA/GATHIGIRIRI/902** to go to Francis Nyingi Wambugu wholly.

Land Parcel No. **KIRINYAGA/GATHIGIRIRI/1018** to be shared as follows:

a. James Kiragu Warui to get four (4) acres.

b. Charles Njiraini Warui to get 10 acres to hold in trust for Ndiga Warui and Rushia Michere Warui.

c. Nyawira Warui to get 4 acres to hold in trust for Dan Muturi Warui.

3. Following this proposed distribution of the estate, an affidavit of protest was filed by Lazarus Gachoki Joseph Warui claiming that he is a son of the deceased by his 3rd wife Nyawira Warui. His protest is

based on the ground that the proposed distribution of the estate has included one Francis Nyingi Wambugu who is a total stranger and not one of the beneficiaries of the estate has been awarded 10 acres out of the estate **L.R. NO. KIRINYAGA/GATHIGIRIRI/902**.

4. According to the protestor the said Francis Nyingi Wambugu has been set to benefit from the estate in a fraudulent manner and will deny the beneficiaries of their right to benefit from the estate if the grant is confirmed as prayed. He deposed that the distribution has not factored in the interest of the beneficiaries to the estate of the deceased and if the distribution is allowed to go unchallenged he will stand deprived of his right to benefit from the said estate. He proposes that in all fairness, equity the estate be shared equally among all the beneficiaries as they are all entitled to equal shares.

5. The protestor further deposed that the said Francis Nyingi Wambugu, James Kiragu and Charles Njiraini Warui have a clear intention of disinheriting the other beneficiaries and should be stopped. That since the wife of deceased is alive she ought to be made the administrator.

6. Objection to the making of grant was also filed by Grace Wawira Warui as the widow to the deceased. It was based on the grounds that the petition was filed without her involvement as a widow to the deceased. That the consent for confirmation filed in this Court is fraudulent as nothing has been communicated to her. Further that some people mentioned are strangers and are not family members. That the deceased never told him of creditors to his estate and the said creditors are fictitious and only known to James Kiragu Warui who is suspected to be intermeddling with the property of the deceased prior to the grant and confirmation.

7. Francis Nyingi Wambugu had on 28th October, 2013 filed a caveat on the estate dated 25th October, 2013. He claimed interest as a creditor to the deceased arising from the sale of land subject to this petition being **L.R. No. KIRINYAGA/GATHIGIRIRI/902**.

8. In reply to the protest and the objection the petitioners filed a replying affidavit sworn on 26th June, 2015.

9. According to the petitioners, Charles Njiraini Warui and James Kiragu Warui, contrary to the averment by the Objector that the deceased did not tell her of creditors to the estate, she had been notified. This was through Kerugoya Civil Suit No. 26/2000 and Chamber Summons application in the same cause dated 26th April, 2000 and the decree of the court dated 8th May, 2000, annexures JKW -1- a and copies of plaint, Chamber Summons and decree.

10. Further that Kerugoya Civil Suit Number 26 of 2000 and Chamber Summons dated 26th April, 2000 was for objector to surrender burial permit to facilitate filing of succession proceedings and an alternative prayer for her to file the succession cause herself.

11. According to the petitioners, Francis Nyingi Wambugu is a purchaser who bought land from James Kiragu after the same was given to him as a gift *inter vivos*. Further that James Kiragu sold only three acres to Francis Nyingi which was his legal entitlement given to him as gift *inter vivos*.

12. That the four acres of rice holdings was given to James Kiragu Warui and Charles Njiraini Warui by Mwea Irrigation Board as licencee and the said land should not form part of deceased's estate, annexure "JKW2". That it would be contrary to the law to allocate a bigger portion to the deceased's estate.

13. From the record a consent for confirmation of grant between the administrators, the creditor and the protestor was filed in court on 12th September, 2014. However the consent was not recorded because on 22nd September, 2014 the court was informed of the consent but the parties were not in court. Parties were ordered to take another date but the consent was not adopted thereafter. The Protestor and the Objector have also challenged the consent.

14. The parties filed written submissions. I have considered the affidavit of protest, the objection and the

supporting affidavit. I have also considered the replying affidavit by the petitioners. The issue for determination is whether the protest and the objection have merits.

15. The petitioners James Kiragu Warui and Charles Njiraini Warui filed this cause as sons of the deceased herein Joseph Warui Ndai. They filed form 38 being consent to the making of grant of administration intestate to person of lesser or equal priority. Though some beneficiaries signed, the objector herein and the protestor, that is Nyawira Warui and Lazarus Gachoki Warui did not sign. Being wife and son respectively, they are beneficiaries entitled to the estate of the deceased. This is not in dispute. The administrators filed a citation for the objector and protestor amongst others to accept or refuse letters of administration. From the record the protestor and the objector entered appearance.

16. Though the petitioners depone that the objector Nyawira Warui was aware as there was a suit filed seeking orders that she produces the burial permit or file succession, there is no evidence to prove that they notified her that they had filed a succession cause. As submitted the petitioners did not come to court with clean hands as they failed to notify their stepmother that they had filed a suit.

17. It is true that the administrators have brought in strangers in the cause who are not beneficiaries entitled to the estate. The claim by the petitioners is that the deceased was indebted to Francis Nyingi Wambugu. No evidence was annexed to the replying affidavit to show that the deceased was indebted to the said Francis Nyingi.

18. In their submissions the petitioners state that three (3) acres given to James Kiragu and not transferred to him yet he sold to Francis Nyingi Wambugu. From this submission it is clear that Francis Nyingi Wambugu was not a creditor to the estate of the deceased.

19. It shows that James Kiragu Warui who is one of the co-administrators, had sold land belonging to the deceased before distribution and before the confirmation of grant. James Kiragu Warui wrote to court requesting that Francis Nyingi Wambugu be inserted in the confirmation. This is undated document filed in court on 19th July, 2013.

20. James Kiragu Warui had no legal interest which he could transfer to Francis Nyingi. The application for confirmation of grant was seeking to have Land parcel No. **KIRINYAGA/GATHIGIRIRI/902** to go to Francis Nyingi Wambugu and it is registered in the name of the deceased Joseph Warui. The affidavit by Francis Nyingi Wambugu in support of the caveat at paragraph -3- states that he entered an agreement with James Kiragu for sale of Land L.R. No. **KIRINYAGA/GATHIGIRIRI/902** measuring three acres.

21. This agreement was entered on 10th January, 2013 when this cause was pending in court. The agreement states that the vendor was selling his inheritance from his deceased father. As submitted by the objectors the petitioners swore a false affidavit that the deceased was indebted to one Francis Nyingi Wambugu. No document was exhibited to support the allegation.

22. The law is clear that personal representatives cannot sell any part of the estate before confirmation of grant. **Section 82 (b) (ii)** of the **Law of Succession Act** provides:

“Personal representatives shall subject to any limitation imposed by their grant, have the following powers –

to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them as they think best: provided that-

no immovable property shall be sold before confirmation of the grant.”

23. James Kiragu had no legal title which he could convey to Francis Nyingi Wambugu. In **Re Estate of Michael Gachihi Mbui (deceased) (2016) eKLR** the Court held:

“The person from whom Ndiritu Gikaria acquired the subject property was not the registered

owner thereof, and therefore he could not possibly have had any legal title to convey to him. The said person was neither an administrator of the estate of the deceased and therefore he could not possibly transact with him over estate property. Even if he was an administrator he would still have had to contend with Section 82 (b) (ii) of the Law of Succession Act. In any event the claim by Nderitu Gikaria is not against the estate of the deceased herein for he never transacted with the deceased or with the administrators of the estate of the deceased. His claim can only be against the person he transacted with.....”

24. Further in the case of Getruda Atsieno Ouma -V- Peter Joseph Osogo & 3 Others (2016) eKLR it was held:

“.....if the objectors have a good and valid claim then they should seek to enforce their claim against the deceased Estate in a civil suit before the Environment and Land Court.”

From the foregoing it is clear that the sale of land belonging to the Estate of the deceased to Francis Nyingi Wambugu by the administrators before confirmation of grant was wrong and in contravention of **Section 82 (b) (ii)** of the **Law of Succession Act**. Francis Nyingi Wambugu cannot enforce his claim through this cause.

25. The Objector and Protestor have proved that the administrators have included in the proposed distribution of the estate, persons who are strangers and not beneficiaries of the Estate. The administrators have intermeddled with the estate of the deceased by purporting to sell immovable property before confirmation of grant. The proposed mode of distribution is not fair as some beneficiaries are getting bigger shares than others without any justification.

26. Confirmation of grant is provided for under **Section 71** of the **Law of Succession Act**. Two issues arise, confirmation of the administrators and the distribution of the estate. **Section 71 (2) (a)** provides that the Court will only confirm the grant if it is satisfied that the grant was rightly made to the applicant and that he is administering the estate according to the law. The second consideration which the court has to make is whether the respective identities and shares of all persons beneficiaries entitled have been identified.

27. What emerges from the protest and the objection is that the grant was not rightly made to the applicant as they left out the surviving widow of the deceased and they are not rightly distributing the estate as they included strangers who are not beneficiaries. The identities of beneficiaries and the share have not been identified. **Section 71 (2) (2A) Law of Succession Act** provides:

“Provided that in case of intestacy the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficiary entitled and when confirmed the grant shall specify all such persons and their respective shares”.

28. The protest and the objection show that **Section 71 Supra** has not been complied with. The beneficiaries listed in the affidavit in support of the petition had left out the surviving widow of the deceased and the distribution is only to a few of these beneficiaries and to a stranger. Others are not provided for and no explanation is offered in the application. Though these were filed which were never adopted by the Court, the Objector Grace Wawira Warui was not involved. Her consent ought to have been obtained. Several children of the deceased who are listed have not been allotted shares. This has not been explained. The administrators have not filed any deed of renunciation of the interest in the estate by the children or a document showing that they have waived their interest in the estate. Their interest has not been factored in the distribution.

29. From the foregoing, it is clear that the application for confirmation of grant amended on 23rd July, 2013 is not properly before this Court for failure to comply with the provisions of the **Law of Succession Act** cited above. The objection and the protest have merits. I order that the proposed confirmation of grant shall be postponed for a period of sixty (60) days. The administrators shall file a fresh application

of confirmation of grant identifying the respective identities and shares of all persons beneficially entitled to the estate of the deceased. All the persons beneficially entitled to a share of the estate shall be provided for unless they have waived or renounced their rights thereto. Francis Nyingi Wambugu shall not be entitled to any share of the estate of the deceased.

Each party to bear its own costs.

Dated and delivered at Kerugoya this 17th day of March, 2017.

L. W. GITARI

JUDGE

17.3.2017

Coram: L. W. Gitari J.,

Petitioners present

Respondent absent

Court Assistant Naomi Murage

Interpretation English/Kikuyu

ORDER: The Court was not sitting on 10th March, 2017 due to other official duty. The ruling has been read out in open court in the presence of the petitioners, court assistant Naomi Murage and in the absence of the respondent.

L. W. GITARI

JUDGE

17.3.2017