



IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.476 OF 1998

IN THE MATTER OF THE ESTATE OF JOSHUA CHEGE WANYOIKE (DECEASED)

ROSEMARY WANGARI CHEGE.....1ST PETITIONER

ELIZABETH GATHONI CHEGE.....2ND PETITIONER

RULING

Before me are two applications dated 28/2/2014 and filed by Rosemary Wangari Chege and Johnson Kinyanjui Chege represented by Mr. Githua Advocate. The second application is dated 6/6/2014 filed by Elizabeth Gathoni who is represented by Mr. Ochang of Mukite Musangi & Co. Advocates. The applications were urged together.

In the application dated 28/2/2014, the applicants seek the confirmation of the grant issued by the court on 18/8/1999. The application is supported by the affidavits of the two applicants, both sworn on 28/2/2014. Rosemary deponed that she is one of the administrators of the estate of Joshua Chege who died intestate on 30/5/1998 and grant was issued to the three widows on 18/8/1999 i.e. Ruth Wambui now deceased, herself and the respondent, Elizabeth Gathoni. She further deponed that all beneficiaries and their shares have been identified and listed in the schedule to the application. According to both Rosemary and Johnson, the deceased was not survived by such persons as referred to in Rule 40(3)(a) and (b) of the Probate and Administration (P&A) Rules as dependants at the time of his death. Johnson deponed that he represents the 1st house who share the property known as Bahati/Engorusa Block 3/125 with the 2nd house of Elizabeth Gathoni and that all parties have agreed to subdivision of the property and it has been subdivided on the ground.

Elizabeth Gathoni swore a replying affidavit dated 20/6/2014 in opposition contending that the application is incompetent and bad in law in that it seeks to confirm a non existent grant; that this application has been brought without the co-administrator being consulted; that there already exists a confirmed grant and certificate duly issued to the administrators and this application is mischievous; that Rule 40(3)(a) and (b) of the P&A Rules formed the basis of the distribution of the estate by J Musinga; that distribution for the 1st and 2nd houses has never been actualized due to the peculiar interest of their counsel in the matter; that the shares of all beneficiaries have been ascertained and determined but that the schedule attached to the application is misleading as it does not accord with the court's rulings and some of the beneficiaries have been omitted from the list; that the applicants are bent on belaying the finalization of the process of distribution which has already been determined by the court.

In the chamber summons dated 6/6/2014, the application Elizabeth Gathoni sought the following orders:

2. **That the court do summon and do order Mr. Githua of Cresswell, Mann & Dod Advocates for the 1st and 3rd houses to appear before the court and explain or show cause why he continues to hold or retain the title deed to LR Bahati/Engushura Block 3/125;**
3. **That the court do order or direct the said advocate, Mr. Githua to the said title deed a complete account of all the documents of title of ownership or membership left to the advocate by the deceased;**
4. **That the court do order or direct that the map schedule of distribution of the title LR No. Bahati/Engorusha Block 3/125 which has been fully agreed upon by the parties in accordance with the court's order be the basis upon which the mutation shall be drawn and titles issued to the respective houses;**
5. **That due to the peculiar participation by the counsel (Mr. Githua) in this matter, he should be directed to disqualify himself.**

The grounds upon which the application is brought are found on the face of the application and the affidavit of Elizabeth Gathoni. The grounds are that; the applicant would wish to ensure that distribution of the estate is completed because she is aged; that the counsel has admitted to holding the title deed to the subject land amongst other documents of title and ownership in the names of the deceased but has declined to disclose why or release them and that is prejudicial to the 2nd house; that the counsel used to represent all the three houses but the court noted that the counsel seemed to have left out some properties from the schedule as per J Musinga's ruling on 26/8/2006; that having believed that the title deed to the land was lost, the applicant applied for another but on the counsel reading the gazette notice dated 14/12/2012 (Ex.1) wrote to the Registrar of Lands confirming that he was in possession of the same. Elizabeth also contends that counsel has attempted to present to the court different schedules for distribution but the correct one which accords with the court's ruling is the one exhibited as 5.

To this application by Elizabeth, grounds of opposition were filed dated 23/6/2014 to the effect that the application is an abuse of the court process as a similar application dated 25/11/2013 is pending. In his application 15/2013; that the counsel is not a beneficiary of the deceased's estate and has no interest therein and only represents the 1st and 2nd houses and that members of the 1st house are also beneficiaries of the said land.

To understand the matter before me, I must make reference to J Musinga's ruling of 16/10/07, his orders were that:-

1. **Bahati/Bahati Block 3/125 measuring 50.704 acres be subdivided as follows:-**
 - (i) **Residential house - 0.704 acres**
 - (ii) **1st house (with each member getting 2.771 acres)- 27.777 acres**
 - iii. **2nd house (with each member getting 2.777 acres) – 22.222 acres**
2. **3rd house to get the rest of the deceased's properties namely Bahati/Bahati Block 1/1421, 1403, 1404, 1422, 1438 and 1456 measuring 12 acres and each member of the 3rd house to be entitled to 2.4 acres.**

Later on 2/7/2010, the parties recorded a consent before J Maraga whereby the parties were to appoint surveyors to sit with Johnson Kinyanjui Chege for 1st house and David Gichua for 2nd house to agree on subdivision of Plot 3/125 into three portions as directed by J Musinga and that after that each house was to carry out the subdivision of its portion in accordance with J Musinga's judgment. It took time before the parties agreed on surveyors and on 22/9/2011 the counsel for both parties Mr. Githua for 1st and 3rd houses and Mr. Ombati for 2nd house confirmed that survey was underway and the matter was marked as settled.

What is before me is an application for confirmation of grant dated 18/8/199. However, I do note that what was before J Musinga was also an application for confirmation of grant but since the parties did not agree on distribution, it proceeded to full hearing inter partes resulting in the orders made by J Musinga on 16/10/2007. A certificate of confirmation grant was issued in terms of the certificate exhibited by Elizabeth as Ex.5. Survey of Block 3/125 was later done in accordance with the said court order and I believe that what is outstanding is for each house to distribute its portion to its beneficiaries in accordance with the court's order of 16/10/2007. What the parties should have the court to do is rectification of the grant to accord with J Musinga's order on distribution.

Elizabeth has opposed the prayers sought and objected to the distribution in terms of the schedule annexed the application. Firstly, the applicants, Rosemary and Johnson have not demonstrated that they consulted Elizabeth over the distribution. It is clear from the schedule that her house's portion of land remains whole and not shared out like the others have done. But the other question is whether the schedule reflects the judgment of the court. Since the portion of each of the two houses 1st and 2nd were to make for access to the homestead, I believe that is why the acreage is not exactly the same as the courts order. The 1st house was entitled to 27.777 acres and when I total the acreage in the schedule it comes to 27.736. The 2nd house was supposed to get 22.227 acres and the schedule shows 21.0 acres. I believe the acreage has reduced due to access road and that should accord with the survey done but the portions set aside for the access road should have been reflected in the schedule. It is clear that the portion of the 2nd house is not distributed as required by the court order. The distribution should have been done in consultation with all the administrators before this application was made. If Elizabeth was not co-operative in the said process, the court should have been told so but it has not been said that she did not co-operate. In my view, it is premature for the two houses to move this court to have their portions of land distributed to the exclusion of one house unless for good reason. I also note that the applicants did not indicate that all the beneficiaries were agreeable in respect of the schedule for distribution that was exhibited. No consent or affidavits were filed.

Elizabeth seems to be suggesting that the Block 3/125 should have been subdivided, by each administrator being issued with the title first before further distribution is done to the beneficiaries of the two houses. I do not believe that is what the court intended. I believe it was meant that once the parties agreed on the survey, then each household should distribute the land to the individual beneficiaries, then titles can be issued in the names of the individual beneficiaries but not in the names of the administrators. However, if one house does not wish to distribute its land at this stage, then it must be done with the consent of the beneficiaries from that house.

Having noted the above, I come to the issue of why the counsel Mr. Gathua is holding the title in respect of the estate. Upon appointment of administrators they should have taken charge of all titles of the estate and the rest of the process. It is obvious that Elizabeth is opposed to the counsel of the two houses holding the title to her exclusion. Since that has been the case since 2010 when Elizabeth applied to be issued with the said documents, the question is why does counsel continue to hold the title? Both administrators cannot hold the title and it seems there is suspicion between them, and therefore the title should be released to the Executive Officer of this court for safe custody forthwith with the parties being given copies of the same because their counsel has not given any good reason why he is holding the titles. This will help with the titles being released to the Land Registrar for purposes of subdivision of the land. As regards the allegation that the counsel is holding more title documents to other properties belonging to the deceased's estate, I do note that J Musinga made note of that, but it is for Elizabeth to come up with substantial evidence to assist the court determine if indeed there are other properties left out of those identified as forming part of the deceased's estate. In any event, even after confirmation, if any party discovers that some property was inadvertently or by design left out of the schedule of the deceased's property, they can apply to the court for rectification of the grant.

In the end, I decline to grant the application dated 28/2/2014 but partially grant the summons dated 6/6/2014 as contained in the ruling. Each party bears its own costs.

DATED and DELIVERED this 2nd day of October, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Ochang for the 2nd House

Mr. Githua for the 1st & 3rd houses

Kennedy – Court Assistant