



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO 83 OF 2006

AND

IN THE MATTER OF THE ESTATE OF CHARLES KARIUKI GACHERU (DECEASED)

STEPHEN NJOROGE & 5 OTHERS.....APPLICANTS

VERSUS

JAMES GACHUHI KARIUKI & 2 OTHERS.....RESPONDENTS

RULING

INTRODUCTION

The matter presented for determination before this Court arises from the orders of Kimaru J of 13th March 2013. The beneficiaries of the deceased's estate were in Court when the following orders were issued:

- a. Parcel Number L.R. Muguga/Gitaru/1833 shall be divided into nine (9) portions each comprising of a plot where each beneficiary resides on and has a portion to cultivate.
- b. Each beneficiary shall not be moved from where he/she is currently residing.
- c. The subdivision plan shall be approved by all beneficiaries.
- d. They shall appear on 30th April 2013 for final orders.

Pursuant to these orders, on 8th October 2014 Counsel for the administrators sought more time for the beneficiaries to canvass the issue of subdivision. On 27th October 2014, when the matter was mentioned in Court, the parties had not complied with the Court Orders, nor had they reached amicable settlement of the outstanding contentious issues concerning the subdivision of the land. On 19th November 2014, Counsel for the administrator, Mr. Wainaina, informed the Court that the confirmed grant was issued on 21st October 2008 on distribution of the deceased's estate. He stated that the property that was to be divided included L.R. Muguga/Gitaru/1833, hereafter "the suit property", which was to be divided equally amongst the beneficiaries culminating with the Court orders of 13th March 2013. He further explained that these orders have not been adhered to as the beneficiaries have not unanimously agreed to one subdivision plan or mode of distribution of the said parcel of land. The administrators filed the proposed mode of distribution at first personally on 21st March 2014, and later through surveyors on 28th January 2015 where they informed the Court of the ensuing challenges.

PLEADINGS

The Applicants/objectors also filed their rival proposal on 21st March 2014, and they were also given time to engage a surveyor to prepare their proposed mode of distribution of the land parcel and to shed light on the issues of divergence, which they finally did on 28th January 2015.

There are two (2) proposals of distribution of L.R. Muguga/Gitaru/1833:

1. Global Plan Surveyors & Land Consultants were requested by Mr. Stephen Njoroge Kariuki to prepare the proposed subdivision scheme plan. The actual ground survey will be performed upon request by the client with the relevant title documents and authority to carry out the survey.
2. The Global Plan Surveyors & Land Consultants proposed area list and allocation of Parcels on Muguga /Gitaru/1833 are as follows:

Beneficiary	Property	Area
a. Mary Ruguru -	Parcel A	0.071 ha
b. John Kihiko -	Parcel B	0.071 ha
c. James Gichuhi -	Parcel C	0.071 ha
d. Family Cemetry -	Parcel D	0.071ha
e. Mary Ruguru -	Parcel E	0.1 ha
f. Simon Waweru-	Parcel F	0.1 ha
g. James Gichuhi –	Parcel G	0.1 ha
h. Martha Waithera –	Parcel H	0.1 ha
i. Benson Raini	Parcel I	0.1 ha
j. John Kihiko	Parcel J	0.1 ha
k. Stephen Njoroge	Parcel K	0.1 ha
l. Benson Raini	Parcel L	0.071 ha
m. Simon Waweru	Parcel M	0.071 ha
n. Stephen Njoroge	Parcel N	0.071 ha
o. Martha Waithera	Parcel O	0.071 ha
p. Elizabeth Murugi	Parcel 1831	0.073 ha
q. Samuel Njenga	Parcel 1832	0.073 ha
r. Elizabeth Murugi	Parcel 1834	0.1 ha
s. Samuel Njenga	Parcel 1835	0.1 ha

The map on subdivision is attached to the list. There are no written consents signed by the beneficiaries of the deceased's estate.

3. The administrators, Mr. James Gichuhi Kariuki and Ms. Elizabeth Murugi Kariuki, instructed J.R.R. Aganyo & Associates Licensed Land Surveyors to carry out a subdivision survey of Muguga/Gitaru/1833 on 28th October 2011.
4. They were issued with:
 - a. The grant of letters of administration intestate of 21st November, 2007;
 - b. Certificate of confirmation of grant of 14th November 2008;
 - c. Land Control Board Regulations, 1968 Consent Form of 3rd November 2011; and
 - d. Mutation Form of 28th October 2011.
5. The Surveyors attached their license issued under the Survey Act issued on 8th December 1988.
6. The proposed subdivision of Muguga/Gitaru/1833 by J.R.R. Aganyo Associates is as follows:

Beneficiary	Property
a. Elizabeth Murugi	Parcel 1831
b. Samuel Njenga	Parcel 1832
c. Elizabeth Murugi	Parcel A

- | | |
|--------------------|----------------------|
| d. John Kihiko | Parcel B (2 Parcels) |
| e. James Gichuhi | Parcel C (2 Parcels) |
| f. Mary Ruguru | Parcel D (2 Parcels) |
| g. Martha Waithira | Parcel E (2 Parcels) |
| h. Stephen Njoroge | Parcel F (2 Parcels) |
| i. Simon Waweru | Parcel G (2 Parcels) |
| j. Benson Raini | Parcel H (2 Parcels) |

7. The Proposed subdivision plan is annexed to the report and also in the mutation form.
8. There are no measurements on the proposed subdivision plan. The mutation form has measurements similar to those in the above plan 0.017 ha 1 parcel and the other 0.1 ha in the other parcel.
9. There are no written consents by the beneficiaries of the deceased's estate.

ORAL SUBMISSIONS

The Court asked Counsel, administrators and all beneficiaries to attend Court on 27th October, 2014 and 19th November 2014. On the 19th November, 2014, the administrators were represented by Counsel Mr. Wainaina, the beneficiaries present were Stephen Njoroge, Simon Waweru, John Kihiko, Benson Raini, Samuel Njenga Kariuki and Martha Waithira was absent and sick.

Mr. Wainaina stated that the administrators had put all beneficiaries on equal share of the land as per the confirmed grant of 14th November 2008 and as per the surveyor's report filed.

The Applicants/objectors raised the following issues:

- a. Whether there should be a burial site or collective graveyard for all family members set aside in the land parcel and if so where the cemetery should be located on the land;
- b. Whether Elizabeth Murugi Kariuki is supposed to have another plot from the parcel of land apart from Plot 1831 which would be unfair to other siblings;
- c. There is a dispute as to whether Mary Ruguru or Samuel Waweru Kariuki will occupy the Plots allocated to Mary Ruguru;
- d. The Plot in the name of Kiambu Nyakinyua Farmers Company should be subject of the proceedings herein as it was also listed in the confirmed grant of 14th November 2008.

One of the objectors/Applicant, Mr. Stephen Njoroge, raised the following issues:

- a. He filed summons dated 16th August 2012, Justice Njagi gave orders which were not followed, and they brought another application. The administrators went ahead and subdivided the land and obtained nine (9) titles;
- b. Justice Kimaru proposed subdivision of land parcel Muguga/Gitaru/1833 to be divided into seven (7) portions for seven (7) people only;
- c. Samuel Njenga got Plot 1835 and 1832 & Elizabeth Murugi got Plot 1831 and 1834;

Their late father, the deceased, had during his life divided land parcel Muguga/Gitaru/150 into four (4) plots and from the said land hived off Muguga/Gitaru/1833;

- d. The confirmed grant of 2008 was not with their knowledge and consent on distribution of the estate of the deceased;
- e. The property of his late mother, Esther Njeri Kariuki, should remain his mother's property and he produced documents to confirm the same.
- f. The Ngure Mwireri Group Shares are not there. He wrote to confirm their existence and was informed the shares that belonged to the deceased did not exist.

ISSUES

1. Whether Land parcel No. Muguga/Gitaru/1833 should be distributed according to the deceased's wishes;
2. Whether Land parcel No. Muguga/Gitaru/1833 should be distributed as per the confirmed grant and/or;
3. Whether Land parcel Muguga/Gitaru/1833 should be distributed as per the Court Order.

LAW

The **Law of Succession Act Cap 160** facilitates administration of the deceased's testate and intestate estate.

Section 66 of the **Law of Succession Act Cap 160** outlines administrators of the estate in order of priority:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference?

- a. *surviving spouse or spouses, with or without association of other beneficiaries;*
- b. *other beneficiaries entitled on intestacy, with priority according to the respective beneficial interests as provided by Part V;*
- c. *the Public Trustee; and*
- d. *creditors;*

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

Section 29 of the **Law of Succession Act Cap 160** defines the dependents to the deceased's estate, and this includes both the nuclear and extended family of the deceased:

For the purposes of this Part, "dependant" means?

- a. *the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*
- b. *such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and*
- c. *where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.*

Section 38 of the **Law of Succession Act Cap 160** outlines the beneficiaries of the deceased's estate where both spouses are deceased:

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

Section 28 of the **Law of Succession Act Cap 160** sets out what the Court should take into account in distributing the estate of the deceased to dependents/ beneficiaries:

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to?

- a. *any past, present or future capital or income from any source of the dependant;*

- b. *the existing and future means and needs of the dependant;*
- c. *wheth*
- d. *the nature and amount of the deceased's property;*
- e. *er the deceased had made any advancement or other gift to the dependant during his lifetime;*
- f. *the conduct of the dependant in relation to the deceased;*
- g. *the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;*
- h. *the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.*

Section 42 of the **Law of Succession Act Cap 160** is instructive as regards the need to take into account any previous benefits that a beneficiary may have received or otherwise derived from the estate during the distribution of the estate:

Where?

- a. *an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*
- b. *property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35,*

that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

EVALUATION

The proposed subdivision of land parcel Muguga/Gitaru/1833 is on the following basis; The Objector Stephen Njoroge Kariuki opposes the grant of 21st November 2007 and confirmed grant of 21st October 2008. The basis of the objection is that they were not consulted and they did not give their consents to the appointment of the administrators, the mode of distribution and there is non-disclosure of all properties.

I have perused the Court File and found as follows. The deceased, Charles Kariuki Gacheru, died on 7th May 2004. There was the deceased's will of 26th October 2003; more particularly, there are minutes of the meeting held by the deceased, his sons and their wives. In a nutshell, the deceased bequeathed the homestead to be subdivided between Elizabeth Murugi, his daughter, and Charles Kariuki Gacheru Junior, his grandson. The land that the deceased remained with was to be subdivided equally amongst his sons and the remaining plot was to be used for the wellbeing and utility of the entire family. The Portion of land in Maai Mahiu estimated at 10 acres, if released, shall be shared among those who shall pursue and financially support the process and Njenga (Samuel Njenga Kariuki) shall be refunded his capital in the Maai Mahiu land. To the extent it is legally possible to do so, this Court shall take into account the wishes of the deceased as per the minutes of the meeting he held with his family.

This Court found from the record that in December 2005 the beneficiaries were served with citations by the applicant(s), Stephen Njoroge Kariuki in **HCC P&A 3325 of 2005**. They entered appearance on 14th December 2005. Thereafter, in July 2006 the respondents were served with an application under certificate of urgency seeking restraining orders over the deceased's estate. On perusal of the Court file, it was revealed that the grant was issued to Stephen Njoroge Kariuki in **HCC P&A 83 of 2006**. The Respondents were not informed or consulted and they did not give their consent to him to obtain the grant. Consequently, they filed summons for revocation and annulment of grant on 15th June 2006.

The Court vide Justice Kubo's Ruling found and accepted the evidence of the applicants that the respondent "*quietly went behind their backs and petitioned for letters of administration without*

consulting the objectors.” The Respondent was found unfit to be an administrator following his malicious damage to the deceased’s homestead, resulting in criminal court proceedings against him and his subsequent conviction. The grant issued to Stephen Njoroge Kariuki was revoked and a new grant was issued to Elizabeth Murugi and James Gichuki Kariuki as administrators of the estate of the deceased by the Court on 21st November 2008.

Stephen Njoroge Kariuki filed successive applications to have this grant revoked but the applications were dismissed. He applied for stay of execution and maintenance of *status quo pending* an appeal lodged in the Court of Appeal. These orders were granted by Justice Njagi and Justice Mabeya respectively. But the orders from the lodged appeal were not forthcoming. In the meantime the administrators obtained the confirmed grant of 21st October 2008 and started the distribution of the estate. Stephen Njoroge Kariuki objected to the mode of distribution and sought to have the administrators committed for contempt of Justice Njagi and Justice Mabeya’s orders. This is because Stephen Njoroge Kariuki conducted a search at Kiambu Land Registry and found that the Land Parcel Muguga/Gitaru/1833 had been subdivided into nine (9) units with new titles.

There were numerous subsequent applications which culminated in the present subdivision of the said Land Parcel. This background is necessary to illustrate the progression of the matter and conduct of the parties herein. It suffices to confirm that the grants of 21st November 2008 and confirmed grant of 21st October 2008 are legal and regular orders of the Court and have not been appealed against. The consents of beneficiaries were waived when the Court heard the objections. As for the confirmed grant, the mode of distribution has been objected to date, and that is why this Court has sought the most amicable but legal process to expedite and conclude the distribution of the deceased’s estate. The grants shall inform and input on the distribution.

The distribution of land parcel Muguga/Gitaru/1833 is now in line with the grants and wishes of the deceased. The Court order was to the effect that the land be divided into nine (9) units. The objector states that it should be divided into seven (7) units as two (2) of the children of the deceased already have land that was allocated to them by the deceased. They are:

- a. Samuel Njenga who got Plot 1835 and 1832; and
- b. Elizabeth Murugi who got Plot 1831 and 1834.

Both of the subdivision plans filed in Court reflect the two (2) beneficiaries’ land in equal measurement to the others except for the fact that they are not hived from Muguga/Gitaru/1833.

Section 28 & 42 of the **Law of Succession Act Cap 160** prescribes that in considering the specific order to be given in distribution of an estate, certain key circumstances must be taken into account. Among them is whether the deceased had made any advancement or other gift to the dependent during his lifetime. In the present case, the deceased bequeathed his homestead to Elizabeth Murugi and wanted Samuel Njenga to be paid back the capital he invested in Maai Mahiu land. Therefore, to be fair, the above mentioned portions should be taken into account while distributing the suit parcel of land.

Be that as it may, as long as all children of the deceased have an equal share of the deceased’s land, as per the confirmed grant and in line with **Section 38** of the **Law of Succession Act Cap 160**, it is fair and just that the suit parcel be distributed to the remaining seven (7) beneficiaries in equal shares so as to take into account the allotted parcels of land already distributed to the two (2) beneficiaries.

The other challenge is with regard to the portion allocated to Mary Ruguru Kariuki marked “**E**” in the administrator’s proposed mode of division. This area belongs to Simon Waweru Kariuki and he has developed the same. The area should remain with Simon while Mary moves to the one marked “**D**”.

If Simon Waweru developed the area marked “**F**” in the objector’s proposed sub-division and “**E**”

in the administrator's subdivision, since he has developed the area, he should have first priority and have the same parcel, unless he can be fully compensated by Mary Ruguru. In order to avoid protracted litigation and prolonged impasse, it is reasonable and fair that Simon Waweru takes the parcel he has developed "F" in the objector's plan and "G" in the administrator's plan. Mary Ruguru should have the next preference and priority before the earmarked burial site. So Ms Ruguru can take "D" in the administrators' plan and "D" Family cemetery. Then the family cemetery shall be allocated elsewhere.

The other challenge is whether there should be a common burial site for all family members or each should have their own. If there is to be a family burial site where should it be? In the objector's plan parcel "D", which the Court gave to Ms Mary Ruguru, is marked out as the common burial site. There is Parcel "A" from the administrator's subdivision plan which is allocated to the administrator Elizabeth Murugi. The objector is of the view that Elizabeth Murugi already has the deceased's homestead with her son and another parcel of land. The Objector states that the family should have a central family cemetery. The Court has also considered that since the deceased's homestead is not exclusively allotted to Elizabeth Murugi but is to be shared with the deceased's grandson, she ought to be compensated in order to have an equal share and hold the property alone. So as to be fair to both parties, to Elizabeth who seems to have taken care of the family and to rest of the family who need a family burial site, Parcel "A" of the administrator's plan shall be divided into two (2) equal parts; one portion to Elizabeth Murugi and the other to be the family cemetery.

There are other related issues raised by the objector. He argued that the Kiambu Nyakinyua Farmers Company shares and assets Plot 612 belonging to his late mother, Njeri Kariuki, who was a wife to the deceased, should be left out of the estate of the deceased. He also explained that there are Ngure Mwireri Group shares that, according to him, do not exist or belong to the deceased's estate. Also, he stated that there are shares of Ngware Family Welfare Association which are registered in the name of Elizabeth Murugi. As regards these properties, when traced, gathered and collected by the administrators, they shall be shared equally amongst the children of the deceased. Where they do not exist or belong to the deceased, then the relevant information and/or correspondence shall be filed in court in an application to remove the said assets from the grant.

The confirmed grant though challenged has not been set aside, revoked or annulled, but the objections have been the subject of the numerous applications. Since there is no amicable settlement or agreement the Court has addressed the issue(s) based on the evidence before it.

FINAL ORDERS

Therefore, the Court orders, in light of the deceased's wishes, that the confirmed grant and court order as follows:

- a. Both subdivision plans are taken into account; the subdivision to be carried out by J.R. R. Aganyo Associates who begun the process and are ongoing, but the subdivision shall be conducted in the presence of all seven (7) beneficiaries.
- b. The subdivision to take into account the other parcels of land allocated to;
 - i. Samuel Njenga who got Plot 1835 and 1832; and
 - ii. Elizabeth Murugi who got Plot 1831 and 1834.
- c. The deceased's homestead is to be allocated to Elizabeth Murugi and her son Charles Kariuki Gacheru Junior.
- d. Parcel "E" in the administrators' Plan and Parcel "F" in the objector's Plan to be allotted to Simon Waweru Kariuki as he has developed the Portion.
- e. Parcel "D" in the objector's Plan is allocated to Mary Ruguru and not to the Family Cemetery.
- f. Parcel "A" in the administrators' plan is to be divided into two (2) equal shares; i) for Elizabeth Murugi; and ii) for the family burial site.
- g. Each beneficiary to remain where they are situated, have developed or are cultivating.

- h. Each party to bear the costs of subdivision and title issuance.
- i. Each party is at liberty to apply.
- j. No orders as to costs.

DATED AT NAIROBI THIS 10TH DAY OF APRIL 2015

M. MUIGAI

JUDGE