



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MILIMANI
SUCCESSION CAUSE NO. 1511 OF 1998
IN THE MATTER OF THE ESTATE OF HENRY NDIRANGU MWARIRI (DECEASED)

R U L I N G

1. The application for determination is dated 23rd July 1999. It seeks that the certificate of confirmation of grant dated 23rd July 1999 be cancelled.
2. It is brought at the instance of Hannah Wanjiru Mwariri and Francis Ngugi Ndirangu in their capacity as beneficiaries of the estate of the deceased. They swore a joint affidavit on 21st August 2013. They have issues with the confirmation process. They state that they were not consulted on the distribution of the estate, and the application for confirmation of grant was not even accompanied by a written consent signed by all the beneficiaries. They also complain that the estate was not distributed equitably, as two administrators, Amos Mungai Ndirangu and James Muoria Ndirangu, allocated to themselves the most prime assets in the estate. The applicants further allege that they had not been informed when the matter came up for hearing of the confirmation application so that they could attend court and present their case. They further allege that even after the confirmation of the grant, the administrators have not to date distributed the assets by causing them to be vested in their names.
3. The reply to the application is by one of the administrators, Amos Mungai Ndirangu, taking the form of an affidavit sworn on 14th November 2013. The gist of the reply is that the deceased had in fact, during his lifetime, subdivided his property, LR No. 8683, intending to give it to his widow, sons and daughters. The land was allegedly subdivided into thirty-four (34) portions, and deed plans obtained for each of the portions. The deceased husband of the first applicant was given the subdivisions described as LR Nos. 12904/8, 10 and 11; while the second applicant got the subdivisions known as LR Nos. 12904/3, 6 and 18. The other sons and daughters got the subdivisions appearing against their names in the certificate of confirmation of grant. The deceased is also said to have distributed the rest of the assets as per the certificate of confirmation of grant. No objections were raised then and everybody took possession of the portions allocated to them by the deceased. .
4. The applicants responded to the contents of the replying affidavit by swearing a supplementary affidavit on 4th February 2014. They concede to the subdivision of LR No. 8683 by the deceased during his lifetime, but state that he subdivided only a portion of the property and distributed it amongst a few of his children. I understand them to be saying that the rest of the property was subdivided by the administrators after the deceased's death who then proceeded to allocate the subdivisions to themselves without the consent of the rest of the family. They aver that there were agreements within the family on distribution of additional plots to the ones given to each of them by the deceased. They assert that they were kept in the dark about the confirmation of the grant

5. Directions were given on 7th October 2014 on the disposal of the application by way of written submissions. Both sides have filed their respective written submissions complete with authorities. I have perused through them and noted the arguments raised therein.
6. The grant was confirmed on the basis of an application dated 13th July 1999. It would appear that the application was not accompanied by a written consent of the proposed distribution. It was heard on 23rd July 1999 and orders made on it allowing it as prayed. There is nothing on record to indicate notice of the application had been given to all the beneficiaries, nor that any of them were in court at its hearing on 23rd July 1999.
7. The involvement of heirs in administration is critical. Administrators hold a position of trust, for the grant appointing them vests the property of the estate in them to hold on behalf of the heirs and other interested persons. They are answerable to the ultimate beneficiaries of the estate. Being in a fiduciary position, they are bound in law to consult those on whose behalf they hold the estate.
8. The fact that the heirs of the deceased or his survivors did not execute documents to consent to the mode of distribution of the estate is telling. The fact that the heirs or survivors were not in court on the day the grant was confirmed should also be something to note. If they were present perhaps they would have voiced their dissatisfaction with the distribution proposed.
9. I do note that the Probate and Administration Rules, at Rule 44, provides for the filing of affidavits of protest by those persons interested in the estate who have issues with a proposed distribution. The applicants herein are clearly unhappy about what was proposed in the confirmation application dated 13th July 1999. They ought therefore to have filed their protests then.
10. However, I do note that the said application was not accompanied by consents by the survivors approving the proposed distribution, and none of them were in court when the application was heard and determined. I have noted that the application was lodged in court on 14th July 1999 and heard and determined nine (9) days later on 23rd July 1999. This, to my mind, should lend credence to the allegation that there was no consultation and that things were done in a rather clandestine manner.
11. Both sides agree that the deceased had subdivided his property during his lifetime, and that he did thereafter distribute the subdivisions amongst his children. The point of departure appears to be how the said subdivisions were allocated. I am unable, from the material before me, to determine who, between the applicants and the respondents, is giving the correct position. The two conflicting positions can only be resolved through a trial. I have noted that applicants allege that the distribution in the certificate of confirmation of grant dated 23rd July 1999 has not been implemented. That allegation has not been controverted by the respondents.
12. I am persuaded that the application dated 21st August 2013 has merit. Consequently, I do hereby make the following orders:
 - a. That the orders made on 23rd July 1999 confirming the grant made herein on 6th October 1998 are hereby set aside and the certificate of confirmation of grant of even date is cancelled;
 - b. That the administrators are hereby directed to apply afresh for confirmation of the grant dated on 6th October 1998;
 - c. That any of the survivors or heirs of the deceased unhappy with the proposals made in the application to be filed as per (b) above shall be at liberty to file an affidavit or affidavits of protest;
 - d. That the matter shall be mentioned thereafter after thirty (30) days to confirm filing of the said application; and
 - e. That each party to bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH DAY OF FEBRUARY, 2016.

W MUSYOKA

JUDGE

In the presence ofadvocate for the applicants.