



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO. 332 OF 2015

(FORMERLY CHUKA SUCCESSION CAUSE NO. 215 OF 2011)

IN THE MATTER OF THE ESTATE OF THE LATE NJIEMA RINCHURI DECEASED

FLORA MBIRO MICHENI.....APPLICANT/CAVEATOR

VERSUS

JACKSON GITONGA ONESMO.....PETITIONER

J U D G M E N T

1. Njiema Rinchuri (hereinafter "the deceased") died on 15th October, 1983. He was survived by the widow Jennifer Ciandia Njiema and nine (9) children. These were five daughters and four sons. On 25th November, 2011, Jackson Gitonga Onesmo ("*the Petitioner*") petitioned for the grant of letters of administration. In Form No. P& A 5, the Petitioner disclosed who all the beneficiaries of the estate are as well as the property known as Karingani/Mugirirwa/296 as the only asset of the estate.

2. Pursuant thereto, on 31st October, 2011 a grant was issued to the Petitioner whereby, having delayed to apply for confirmation, Flora Mbiro Micheni a wife of one of the sons of the deceased who has since passed on applied for the confirmation of grant. In that application, she proposed that the only asset of the estate, measuring 4.70 acres, be distributed equally amongst all the beneficiaries save for the widow's share that she proposed to be 0.33 acres. The rest of the beneficiaries were each to get a share of 0.44 acres.

3. At the hearing, the Applicant told the court that the beneficiaries were five (5) in number to wit, her late husband, the Petitioner Jebel Munene, James Mwenda and the widow Jennifer Ciandia. According to her, her assertion for the division of the estate among five (5) beneficiaries was based on a division of the property which was undertaken in 2001 by the family. At that time, it had been agreed that the daughters of the deceased who were all married were to benefit from the share of the mother in the event they returned home. The problem was only that the Petitioner had refused to have the said agreed subdivision be effected on the ground.

4. In opposing the proposed division, the Petitioner filed a Replying Affidavit of Protest. He stated that the Applicant cannot administer the estate whilst the deceased's widow and children were still alive; that the Applicant had left out the daughters of the deceased in her proposed distribution and he denied that he had been indolent in the administration of the estate. In his testimony, he agreed with the Applicant's testimony that the property had already been sub-divided by the family in 2001 but not equally; that the

daughters were to have an interest in the widow's share. The Petitioner observed the widow was at the moment aged over 90 years and insisted that the property be shared amongst the five (5) beneficiaries proposed by the Applicant as had been done in 2001.

5. Rosalid Ciambaka (PW3) a daughter of the deceased, testified that although she was married in 1964 she had returned home in 1999 and that she was now living with her mother. She agreed with the Petitioner that the property should remain as had been divided by the family in 2001. Catherine Igoki (PW4) also a daughter agreed with both Rosalid Ciambaka and the Petitioner. James Mwenda (PW5) supported the testimonies of the Petitioner and his two sisters PW3 and PW4 but insisted that the shares of each beneficiaries should be parcelled to extend to the market that abutts the property.

6. At the close of the testimonies, the court ordered for a topographical survey of the property to be filed by the District Land Surveyor. That report was filed on 7th March, 2016. In his submissions, Mr. Mutani learned counsel for the Applicant submitted that there seemed to be no much contestation on the Petitioner's proposal for each beneficiary to get 0.70 acres but that the positions the parties occupy on the ground should be maintained. He further submitted that in order to avoid any further tug-of-war, the grant should be re-issued in the names of the Applicant and the Petitioner. On his part, Mr. Kijaru learned counsel for the Petitioner urged the court to adopt the distribution proposed by the Petitioner as the same had largely been agreed to by the family. He urged that each share of the beneficiaries be made to extend to the road so as to all the beneficiaries will have access to the said road.

7. I have considered the Affidavits on record, the testimonies of the parties and the beneficiaries as well as the submissions of learned counsel. The issues for determination are two. Firstly, who should be the administrator of the estate of the deceased and secondly, how should the estate be distributed?

8 It was not in dispute that the Petitioner obtained the grant on 31st October, 2011. It was not clear what he was doing between that time and when the Applicant approached the court with the application for confirmation on 11th February, 2014. At least, he never gave any reason or explanation at all for the delay or the failure to apply for the confirmation thereof. Section 76 of the Law of Succession Act, Cap 160 of the Laws of Kenya (hereinafter "*the Act*") provides:-

"76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(a)

(b)

(c)

(d) that the person to whom the grant was made has failed after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court may order or allow:- or

(ii) to proceed diligently with the administration of the estate: or

(iii) "

9. From the foregoing, it is clear that there is jurisdiction for the court to revoke a grant which has not been confirmed for a period of more than one year from the date of issuance. In the present case, the delay was for a period of over two (2) years and four (4) months. As already stated, the Petitioner did not explain why he had not applied for confirmation. In this regard, the grant is fit for revocation. Be that as it may, Mr. Mutani learned counsel for the Applicant was of the view that rather than revoke the grant and appoint his client, the grant should be issued to both the Petitioner and the Applicant to avoid

any further tug-of-war. I agree with learned counsel's suggestion. It makes sense as all the parties will feel represented in matters of administration of the estate. Accordingly, the grant issued to the Petitioner on 31st October, 2011 is hereby amended to include the Applicant. In this regard, the administrators of the estate of the deceased shall henceforth be Jackson Gitonga Onesmo and Flora Mbiro Micheni.

10. On distribution, the Applicant presented a different formula from that of the Petitioner. I think from the evidence, this court will go with the mode proposed by the Petitioner for the following reasons. It was clear from the testimonies of all those who appeared before me that the estate had been divided in or about 2001 amongst the four (4) sons of the deceased and the widow. The parties are already settled on the property with their portions well marked although not well demarcated. All the parties were agreeable to how the division of the estate had been undertaken by the family, ie that each son of the deceased gets a portion of the land whilst all the daughters do share with the widow the one distributed to her. The family did divide the property into five equal portions as proposed by Jackson Gitonga Onesmo. Indeed, that is why this court called for a topographical survey report by the District Land Surveyor. This court has looked at the said report dated 4th March, 2016 and it is clear that the five (5) beneficiaries had their structures well marked on the ground. Indeed, even the daughters of the deceased who appeared and testified supported the Petitioner's mode of distribution as ably put forth by his counsel Mr. Kijaru in his submissions filed on 14th June, 2016.

11. The only issue which the parties raised, and quite rightly so, is that the property be shared in a manner that each beneficiary's share touches the main road. The topographical survey report dated 4th March, 2016 shows that the property borders an 18 metre wide road on its southern part. It is clear from the said report that some of the beneficiaries' structures will have to be pulled down in the process. That will be an inevitable consequence since dividing the property otherwise than as proposed by Mr. Kijaru, the 1.7 Ha will be too small to be able to provide the necessary access roads to each of the beneficiary.

12. Accordingly, this court directs that the estate be distributed as follows:-

LR No. Karingani/Mugirirwa/296:-

a. Jackson Gitonga Onesmo	-	0.70 Acres
b. Jebel Munene Onesmo	-	0.70 Acres
c. James Mwenda Onesmo	-	0.70 Acres
d. Jennifer Ciandia Niima	-	0.60 Acres
e. Rosalid Ciambaka		
Violet Muthoni		
Dores Kangai		
Rose Kanyua	0.70 Acres - Jointly	
Bancy Makena		
Catherine Igoki		
f) Flora Mbiro Micheni		
Micheni and Njoki Micheni	0.70 Acres - Jointly and to hold Murimi Micheni in trust for Nkirote Micheni, Mutugi	

The shares are to be parcelled in a manner that each share touches the 18 metre wide road.

13. This being a family matter, each party is to bear own costs.

DATED and Delivered at Chuka this 14th day of July, 2016

A. MABEYA

JUDGE

The Judgment is delivered in open court in the presence of all parties.

A.MABEYA

JUDGE

14/7/2016