



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 445 OF 2012

AND

IN THE MATTER OF THE ESTATE OF SARAH MUMBI KIGWE (DECEASED)

PATRICK KIBATHI KIGWE

ROSEMARY WANJIKU KIGWE.....EXECUTORS/APPLICANTS

NANCY WETTSTEIN KIGWE

VERSUS

CHARLES KIGWE GATHECHA.....PROTESTOR/RESPONDENT

RULING

PLEADINGS

1. The matter before this Court concerns the contested administration of the estate of the late Sarah Mumbi Kigwe, hereafter “the deceased”, who died testate on 20th June 2002 as evidenced in the certified copy of the deceased’s Certificate of Death on the Court’s record. The deceased wrote a will that was duly executed on 4th June 1997, and the validity of this will is not the subject of any dispute.

2. On 5th March 2012, Patrick Kibathi Kigwe, Rosemary Wanjiku Kigwe and Nancy Wettstein Kigwe, hereafter “the Applicants/Executors”, in their respective capacities as the executor and executrices of the deceased’s will, petitioned the Court for a grant of probate of written will of the estate of the deceased. The said grant of probate was made to the Applicants by this Court on 10th July 2012 on the basis that the Respondents are the executors named in the deceased’s will. The full inventory of the deceased’s known assets as per the Respondent’s petition for the grant of probate is as follows:

<u>Property</u>	<u>Estimated Value</u>
a. Kiganjo/Kiamwangi/1200	Kshs 3,000,000
b. Kiganjo/Gachika/1597	Kshs 4,000,000
c. Kiganjo/Kiamwangi/1198	Kshs 1,000,000

- d. Nairobi/Block 23/546 Kshs 7,000,000
- e. 2964 East African Breweries Limited shares Kshs 7,039.50
- f. Account No: *[particulars withheld]* at Citi Bank Kshs 1,247,720.95
- g. Account No: *[particulars withheld]* Standard Chartered Thika Kshs 84,718.45
- h. Shares at Kisambi Investments Limited Kshs 500,000,000

The estimated total value of the abovementioned assets of the deceased is Kshs 516, 339, 478.90. No liabilities of the deceased's estate were disclosed.

3. Charles Kigwe Gatheca, hereafter "the Respondent/Protestor", is the deceased's grandson; son of the late James Gatheca Kigwe who died in 1997, son to the deceased herein; Serah Mumbi Kigwe. Charles Kigwe Gatheca is also named as a beneficiary in the will of the deceased upon attaining the age of twenty one (21) years. The Applicant who was born on 25th May 1989 and attained the said age on 25th May 2010. The Respondent was bequeathed 3 ½ shares in Kisambi Investments Limited, hereafter "the Company", as stated in **Paragraph 3** of her will which provides:

"I GIVE AND BEQUEATH my seven shares in Kisambi Investments Limited as follows:

- a. as to three and half shares to my grandson Charles Gatheca Kigwe upon his attaining the age of twenty-one years absolutely;
- b. as to one share to my said son Patrick Kibathi Kigwe absolutely;
- c. as to two and a half shares to my five said daughters Nancy Wettstein Kigwe, Rosemary Wanjiku Kigwe, Cecilia Njeri Mungai, Jane Waruiru Kigwe and Margaret Wacuka Kigwe as tenants in common absolutely."

4. The Respondent moved this Court on 2nd April 2013 by way of a summons made under **Sections 47 & 71(1)** of the **Law of Succession Act Cap 160** and under **Rules 40(1) & 73** of the **Probate and Administration Rules** seeking orders that the Applicants be compelled to apply for the confirmation of the grant of probate made to them on 10th July 2012, or in the alternative to have this Court confirm the grant of probate made to the Applicants. The grounds in support of the Respondent's summons which are expounded in his Supporting Affidavit were, among others, that although the Respondent is named as a beneficiary of the estate in the deceased's will, the Applicants have been reluctant to execute the succession. This caused the Respondent to file **Nairobi Succession Cause No. 320 of 2012** on 17th February 2012 which prompted the Applicants to apply for and obtain a grant of probate from this Court vide **Nairobi Succession Cause No. 445 of 2012**. The Respondent further deposed that despite having the grant of probate made to them, the Respondents had failed to apply for confirmation of the grant after more than 9 months had lapsed. The Applicant therefore prayed that this Court grant the orders sought because the failure by the Respondents to apply for confirmation of the grant was not only an abuse of the judicial process, but was also an abuse of his constitutional right to property.

5. The Respondents applied to have the grant of probate confirmed by this Court on 14th August 2013 by way of a summons made under **Section 71(1)** of the **Law of Succession Act**. The Respondents' affidavit in support of the summons for confirmation of the grant named the following as children of the deceased:

- a. Patrick Kibathi Kigwe – Adult son
- b. Rosemary Wanjiku Kigwe – Adult daughter
- c. Nancy Wettstein Kigwe – Adult daughter

d. Catherine Njeri Mungai – Adult daughter

e. Jane Waruiru Kigwe – Adult daughter

f. Margaret Wacuka Kigwe – Adult daughter

The Respondent's further averred in their affidavit that the deceased was not survived by any dependents' falling within the provisions of **Rule 40(3)(a) and (b) of the Probate and Administration Rules**.

6. Subsequently, the Applicant filed an affidavit of protest to the Respondents' application for confirmation of the grant on 26th November 2013. In the said affidavit, the Applicant stated that he had sought to reach an agreement with the Respondents over the actual benefits due to the beneficiaries of the estate of the deceased but without avail. The Applicant stated that the main reason for the disagreement concerned the distribution of the land owned by the Company in which the Respondent was bequeathed 3.5 shares by the deceased out of the 7 ordinary shares owned by the deceased in the Company. At the time of the deceased's demise, the Company was the registered owner of 1160.40 acres of land in which the whole shareholding was 20 shares. The Respondent urged the Court to clarify the acreage of land due to the beneficiaries of the deceased's estate before the confirmation of the grant. The main contention is distribution of the parcels of land owned by Kisambi Investments. There is ongoing subdivision and apportionment of parcels of land by executors. The Protestor would want the apportionment to his shareholding determined early on to avoid hostility and protracted litigation.

7. The Applicants opposed the Respondent's protest and filed their grounds of opposition on 5th December 2012. The Applicants argued that their power to vest the specific legacy of 3½ shares in Kisambi Investments Limited on the Respondent was only effective after the confirmation of the grant. They also stated that the deceased's will does not empower the Applicants to determine the underlying assets that could result from the shares bequeathed by the deceased to the Respondent. The Applicants further argued that since there is a distinction in law and in fact between the roles of Executors of the will and the Company Directors, the Applicants could not translate the Respondents share in the Company into acreages of land. A further ground of opposition to the Respondent's protest was that the discussion on the mode of distribution of the Company land was done by the family in anticipation of agreement between all beneficiaries and thus does not constitute a valid ground to protest the confirmation of the grant. Furthermore, the Applicants argued that this Court lacks jurisdiction to refuse the confirmation of the grant prior to the distribution of land being done.

8. The parties were heard before this Court on the 27th November 2013 and it was agreed by all parties that the rival positions outlined in the Respondent's affidavit of protest and the Applicants' grounds of objections be disposed of by way of written submissions. The Respondent filed his written submissions on 11th December 2013 in which he disclosed that the main dispute between the parties concerned what constitutes one share of the Company and how the 3½ shares bequeathed to the Respondent should vest in him. He also submitted that the main property owned by the Company was **L.R. 11407/6** at South West of Thika Municipality measuring four hundred and sixty nine decimal eight hectares (469.8 Ha). On the basis that there were twenty (20) fully subscribed shares in the Company at the time of the deceased's death, the Respondent calculated that out of total 496.8 Ha (which translates to 1160.41 acres) one share in the Company comprises 58.02 acres. Since the deceased owned seven (7) shares, the Respondent calculated that the total acreage of land owned by the deceased at the time of her demise was 406.18 acres. Thus, the Respondent submitted that the 3.5 shares bequeathed to him, which is equivalent to half of the deceased's share in the Company land, translate to 203.7 acres.

9. The Respondent concluded in his written submissions of 11th December, 2013 that the dispute between the parties falls under **Section 71** of the **Law of Succession Act** and **Rule 40** of the **Probate and Administration Rules**. Accordingly, he urged this Court to order that:

a. The Respondent's share in the deceased's estate in 203.07 acres in the land owned by the Company;

- b. All the beneficiaries agree on a surveyor to physically demarcate the land due to each beneficiary and submit his report to the Court;
- c. The Executors in their capacity as directors and shareholders in the Company ensure the transfer of 3.5 shares initially owned by the deceased to the Respondent;
- d. The Executors provide a full list of all other assets owned by the Company as well as a schedule of what comprises the residuary estate so that the same can devolve upon the beneficiaries;
- e. The matter be subsequently mentioned in Court to confirm that all the issues of the estate have been well defined;
- f. The grant of probate be confirmed after all the above conditions have been met;
- g. The prohibition of any sale, alienation or any other dealings with the said Company land.

10. The two Executrices of the deceased's estate, Rosemary Wanjiku Kigwe and Nancy Wettstein Kigwe, filed their submissions on 24th October 2014 in which they strongly opposed the issuance by this Court of the orders sought by the Respondent. The Executrices argued that all the property of the deceased vests in the Applicants by virtue of **Section 79** of the **Law of Succession Act**, and further that the Respondents were entitled to give effect the last wishes or intentions of the deceased in accordance with her will. The Executrices' reading of Paragraph 3 of the deceased's will was that the deceased intended to bestow only 3.5 shares in the Company to the Respondent, not the land owned by the Company. The Executrices also opposed the issuance by this Court of an order regarding the translation of the shares to acreage of land as this is neither a function of the Court nor the Applicants, but a function of the Company directors. The Executrices stated that under **Section 71(1)** of the **Law of Succession Act**, the Executors/Applicants are only required to apply for the confirmation of the grant, and to assent to the vesting of the Company shares to the beneficiaries after such confirmation. Thus, the Executrices argued that the Respondent's application was contrary to the procedure set out in the Act and had the effect delaying the administration of the estate. The Executrices further called to their aid **Section 83** of the **Law of Succession Act**, which sets out the duties of the personal representatives, to argue that the Respondent's claim that the Executors have begun to subdivide the land is unfounded since that is beyond their powers.

11. On 28th January 2015, Patrick Kibathi Kigwe, an Executor of the deceased's estate, also filed his submissions opposing the Respondent's protest against the confirmation of the grant. He argued that the Respondent has confused the allocation of Company shares with the division of Company land, the sole asset of the Company. Accordingly, he concurred with the Executrices that the Respondent should await the confirmation of the grant before the Executors can determine the value of the 3.5 shares in the company bequeathed to him, and thereafter how they can be transferred to him. The Executor also stated that only once the Respondent's 3.5 shares are transferred to him then can his shareholding in the Company be confirmed and his claim of land be articulated in accordance with the Company's Memorandum and Articles of Associations. On the basis of **Section 83** of the **Law of Succession Act**, the Executor argued that it is the duty of the Applicants, as personal representatives, to gather the assets of the estate in a manner that will ensure that all the beneficiaries will get what is rightfully due to them. Therefore, he argued that the Respondent's protest was in bad faith and ought to be dismissed.

ORAL SUBMISSIONS

On 28th January, 2015, parties to proceedings through respective Counsel highlighted salient features of the submissions filed. In a nutshell Mr. Wakoko for the Protestor, he attained 21 years in 2010, he wants to know the value of the residual estate, and he is not involved in the affairs of the Company. The land in question be valued by an independent valuer, the land is wasting away, being subdivided and disposed of. The Court should order prohibition of further delineation of the land until determination of this Cause.

Mr. Gachuhi for the executrix referred to Grounds of Opposition filed on 24th October, 2014. The

executors of the estate of the deceased according to the Will filed for grant of probate on 5th March 2012 which was granted on 10th July, 2012. They filed for confirmation of grant of probate on 14th August, 2013 so as to distribute the estate according to the Will. The shares were bequeathed to the Protestor 3 1/2 shares and other beneficiaries and distribution and transfer of shares can only take place after confirmation of Grant. The process is halted by Affidavit of Protest filed by grandson of Deceased on 25th November, 2013. The Family Court has no jurisdiction to apportion Company land or property; that is within the purview of the Company through Directors.

Mr. Kinyanjui for the executor adopted submissions by Mr. Gachuhi and added that the Protestor did not contest the validity of the Will of the deceased. The Court should confirm the Grant of Probate and allow distribution of the deceased's estate in accordance with the Will. The Court should allow itself to be digressed from the requirements of Section 83 of the Law of Succession Act Cap 160 and interfere with the running of the Company.

ISSUES

12. The rival submissions of the parties to this dispute disclose that the issues for determination by this Court are as follows:

- a. Whether the bequest made to the Respondent was limited to only shares in the Company or it also included the land parcel owned by the Company;
- b. Whether there is a conflict of the roles of Executors and Directors of the Company;
- c. Whether there are valid grounds to deny the confirmation of the grant;
- d. Whether this Court has jurisdiction to deny the confirmation of the grant.

EVALUATION

13. The applicable law in the above dispute between the parties is the cumulative provisions of **Sections 2, 71(2) (d), 79 and 83** of the **Law of Succession Act** as read together with **Rule 40** of the **Probate and Administration Rules**.

14. **Section 2** of the **Law of Succession Act** is instructive insofar as the definition of the words "executor" and "will" are concerned. These words are defined as follows:

"executor" means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided;

"will" means the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II, and includes a codicil.

15. **Section 71(2)(d)** of the **Law of Succession Act** provides that:

Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

The above provision should be read together with **Rule 40** of the **Probate and Administration Rules** which provides:

Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.

16. The Family Court has jurisdiction to deal with matters relating to intestate and testamentary succession and the administration of estates of deceased persons as provided in the **preamble of Law of Succession Act Cap 160**. The Court rightfully shall consider the transfer or transmission of shares of the limited Liability Company; Kisambi Investments Company Limited that belong to deceased and facilitate the said transfer of shares to beneficiaries as outlined in the Will of 4th June, 1997. The Court shall also protect wastage of the estate of deceased until distribution of the estate as provided in **Section 45 of Law of Succession Act Cap 160**.

17. An examination of the evidence before this Court indicates that the property owned by the Company and which is identifiable for purposes of distribution of the estate of the deceased is the parcel of land known as **LR 11407/6**. A copy of the Certificate of Title annexed to the Respondent's affidavit of 11th December 2013 indicates that the Executors of the deceased's Will; have been dealing with the land owned by the Company since 15th June 2002. That certain portion of that land has been transferred to the Executors. However, there is no evidence to suggest that any portion of the Company's land has been transferred to the Respondent. Therefore, as a beneficiary of the estate of the deceased whose bequest of 3.5 shares in the Company is not disputed, the Respondent has cause to be apprehensive that the property to which he is rightfully entitled is being disposed of. The Executors are currently directors and shareholders in the Company while the Respondent is not, at least in formal terms. In these capacities, the Applicants have benefited from the estate by having portions of land transferred to them. Thus, the argument raised by the Applicants that the powers to which they are entitled under **Section 83** of the **Law of Succession Act** would prevent them from appropriating the land is unconvincing.

18. The Court notes with concern, although the Will of the deceased; Serah Mumbi Kigwe is explicit as to beneficiaries and distribution of her estate; in the Petition for grant of Probate filed on 5th March 2012 and application for confirmation of Grant the name of the grandson of the deceased is conspicuously missing. The affidavit of Protest filed on 25th November, 2013 speaks to the reluctance to include the Protestor and actually omit him in the confirmation proceedings. He attained the age of 21 years as required under the Will. Therefore for avoidance of doubt; the beneficiaries and or dependents shall include Charles Kigwe Gatheca as per the Will of the Deceased.

19. The Protestor has enumerated the issues of concern and resulting opposition to the confirmation of grant. The main issue is that this Court determines the transfer of shares, distributes the land in question and confirm the Protestor's benefit's worth so that he may obtain his share of property. The reality is, this Court can only adjudicate on transfer of shares to the extent the process involves the deceased's property and estate. However, the valuation of shares of a Company, valuation and apportionment of the Company's property is subject to the Companies Act, the Memorandum and Articles of Association of the Company. This Court's jurisdiction begins and ends with the transfer of shares in accordance with the Will of the deceased and preservation of the estate until distribution. Thereafter, the Beneficiary is at liberty to pursue his rightful role and shares from the Company. In case of any dispute, then the matter be adjudicated by the Commercial Division of the High Court.

20. Whereas, there are legitimate concerns as to the conduct of the executors who are also Directors of Kisambi Investments over the property of the Company; these concerns are best addressed by the Protestor as a shareholder of the Company. At this stage it is the duty of the Court to facilitate transfer of shares of the deceased to beneficiaries and distribution of the deceased's estate according to the will.

21. The grandson of the deceased was bequeathed 3.5 shares in Kisambi Investment Company. Once he is registered as shareholder of the Company, he may find out his role and entitlement in and from the Company and pursue his rightful share *vis- a -vis* other shareholders.

22. There is a disparity between the roles of executors under Law of Succession Act and Directors under

Companies Act. In the instant case the 2 roles are carried out by the same parties over the estate of the deceased. To claim the Family Court cannot interfere is to ask it to abdicate its role of facilitating distribution of estate from the deceased to the beneficiaries. To that extent the Court has to oversee the estate of the deceased is not wasted and is preserved under Section 45 until the distribution is effected.

FINDING

23. The upshot of the application for confirmation of Probate and affidavit of protest is that the Protest should not interfere and stall the confirmation process, if confirmation of grant of Probate is not granted; the transfer of shares will stall and the estate of the deceased wasted. The Court will confirm grant of probate in the following terms;

I. The grant of Probate made to the applicants on 10th July, 2012 is confirmed to distribute the estate of the deceased according to the Will of 4th July, 1997 to the following beneficiaries;

II. Patrick Kibathi Kigwe -son

III. Rosemary Wanjiku Kigwe -daughter

IV. Nancy Wenstein Kigwe -daughter

V. Cecilia Njeri Mungai -daughter

VI. Jane Waruiru Kigwe -daughter

VII. Margaret Wacuka Kigwe' -daughter

VIII. Charles Kigwe Gatheca - grandson

2. The name Charles Kigwe Gatheca be entered forthwith in the members or shareholders register as holding 31/2 shares in Kisambi Investment Company Limited.

3. Any delineation, subdivision or disposal of Company's property be done in accordance with the shareholding of all beneficiaries of the deceased's estate in the Will of 4th July 1997, Inventory of assets and liabilities of Kisambi Investments Company Limited filed in Court on 5th March 2012.

4. Distribution of the estate of the deceased is as per the Will of the deceased of 4th July, 1997 and operations of the Company are as per Companies Act, memorandum and articles of Association of Kisambi Investments Company Ltd.

5. Each party to bear its own costs

6. Each party may apply.

READ, DELIVERED AND SIGNED AT NAIROBI THIS 10TH DAY OF MARCH, 2015.

MARGARET MUIGAI

JUDGE

In the presence of:

Mr. Gitaka holding brief for Mr. Gachuhi for the Executrix