



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 86 OF 2012
P&A 10 OF 2003 GITHUNGURI LAW COURTS
IN THE MATTER OF THE ESTATE OF MUIRURI NJUGUNA (DECEASED)
TERESIAH WANGARI.....APPLICANT

VERSUS

JOSEPH GACHEMA MAAI

MARY NYOKABI MUCHIRI

JASON KIMANI MAAI

FRANCIS GACHEMA MUIRURI

JOSEPH MBURU MAAAI..... RESPONDENTS

J U D G M E N T

INTRODUCTION

The deceased Muiruri Njuguna died on 8th May, 2001. Pursuant to Court orders of 27th January, 2014 by Kimaru J that applications filed one on 18th January, 2012 and another on 28th August, 2013 be heard and determined; and the administration of the estate to be determined by the Court; on 4th March, 2014, the parties were to exchange and file written submissions and the parties' respective Counsel to highlight the salient features.

ORAL SUBMISSIONS

The matter was referred to this Court on 9th December, 2014. These orders were complied with on 21st January, 2015. Mr.Njengo sought to rely on the submissions filed. Mr. Ngala for the Respondents informed the Court by oral submissions that this case was canvassed at Githunguri Law Courts in **Succession Cause 10 of 2003** through an *interpartes* hearing and the Court gave judgment on the mode of distribution of the deceased's estate on 14th, September, 2006.

The Applicants appealed the Magistrate's Court judgment in the **High Court vide Appeal Cause 52/2006** which was struck out. The Applicants' successive applications in Court as if the matter is a fresh one is not tenable in law as there is a valid Court judgment that has not been appealed against now in the Court of Appeal.

PLEADINGS

Counsel informed the Court that the applicants have frustrated the implementation of the mode of distribution; on the eve of the surveyor's delineation of land; they filed the application dated 18th January, 2012 under certificate of urgency. The District Surveyor was to subdivide the land Gatamaiyu/Kagwe/548 and Gatamaiyu Kagwe/471 on 20th January, 2012 as per the letter attached "JGM3". The Applicants sought;

- i. Temporary injunction against the administrator, Teresiah Wangari Muiruri, her servants, agents or employees from interfering, subdividing or in any way dealing with land Title No. Gatamaiyu/Kagwe/54 and Gatamaiyu/471 with the hearing and determination of the application and the summons for annulment of grant of 19th January, 2012.

In the application; the grounds were that;

- i. The administrator disclosed only the 2 properties; Gatamaiyu/Kagwe/548 and Gatamaiyu/Kagwe/471. The administrator concealed other properties of the deceased and
- ii. She obtained the confirmed grant without the agreement of all beneficiaries.

The Applicants wanted the process of subdivision stopped; if it went on it would finalize the process of administration leaving the rest of the estate unadministered and unaccounted for. The affidavit of one Joseph Gachema Maai to the effect that pleadings were filed in **Githunguri Senior Resident Magistrate Succession Cause 10 of 2003 marked "JGM1"**.

The Court issued letters of administration to the administrator, the applicant's step mother on 19th November, 2003. She did not consult and obtain consents regarding the properties constituting the estate of the deceased. The grant was confirmed on 14th September, 2006. The applicant claimed the administrator left out 2 Friesian cows, 6 sheep and a bank account in Kenya Commercial Bank whose details are within the knowledge of the administrator.

The next application is one dated 28th October, 2013 filed on 29th October, 2013 (not 28th August, 2013). The application sought

- i. The summons for revocation of granted 18th January, 2012 filed herein be heard and determined soonest.
- ii. The administrator Teresiah Wangare who was abducted after the Respondents destroyed all the structures and invaded on the parcels of land and subdivided it among themselves; be released forthwith from the confines of the Respondents through the help of OCS Kilgoris Police Station.

The Applicant David Waburi Muiruri son of the administrator listed the following grounds;

- i. The Respondents blocked the distribution of the estate of the deceased that they moved the Court during the impending visit by the surveyor.
- ii. The Respondents destroyed structures, and subdivided the land among themselves, and abducted the administrator.
- iii. The Respondents disposed off the land before confirmation of grant and the buyers lodged cautions on the said parcel of land.
- iv. The Applicants stated that the confirmation of grant was by the Githunguri Court after listening to *viva voce* evidence by the parties.
- v. All beneficiaries listed in the petition are to be allocated equal shares save for the married daughters who got a lesser share.
- vi. The Respondents appealed against the Githunguri Court decision in the High Court and the appeal was struck off.

The written submissions for Applicants were filed on 13th March, 2014 by J. M. Njengo & Co.

Advocates. The submissions are as follows;

1. The confirmed grant did not include;
 - a. 2 Friesian cows
 - b. 6 Sheep and
 - c. A bank account at Kenya Commercial Bank
2. The administrator due to advanced age and health condition cannot collect, manage the property of the deceased and propose mode of distribution of the deceased's estate as evidenced by Dr. M.A Makanyango's medical report of 9th April, 2008.
3. Due to her mental state she cannot provide the Court with full inventory and account of the assets of the deceased.
4. The administrator did not obtain written consents for the beneficiaries on the mode of distribution of the deceased's estate as required by law.
5. The administrator concealed material facts and fraudulently obtained the grant and confirmation of grant which should be annulled under **Section 76 of Law of Succession Act Cap 160**

Reference was made to the case of;

Grace Kanyi Nganga Vs. Nicholas Njonjo Nganga (2012) eKLR - G. B. M Kariuki SC J

“The provisions of the law required that all beneficiaries must consent to the confirmation of the grant and distribution of the estate.”

The beneficiary's submissions on 14th April, 2014 by Ngala Morara & Co. Advocates. The beneficiaries/Respondents stipulated in submissions that

- i. The confirmed grant is the outcome of proceedings and judgment of **Succession 10 of 2003 of Githunguri Law Courts** after an *inter partes* hearing. The applicants were given an opportunity to give oral evidence in Githunguri Succession Cause 10 of 2003, although they were present and they had Counsel, they did not offer any evidence to contradict the evidence that was adduced in Court.
- ii. The Applicants appealed the Magistrate's Court decision in the High Court and the appeal was struck off. The present matter should be an appeal in the Court of Appeal. The Applicant have blocked any subdivision of land despite issuance of an injunction.
- iii. The Applicants abducted the administrator and urged the Court to proceed with the hearing of the application in the absence of the administrator.
- iv. The land has been sold to purchasers and the administrator evicted from the land. Despite her age and they demand her return and reinstatement and distribution of the estate as per the confirmed grant.

ISSUES

1. Is the confirmed grant of 19th November, 2003 valid or invalid to be annulled and revoked under **Section 76 Law Succession Act Cap 160?**
2. Where is the administrator of the estate of the deceased, what is her status/progress, was she abducted or resettled for medical care and attention? Can she carry out duties under **Section 83 Law of Succession Act Cap 160?**
3. Is the mode of distribution of the estate of the deceased fair, just and equitable to all beneficiaries of the estate of the deceased?

EVALUATION

The Court has been called upon to determine the two (2) applications at this stage. At the outset the Court is placed in unenviable situation; whether it is sitting on appeal on the Githunguri Law Court decision **in**

Succession Cause 10 of 2003 or not? If so; if it is legally possible to do so; hearing the appeal the 2nd time after the same was struck off earlier by the **High Court Appeal Cause 52 of 2006** as borne out by the Court Record. The Court holds the position that it lacks appellate jurisdiction of the Court of Appeal.

This Court will restrict itself to the determination of the two (2) applications to ensure that the overriding objective envisaged in **Section IA and IB of Civil Procedure Act** is realized. Each and every party should be heard and his/her claim determined on merit and expeditiously. Secondly **Article 157** of the **Constitution** lays focus on the substantive issues rather than procedural technicalities to resolve a dispute.

Therefore in the instant case; the Court perused the proceedings and judgment of **Succession cause 10 of 2003**. The petition for grant of letters of administration filed on 25th September, 2003 has the list of the beneficiaries' children of the deceased Muiruri Njuguna from the 2 houses.

The 1st house whose wife is deceased has the children are;

- I. James Njuguna Maai,
- II. Mary Nyokabi Muiruri,
- III. Joseph Gachema Muiruri and
- IV. Joseph Karanja Maai.

The 2nd house; they are;

- V. the widow Teresia Wangui Muiruri,- administrator
- VI. Eunice Wangui Kuria,
- VII. Mary Njeri Muiruri,
- VIII. Peter Njuguna Maai,
- IX. Mburu Maai,
- X. Francis Gachema Muiruri,
- XI. David Waburi Muiruri and
- XII. Jason Kimani Muiruri.

The list of assets included;

- XIII. Gatamaiyu/Kagwe 548
- XIV. Gatamaiyu/Kagwe/471

The Court confirms that there was full disclosure of the list of beneficiaries of both houses of the deceased. There was also the list of assets the land in question. It was alleged that 2 Friesian cows and 6 sheep were left out. There is also an alleged bank account in Kenya Commercial Bank which details only the widow of the deceased knows.

The claim of undisclosed assets was not proved on a balance of probabilities as the widow claimed she owned the 2 cows and 6 sheep. She denied any knowledge of the Account and sought proof from the Respondents.

The 2 cows and 6 sheep ownership was not proved as belonging to the deceased as claimed by the Applicants or the administrator; it is one's word against the other. Secondly, the Court finds that distribution of 2 cows and 6 sheep amongst 12 beneficiaries overstretching and impossible. The Court is not satisfied that the animals belonged to the deceased or belonged to the widow. It is one sword against the other. They cannot be included as assets of the deceased.

The account details are not disclosed and verified. **Section 102 – 107 Evidence Act Cap 80** require that he who alleges must prove. In the instant case the Respondents ought to provide more details of the alleged bank account so as to confirm its existence and contents. Until then it cannot be included in the

list of assets.

The Court finds no proof of any concealed facts or fraudulent conduct in obtaining grant and confirmation of grant by the administrator. There was full disclosure of beneficiaries and assets. The bone of contention is the mode of distribution amongst the beneficiaries. With regard to the 1st issue, the Court finds the grant valid.

The 2nd issue is with regard to the administrator of the estate of the deceased. The son; David Waburi Muiruri deponed that his mother was abducted by the Respondents and resettled in Kilgoris. The last order by Kimaru J on 27th January, 2014 was that the administrator be produced in Court on the next date.

The Court Order was not complied with. The administrator's whereabouts are not known. It has not been clarified or confirmed if she is alive, well and stable. What is her state, progress in light of her age and health and mental status? This Court can only put closure to this matter after the state of the administrator is disclosed or she is presented in Court. Until then, the Court cannot consider the application to replace the administrator due to her age and health circumstances. When the Court is satisfied of her whereabouts and safety then the proposal to amend the grant the confirmed grant to include other administrators to account in the distribution of the estate can be dealt with. The Court will require the status and progress of the administrator from the parties to this cause before further orders or directions are made by the Court.

The 3rd issue is with regard to the mode of distribution of the estate of the deceased. The proceedings and judgment of the **Magistrate's Court in Succession Cause 10 of 2003 Githunguri Law Courts** shows as follows;

The proceedings at page 18 and 19 the administrator widow of the deceased states; all the sons were to get equal share of the land Gatamaiyu/Kagwe which is about 17 acres. The daughters are married but she wanted to give them each $\frac{1}{4}$ of an acre each; to Grace, Wangari and Nyokabi. Mary Njeri who is not married was allocated 1.69 acre of the land by the deceased while he was alive. No beneficiary would be made to move from where he/she resides. Those who sold their land the same portions would be taken into account as their share during the subdivision of the parcel of land.

At page 25 of the proceedings Peter Njuguna testified that the deceased had indicated and said how he wanted his assets and property divided among his children. His father had 8 sons and 3 daughters and they all were married. According to him the mode of distribution was to include; All sons to share equally. The widow/administrator allocated 1 acre, Mary Nyokbi was to be allocated $\frac{1}{2}$ since she is married to a poor family and her husband died. Mary Njeri got $\frac{1}{2}$ as she separated from her husband. Eunice Wangari refused any land as her husband left her a large portion of land. He refused the administrator to give Eunice land which she did not want and it was a way to get more land and due to greed. Two (2) girls share $\frac{1}{2}$ acre each under 1 acre the rest of the sons share equally otherwise the applicant David will get a bigger share from his mother the administrator.

As clearly evaluated in the judgment of the Court; the issue is mainly distribution of the land to the girls or women of the family which would reduce the amount of land to be shared among the sons.

Section 3 of the Law of Succession of Act Cap 160 define a child;

“A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock”.

It does not discriminate whether the child is male or female, young or old, rich or poor, married or unmarried etc as illustrated in the case of ***Peter Karumbi Keingati vs Ann Nyokabi Nguithi: In the matter of the estate of Keingati Waiharo Keingati (Deceased) P&A 1140 of 1990***

Therefore this Court can only confirm the distribution of the estate of all the beneficiaries as children of

the deceased. If as alleged it is true Eunice wishes to forgo her right to inherit her father's land, the ¼ acre would go to the 2 sisters and each would have ¼ and ½ of the remaining acre each.

The sons would share equally the rent of the land except Mary Njeri who was allocated 1.69 acres by her father as a gift *inter vivos*. Secondly **Section 40 of Law of Succession Act Cap 160** provides mode of distribution where the intestate was polygamous.

The Court is satisfied that the administrator fully disclosed all material facts in filing for the grant of letters of administration and in the confirmed grant which was protested against by Mary Nyokabi. The Court heard *viva voce* evidence which culminated to the grant confirmed by the Court on 14th September, 2006. The appeal against the judgment was struck out. The judgment remains a valid order of the Court.

The Court finds that the application of 18th January, 2012 the applicants did not demonstrate an arguable appeal with chances of success or any irreparable damage to be caused as they are beneficiaries of the estate. On a balance of convenience, the matter has been ventilated in the Magistrate's Court and the High Court and this Court has found that the mode of distribution by the Magistrate Court is valid and should be implemented.

The Court has noted with concern that this being a Family Court, a Court of equity parties should come to Court with clean Hands. In the instant case, the applicants in the application of 18th January, 2012 have been accused of razing down structures, selling land, abducting or chasing away the administrator, threatened siblings and blocked subdivision instead of addressing any challenges emanating from the Court orders in Court. This conduct does not make them entitled to any equitable remedies as they have not obeyed Court orders or any instructions by the law enforcement agencies.

The application of 18th January, 2012 is dismissed with costs to the Respondents. The application of 28th October, 2013, seeking the application of 18th January, 2012 be expeditiously disposed of and the administrator released and returned from Kilgoris to her home be disposed of. The Court awaits a formal report from family members and law enforcement agencies on the status or progress of the administrator before final order are made.

FINAL ORDERS

The sum total of the Courts consideration of the matter and determination of the 3 issues, this Court orders as follows;

1. The application of 18th January, 2012 for injunction to stop any dealing with land Title No. Gatamaiyu/Kagwe/548 and Gatamaiyu/Kagwe/471 is not upheld but dismissed with cost to the Respondents
2. The application of 28th October, 2013 is upheld; the whereabouts, status and progress of Teresia Wangari Muiruri administrator of the estate be established.
3. The OCPD Kiambu Police Station to launch investigations and file report in Court within 30days from today.
4. The confirmed grant of 18th January, 2005 did not have written consent of all beneficiaries. However, there was a protest by Mary Nyokabi which made the Court hear oral evidence of the administrator, son, buyer, and objector and vide judgment of 14th September, 2006 decided on the confirmed mode of distribution under **Section 71 of Law of Succession Act Cap 160**. The requirement of consents was overtaken by the *interpartes* hearing.

The grant is also valid as there was full disclosure of list of beneficiaries, list of assets and proposed mode of distribution except from who would get what; The confirmed grant is approved by this Court in the following terms;

- a. Teresia Wangari Muiruri - ¼ acre
- b. Eunice Kuria - ¼ acre

c. Mary Nyokabi	-	1.69 acre
d. Mary Njeri	-	¼ acre
e. James Njuguna	-	1.69 acre
f. Peter Njuguna	-	1.69 acre
g. Joseph Karanja	-	1.69 acre
h. Mburu Maai	-	1.69 acre
i. Joseph Gachena	-	1.69 acre
j. Francis Gachena	-	1.69 acre
k. David Wachira	-	1.69 acre
l. James Kimani	-	1.69 acre

5. The subdivision of the land be conducted by an agreed upon surveyor in the presence of all beneficiaries under Police supervision by Kiambu Police Station.
6. Each party to bear its own costs
7. Each party may apply.

READ AND SIGNED AT NAIROBI THIS 4TH MARCH, 2015

M. MUIGAI

JUDGE

In the presence of;

David Waburi Muiruri and in the absence of all other parties.