

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1906 OF 2014

IN THE MATTER OF THE ESTATE OF AGNES NYAMBURA GITHINJI (DECEASED)

RULING

1. The cause relates to the estate of the deceased herein, who died on 1st April 2014. A letter from the Chief of Athi River Location dated 25th May 2014, indicates she was survived by three (3) children, James Irungu Mwangi, Peter Njomo Mwangi and Kennedy Kariuki Mwangi.
2. Representation was sought in the cause by Peter Njomo Mwangi through a petition filed herein on 11th September 2014. She was expressed to have been survived by the three individuals identified in the Chief's letter. She was also said to have died possessed of several landed assets largely situated within Kajiado County, shares in several companies, and money in the bank. A grant of letters of administration intestate was accordingly made to her on 27th April 2015. The grant has not been confirmed for there is a pending application for revocation of the grant.
3. The application for determination is dated 20th July 2016. It is brought at the instance of the administrator. He seeks that Kennedy Kariuki Mwangi, a survivor of the deceased, be restrained from intermeddling with the assets of the estate, particularly with respect to Plot No. 65 Kitengela. There are prayers that tenants in occupation of premises within Plot No. 65 Kitengela pay rent to a named agent and that the respondent accounts for the rents that he has collected so far. He asserts that as administrator he is the person who should be in charge of the property.
4. There is a reply to the application, vide an affidavit sworn by the respondent on 25th October 2016. He explains why he was opposed to the distribution proposed in the application for confirmation of grant. He states that the administrator had obtained the grant by stating some untruths and concealing information from the court. He argues that the family resided at Kitengela, and therefore the letter introducing the family to court ought to have been issued by the Chief of Kitengela Location, Kajiado, and not Athi River Location in Machakos. It was also a lie to assert that the deceased had never married as in fact she had contracted a marriage which was never dissolved. He states that the administrator gained control of Plot No. 65 Kitengela forcibly after the deceased's death, from where he removed some documents. He asserts that he, the deponent, insisted on managing the property as he did not believe that it formed part of the estate of the deceased. He claims that he had been living with his mother in Plot No. 65 Kitengela and the deceased had indicated to all and sundry that the property was to be his upon her death. He also alleges that the property known as Block 5/Kagumoini/2284 was bought by the deceased with an intent to make it the family graveyard, and the same should therefore not be distributed. He also alleges that the administrator had left out some of the assets from distribution.
5. Together with his affidavit the respondent has lodged at the registry several affidavits sworn by individuals who all claim to have had heard the deceased on diverse occasions say that she wished that Plot No. 65 Kitengela would pass to the respondent, her last born child. The affidavits were sworn by Peter Njoroge, Michael Nderitu, Joseph Githinji, Peter Njomo Githinji and Diana Njeri. The affidavits were sworn on diverse dates but were filed in court on 21st November 2016.
6. The application was urged orally before me on 23rd November 2016.
7. I have carefully gone through the record, and noted that there is a pending application for revocation of the grant filed herein on 20th May 2015 by the respondent herein. There is also a summons for

confirmation of grant dated 19th November 2015, which is also pending. Ideally a summons to confirm a grant ought not to be filed where there is a pending application for revocation of grant, and once filed its determination should await disposal of the revocation application.

8. I also note that the parties hereto are going through a court annexed mediation process. Litigating over these matters during the pendency of a mediation process does not augur well for the process. Parties ought to give the mediation process a chance.

9. The primary role of the probate court is to oversee the distribution of the estate of the deceased. According to the timetable set out in the Law of Succession Act, Cap 160, Laws of Kenya, the estate ought to be distributed within one year of the making of the grant. Generally, the court should frown on multiple applications on all manner of things, but skirting distribution. It should also frown on efforts to have it macro-manage administration of the estate – collection of revenue, settlement of debts, keeping off trespassers, etc. That jurisdiction lies elsewhere.

10. The issues raised in the application dated 20th July 2016 by both sides all touch on distribution. Questions about who is entitled to what property, which of the assets make up the estate and which do not, etc. all these can be addressed in the confirmation application. I note that the respondent raises the issue of the process of obtaining representation, which incidentally is also raised in the revocation application. Under section 71 of the Act, these can also be tackled during confirmation. Rather than having the revocation question dealt with separately from the confirmation application, the court would kill two birds by the same stone by having everything disposed of within the confirmation application. The other option would be to have the two applications consolidated and disposed of simultaneously.

11. I note that the parties are going through court annexed mediation. Again, all the issues raised in the three applications can be disposed of at mediation. In fact mediation would be the most effective way of resolving cases where the deceased had a small family, like in this case, of three children. It is easier to reach settlement in the circumstances.

12. I will decline to grant the orders sought in the subject application, much as the applicant might be entitled to them, in view of sections 45 and 79 of the Law of Succession Act, so as to give room for the parties to pursue out of court settlement through mediation. A successful mediation ought to resolve all the outstanding issues. In the event the mediation fails, the applications for revocation and for confirmation of the grant should be consolidated and disposed of simultaneously.

13. I note that the bulk of the estate is situated within Kajiado County, and the family is equally resident in Kajiado County. Should the ongoing mediation process fail, the cause herein shall be transferred to the High Court of Kenya at Kajiado for final disposal.

DATED, SIGNED and DELIVERED at NAIROBI this 12TH DAY OF MAY, 2017.

W. MUSYOKA

JUDGE