



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2834 OF 2015

IN THE MATTER OF THE ESTATE OF GACHUNGA GITHAGUI (DECEASED)

RULING

1. The deceased herein died on 29th June 2015. According to the letter from the Chief of Engineer Location dated 14th October 2015, the deceased was a polygamist having married twice. He was survived by his two widows and six children. The first house is said to have comprised of the widow, Elizabeth Wanjiku Gachembe, and her four children – Charles Nyaga Gachunga, Samuel Mutune Gachunga, Mary Wanjiku Gachunga and Winnie Ruguru Gachunga. The second house is said to comprise of the second widow, Mary Gathiri Gacunga and her children – Paul Karuri Gacunga and George Mutune Gachunga.

2. A petition for grant of letters of administration intestate was lodged in the cause by Paul Karuri Gachunga and Winnie Ruguru, being a son and a daughter of the deceased, from both houses of the deceased. They listed the survivors of the deceased as Elizabeth Wanjiku Gacembe, Samuel Mutune Gachunga, Mary Gathiri Gacunga, Charles Nyaga Gachunga, Tom Mwai Kanyi and Assumptah Nyokabi Mwai. The deceased was expressed to have died possessed of Muguga/Gitaru//T285 (expressed as still registered in the name of his deceased mother Helen Gachunga), Muguga/Kanyariri/164 (described as ancestral land to be allocated to the deceased), Nyandarua/Tulaga/9164, unsurveyed plots at Kibera allotted by letters numbers 148876/A and F and both dated 27th October 1994. A grant was accordingly made to the petitioners on 16th March 2016.

3. The application I am called upon to determine is dated 22nd July 2016. The applicants identify the survivors of the deceased as Elizabeth Wanjiku Gacembe, Samuel Mutune Gachunga, Mary Gathiri Gacunga, Charles Nyaga Gachunga, Tom Mwai Kanyi and Assumptah Nyokabi Mwai. They propose that the estate be distributed as follows:

a. Muguga/Gitaru//T285 – to Elizabeth Wanjiku Gachembe, Charles Nyaga Gachunga, Samuel Mutune Gachunga, Mary Wanjiku Gachunga, Winnie Ruguru Gachunga, Mary Gathiri Gacunga, Paul Karuri Gacunga and George Mutune Gachunga;

b. Muguga/Kanyariri/164 – to Elizabeth Wanjiku Gachembe, Charles Nyaga Gachunga, Samuel Mutune Gachunga, Mary Wanjiku Gachunga, Winnie Ruguru Gachunga, Mary Gathiri Gacunga, Paul Karuri Gacunga and George Mutune Gachunga;

c. Kibera unsurveyed commercial plot A allotted by letter number 148876/A reference number 91197/111/166 - Elizabeth Wanjiku Gachembe, Charles Nyaga Gachunga, Samuel Mutune Gachunga, Mary Wanjiku Gachunga, Winnie Ruguru Gachunga, Mary Gathiri Gacunga, Paul Karuri Gacunga and George Mutune Gachunga, equally;

d. Kibera unsurveyed commercial plot B allotted by letter number 148876/F reference number

91197/111/167 - Elizabeth Wanjiku Gachembe, Charles Nyaga Gachunga, Samuel Mutune Gachunga, Mary Wanjiku Gachunga, Winnie Ruguru Gachunga, Mary Gathiri Gacunga, Paul Karuri Gacunga and George Mutune Gachunga, equally; and

e. Nyandarua/Tulaga/9164 – to Tom Mwai Kanyi and Assumptah Nyokabi Mwai.

4. The applicants were granted leave on 16th September 2016 to file a further affidavit. Rather than file a further affidavit, the applicants chose to file a summons dated 26th October 2016 seeking for rectification of the summons for confirmation of the grant. When the matter came up for hearing on 15th November 2016, counsel indicated that they had complied with the orders of 16th September 2016, and invited the court to determine the confirmation application.

5. There has been no compliance with the orders of 16th September 2016, and the application dated 26th October 2016 has not been determined. I have gone through the same, and I doubt its competence. There is no provision in the law for rectification of a summons for confirmation of grant. The ideal situation should be that a party who feels that their application is deficient in some way withdraws it and files another, or otherwise files a further affidavit. I shall proceed as if the incompetent application dated 26th October 2016 is not on record.

6. I have gone through the record carefully. I have noted that copies of the relevant title documents have not been exhibited. There is no evidence therefore that these assets in fact belong to the deceased. This is particularly important given that some of the assets are to be inherited by the deceased from estates of other persons who have since died, and other assets are mere allotments. There is no evidence that titles have been processed to the name of the deceased.

7. I am talking about Muguga/Gitaru//T285 which is said to be still registered in the name of the deceased's mother, Helen Gachunga, and deceased's Muguga/Kanyariri/164, which is said to be ancestral land to be inherited by the deceased. What emerges from this is that the two pieces of land are not in the name of the deceased. They are still in the names of others and the deceased has only a right to inherit them. The assets did not belong to the deceased at the point of his death. It would appear that the administrators are yet to finalize devolution of the said two assets to the names of the deceased. The two assets do not form part of the estate of the deceased, and therefore they are not available for devolution at this stage.

8. The Kibera property is also not in the name of the deceased, what there is are allotment letters. An allotment letter does not confer title. The allottee has to go through a process. Pay certain sums of money to the lands authorities, among other requirements. To the extent that titles in respect of the two plots have not been processed to the name of the deceased the property does not form part of the estate of the deceased, and is not available for distribution. The administrators ought to process the titles before they can present the property for distribution.

9. Nyandarua/Tulaga/9164 is proposed to be devolved to Tom Mwai Kanyi and Assumptah Nyokabi Mwai. In the first place there is no proof that the said property belongs to the deceased. In the affidavit in support of the application dated 22nd July 2016 the two beneficiaries are not defined, yet it is clear from the Chief's letter of 14th October 2015 that they are not listed among the survivors of the deceased. The affidavit sworn in support of the unfortunate application dated 26th October 2016 defines them as persons who had bought the property from the survivors of the deceased. Attached to that affidavit is an undated sale agreement between Tom Mwai Kanyi and Assumptah Nyokabi Mwai, on one side, and Samuel Mutune, Elizabeth Wanjiku, Mary Wanjiku, Winnie Ruguru, Mary Gathiri, Charles Nyaga and Paul Karuri on the other.

10. From the above, it is clear that the property in question was disposed of after the deceased had passed on and before the grant was confirmed. The property of a dead person can only be sold by a person who has been vested with authority over it, and according to section 79 of the Law of Succession Act, only a person holding a grant of letters of administration or grant of probate gets to have the property of the

deceased vested in them. Only such a person can sell estate property, and even then there are limitations. According to section 82(b) (ii) of the Act, immovable property of the deceased cannot be sold before confirmation of the grant.

11. The undated sale agreement attached to the affidavit of 26th October 2016, sworn by Apolot Sarah, was between the two purported buyers and persons in whom the estate did not vest and who had no authority to sell it. Crucially, the sale occurred before the grant was confirmed, which was contrary to section 82(b) (ii) of the Act. The said sale was no doubt unlawful, and could confer no title whatsoever to the alleged buyers. In any case, even if there was a lawful sale, that would not constitute the buyers beneficiaries of the estate. The property would have to be devolved upon the administrators who would thereafter convey it to the buyers in the usual way.

12. Clearly, the application dated 22nd July 2016 is premature. The orders that it seeks are not available. The administrators should first perfect the titles in Muguga/Gitaru//T285, Muguga/Kanyariri/164 and the unsurveyed plots at Kibera before moving the court for confirmation of their grant.

DATED and SIGNED at NAIROBI this 3RD DAY OF MAY, 2017.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE