



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 206 OF 1994

IN THE MATTER OF THE ESTATE OF KIMACHIA GITUANJA (DECEASED)

JUDGMENT

1. The deceased herein is said to have died sometime in 1970. Representation was sought in this cause by Francis Kabaa in his capacity as brother of the deceased. The petition was lodged at the registry on 13th June 2005. He is expressed to have been survived by three individuals, the petitioner, the widow of the deceased, Jane Wanjiku Kimachia, and a widow of a brother of the deceased called Robinson Gituanja, called Jane Wanjiru Gituanja. He is said to have died possessed of Muguga/Kanyariri/69 and Kabete/Kibichiku/290. The petitioner passed away in 2006 and his place was taken by his son, Edward Ngugi Kabaa. An objection was subsequently filed by Jane Wanjiru Gituanja in 2007. A grant of letters of administration intestate was eventually issued on 27th November 2007 to Jane Wanjiru Kimachia, Stephen Kabaa Kimachia, Joseph Itotia Kimachia and John Njenga Kimachia.

2. The application for determination is the summons for confirmation of grant dated 5th February 2010. It is brought by one of the administrators, Stephen Kabaa Kimachia. He avers that the deceased was survived by fourteen (14) individuals – his widow, Jane Wanjiru Kimachia; his sons, Joseph Itotia Kimachia, John Patrick Njenga Kimachia, John Mungai Kimachia, John Ndiithi Kimachia and Stephen Kabaa Kimachia; his sister-in-law, Jane Wanjiru Gituanja; and his nephews, Samuel Ngaruci Gituanja, Simon Kanai Gituanja, Francis Kabaa Gituanja, Charles Itotia Kabaa, Simon Kiambuthia Kabaa, Peter Kimachia Kabaa and Edward Ngugi Kabaa. He proposes that Muguga/Kanyariri/69 be shared out between the families of Nancy Wambui, Jane Wanjiru Gituanja and Francis Kabaa at specified proportions. The same applies to Kabete/Kibichiku/290, save that a portion of it is allotted to Peter Kimachia Itotia, an alleged purchaser.

3. Edward Ngugi Kabaa has filed an affidavit of protest sworn on 15th February 2010. He complains that the estate has already been distributed and there was no need for a confirmation of the grant. Another affidavit of protest was filed on 19th April 2010 by Simon Kiambuthia Kabaa, sworn on even date. He appears to be mainly questioning the competence of the administrators to manage the estate of the deceased. In response to those protests, Edward Ngugi Kabaa swore an affidavit on 13th May 2010. He explains that portions of Muguga/Kanyariri/69 and Kabete/Kibichiku/290 had been sold to various people. He states that Muguga/Kanyariri/69 has 7.9 acres remaining out of which 0.25 acre should be deducted to compensate Francis Kabaa with the balance being shared out equally between the three beneficiaries Francis Kabaa, Jane Wanjiru Kimachia and Jane Wanjiru Gituanja; while in respect of Kabete/Kibichiku/290, 3.36 acres remain, out of which 0.25 had been sold to Peter Kimachia Itotia, which should be allotted to him, with the rest being shared equally between the beneficiaries. He says Francis Kabaa's share should be in his name as administrator.

4. On 28th June 2011, the issues for determination were framed and agreed upon -

a. Whether some portions of properties comprised in the estate have been sold off; and

b. Whether upon distribution of the estate the share of Francis Kabaa should be transferred to his estate or to Edward Ngugi Kabaa.

5. The hearing commenced on the same date. The protestors were the first to begin. The first on the stand was Edward Ngugi Kabaa. He adopted his affidavits, and added that T222 Muguga Kanyariri had been sold by Jane Wanjiru Gituanja to Maina Kabiti also known as Leonard Kabiti Mbugua. He explained that there were proceedings at Kikuyu from which the three Nancy Wambui, Francis Kabaa and Jane Wanjiru Gituanja were registered on 10th July 1987 as proprietors. He explained that were issued as a result. He further explained that some land was sold before 1958 by the deceased and Robinson before the registration of two parcels of land. Peter Kimachia Itotia allegedly bought a portion of Kabete/Kibichiku/290, and his name is said to appear on the title he said the transactions took place before he was born, and he only got to hear about it from his father, Francis Kabaa. He explained that a succession cause had been filed at the Kikuyu court in 1981 where Peter Kimachia wanted to get the portion that he had bought from Kabete/Kibichiku/290. The elders decided that he should get his plot, and his name was inserted in the title in 1987. The elders award was adopted by the Kikuyu court, but that order was set aside by Mbitio J. in 2010/. He confirmed to be the administrator of his father's estate.

6. The administrators' case opened on 24th October 2013. The first administrator to take the stand was Jane Wanjiru Gituanja. She introduced herself as sister-in-law of the deceased, being a widow of his elder brother called Robinson Gituanja. The deceased herein had two wives, the Nancy Wambui and Jane Wanjiru. The deceased had two parcels of land at Kanyariri and Kabete. The matter was initially filed at the court at Kikuyu so as to have it shared out between Nancy Wambui, Jane Wanjiru Gituanja and Francis Kabaa. The Kanyariri property was to be shared between Jane Wambui Kimachia, Francis Kabaa and Jane Wanjiru Gituanja; while the Kabete property was to go to Nancy Wambui, Peter Kimachia, Jane Wanjiru Gituanja and Francis Kabaa. She described Francis Kabaa as a brother of her husband and the deceased. She said that Peter Kimachia was a member of their family. Nancy Wambui was said to have given him a portion of what was due to her in keeping with the wishes of the deceased, her late husband. She was not able to tell how Peter Kimachia Itotia came into the land, although she was positive that by the time she married into the family she found him already on site. She said she was unaware of the plots alleged by Edward Kabaa to have been left out.

7. The next in line was Patrick Njenga Kimachia. He is a son of the deceased, and one of the administrators of the estate of the deceased. He stated that his father had two wives, the late Nancy Wambui and Jane Wanjiru. He also had two brothers the late Francis Kabaa and the late Robinson Gituanja. His property at Kanyariri and Kabete was to be shared out between him and his brothers. Muguga/Kanyariri/69 was shared out between Nancy Wambui, Francis Kabaa and Jane Wanjiru; while Kabete/Kibichiku/290 was given to Nancy Kimachia, Peter Kimachia Itotia, Francis Kabaa and Jane Wanjiru Gituanja. He also said he was unaware of the plots that Edward Kabaa was alleging had been left out. He said he had heard that Peter Kimachia Itotia had exchanged some of his plots with Robinson Gituanja and Francis Kabaa and that was why he was being allotted a portion of the estate. The last witness was Simon Kiambuthia Kabaa. He testified that the deceased was his uncle, Francis Kabaa. He stated that Muguga/Kanyariri/69 and Kabete/Kibichiku/290 was held by the deceased and later by his father in trust. He conceded that 0.25 acres had been sold to Peter Kimachia Itotia, but he was not agreeable to his father's share passing to his brother Edward Ngugi, saying that he was not aware that his brother had been appointed administrator to his father's estate. He explained that all the families interested in the two assets actually live on Muguga/Kanyariri/69, while Kabete/Kibichiku/290 is a farm where no one lives.

8. At the conclusion of the hearing it was directed that the parties would file written submissions. There has been compliance with the directions, for both parties did file their respective written submissions, which I have read through and noted the arguments made therein.

9. The matter is fairly straight forward. The matter had been handled by a panel of elders and the Kikuyu court. The property was identified and the beneficiaries also identified. Indeed, the court had ordered

reregistration of the property in the names of the said beneficiaries, and the property was so registered. The beneficiaries were identified as Nancy Wambui, Francis Kabaa, and Jane Wanjiru Gituanja. Muguga/Kanyariri/69 was registered in favour Nancy Wambui (0.354 ha), Francis Kabaa (0.322 ha) and Jane Wanjiru Gituanja (0.322). There is a title deed in those terms dated 15th July 1987. Kabete/Kibichiku/290 was registered in the names of Nancy Wambui Kimachia (0.100 ha), Peter Kimachia Itotia (0.233 ha) Francis Kabaa (0.333 ha) and Jane Wanjiru Gituanja (0.333). There is a title deed in those terms issued on 15th July 1987.

10. The matter would have rested there were it not that Edward Ngugi Kabaa challenged the distribution on the grounds that it did not take into account some three plots that were allegedly sold by some of the beneficiaries. The hearing conducted herein was to confirm whether there were such sales and also to consider whether the share due to Francis Kabaa should pass to Edward Ngugi or to the deceased. From the material before me, I do not find basis upon which I can conclude that there were plots hived off the two parcels of land that had been sold, and which required to be considered at distribution. There is overwhelming consensus that the only non-immediate family member to benefit from the estate should Peter Kimachia Itotia, there was apparently some transaction that he was involved in with the deceased and his brothers, and all the survivors are in agreement that he should get his share, but nobody else should. On whether the share due to Francis Kabaa ought to go to Edward Ngugi, I do note that the latter is the administrator of the estate of Francis Kabaa in a pending cause. Ideally, the property should devolve upon the estate of the late Francis Kabaa and thereafter his survivors would have it shared out in the usual course in the succession cause that has already been filed.

11. These proceedings were a mere formality as distribution had already been carried out. My very humble task appears limited to confirming the distribution of the Kikuyu court so that at the end of it there is a Certificate of Confirmation of the grant of letters of administration intestate. At the end of the day the distribution should be as that stated in the title documents on record in respect of the two parcels of land.

12. I shall order as follows: -

- a. That I declare that it has not been proved that portions of the estate property were sold off, save for that sold to Peter Kimachia Itotia;**
- b. That the estate of the deceased shall be distributed in the manner set out in the title deeds on record in respect of Muguga/Kanyariri/69 and Kabete/Kibichiku/290 both issued on 15th July 1987;**
- c. That a certificate of confirmation of grant intestate shall issue accordingly;**
- d. That as the estate comprises of property situated exclusively within Kiambu County, the cause herein shall be transferred to the High Court of Kenya at Kiambu for disposal; and**
- e. That costs shall be in the cause.**

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

W. MUSYOKA

JUDGE