



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Prob & Admin Cause 2039 OF 1998

IN THE MATTER OF THE ESTATE OF JOSEPH GITHARA NGUNDA - DECEASED

CECILIA MUTHONI KARANJA)

CECILIA MUTHONI GITHARA)

LUCY NJERI KAMAU)..... APPLICANT

VERSUS

PETER KAMAU GITHARA)

DAVID KIMANI GITHARA)

SCHOLASTICA WANJIKU GITHARA)..... RESPONDENT

RULING

PETER KAMAU GITHARA and DAVID KIMANI GITHARA (the applicants) have filed this application by way of a Chamber Summons dated 4th June 1999 and filed under Section 71.(3) of the Law of Succession Act Chapter 160 Laws of Kenya, for the grant of letters of administration issued to them jointly with SCHOLASTICA WANJIKU GITHARA (the objector) on 14th day of August 1998 to be confirmed. It is supported by the joint affidavit of the applicants, drawn and sworn by them on the same 4th June, 1999.

In that affidavit the applicants have deposed that JOSEPH GITHARA NGUNDA (the deceased) died on the 6th February, 1998 and a grant of letters of administration was made in this cause by this court on the 14th August, 1998 that the deceased was survived by the persons named in the petition who are eligible to be his heirs; that the deceased was not survived by any other dependants falling within the meaning of section 29 of the Law of Succession Act and no application under part III of the said Act is pending; no Estate duty is payable in respect of the deceased who died after 1st day of January, 1982; that there being no sustainable objection by any party it would be meted and just in all the circumstances of the case that the grant be confirmed now that six months are over.

The assets of the deceased are listed in paragraph 6 of that joint affidavit and the mode of distribution is stated at paragraph 7 thereof. Essentially the estate of the deceased is proposed to be distributed between SCHOLASTICA WANJIKU GITHARA (the objector) who is to enjoy a life interest in the estate in her capacity as the deceased's widow, while PETER KAMAU GITHARA and David Kimani Githara share the

residual net intestate estate in their capacities as the deceased's surviving sons. The affidavit in support of the petition filed on 9th June, 1998 shows that SCHOLASTICA WANJIKU GITHARA was aged 81 years (she is now 82 years) while Peter Kamau Githara was 40 years and David Kamau Githara was 44 years. They are now aged 41 and 45 years respectively.

The grounds of opposition to the confirmation of this grant have been filed by the same SCHOLASTICA WANJIKU GITHARA (the deceased's surviving widow and the mother of Peter Kamau Githara and David Kamau Githara). Her main objection is that, one of the deceased's daughters, namely MISS CECILIA MUTHONI GITHARA, has been left out in the distribution of the estate of her deceased father. The issue then for my determination is whether Miss CECILIA MUTHONI GITHARA is entitled to a share of her father's estate.

I received submissions on this issue from both Mr. Nyangoro Advocate, representing the applicants, and Mr. Wachira, representing the objector.

According to Mr. Nyangoro, Miss Cecilia Muthoni Githara is not entitled to the property or to a share of her father's estate because she is a married daughter of the deceased. She got married to RICHARD MWANGI KIRIGWI in 1978 under Kikuyu Customary Law, which marriage was solemnised at Kinyona Catholic Church in 1994. The best man in that marriage was PETER Kamau Githara (1st applicant) and both CECILIA MUTHONI GITHARA and RICHARD MWANGI KIRIGWI were blessed with five children who are still alive. Mr. Nyangoro asked the court to refer to the Ruling of the Hon Mr. Justice O'Kubasu in this respect delivered on 9th December, 1998 and to an affidavit filed on 17.9.98. I have done so.

In that affidavit filed on 17.9.98 this is what PETER KAMAUGITHARA had deposed to in paragraph 8 (iii):-

"The second applicant CECILIA MUTHONI GITHARA was born in 1961 and was married in 1978 to RICHARD MWANGI KIRIGWI first under Kikuyu Customary Law and later the marriage was solemnised at Catholic Church Kinyona in 1994 in which I was a best man. The children of their marriage are:

- (a) Seth Kirigwi Mwangi born 1978
- (b) Jane Wairimu Mwangi daughter born in 1980
- (c) Caroline Waithira Mwangi daughter born in 1983
- (d) Wanjiku Mwangi daughter
- (e) Joseph Githara Mwangi son born 1989

Her marriage is still subsisting"

In his ruling delivered on 9th October, 1998 Mr. Justice O'Kubasu said that in this cause the deceased had two wives: Scholastica Wanjiku and Jane Wairimu. The house of Scholastics is represented by Scholastica herself, and the house of Jane Wairimu is represented by her two sons Peter and David. This is how it should be. Cecilia Muthoni Karanja, Cecilia Muthoni Githara and Lucy Njeri Kamau, who are married daughters of the deceased, have no business in interfering in this estate of their late father.

That decision of Mr. Justice O'Kubasu has not been overturned or overruled by an appellate court. Though it is not binding upon me, in my view, it is good law. It gets support in the holding of the court of Appeal decision in JOHN NDUNGU MUBEKA -VS- MILKANYAMBURA MUBEKA - CIVIL APPEAL NO.76 OF 1990 unreported. It is also supported by the findings of EUGENE COTRAN in his book

"Inheritance under Kikuyu Law is patrilineal. The pattern of inheritance is based on the equal distribution of a man's property among his sons, subject to the provision that the eldest son may get a slightly larger share. In a polygamous household the distribution is by reference to the house of each wife. Widows, though not entitled to an absolute share of the estate, have a right of use during their lifetime, of a portion of land and certain movables. Daughters are normally excluded but may also receive a share if they remain unmarried."

Mr. Wachira Advocate even concedes this point of law. But he has submitted that CECILIA MUTHONI GITHARA has since separated from her husband Richard Mwangi Kirigwi and has returned to her parents' home. This means that the marriage of CECILIA MUTHONI GITHARA and Richard Mwangi is no more. This begs the question: when did the separation occur? If this was done through a court of law, where is that court order dissolving that marriage or ordering a separation? Where is the affidavit of CECILIA MUTHONI GITHARA to that effect or even of Richard Mwangi Kirigwi? And why didn't SCHOLASTICA WANJIKU GITHARA depone so in her Replying Affidavit filed on 16th August, 1999, as a reply to this application?

In the absence of any acceptable and credible evidence to the contrary, this court still holds that CECILIA MUTHONI GITHARA is a married daughter of the deceased and is not entitled to inherit her father's estate.

Like Mr. Justice O'Kubasu, I wish to say in this ruling, hopefully for the last time, that the married daughters of the deceased in this cause, including CECILIA MUTHONI GITHARA, have no business in interfering in matters relating to the estate of their late father. They should concern themselves with the properties of their husbands.

Therefore Scholastica's main opposition to the confirmation of this grant on the basis that CECILIA MUTHONI GITHARA has been excluded from the deceased's estate, does not have a legal support. The applicants have lawfully excluded CECILIA MUTHONI GITHARA from their father's estate.

SCHOLASTICA'S second ground of opposition is that the application does not outline how the liabilities of the deceased's estate shall be dispensed with, especially the Shs.70,000 Hospital bill which remains unpaid to date.

Mr. Nyangoro has replied to this by saying that, if there is such a Hospital bill unpaid, or if Shs.150,000 borrowed from one Gathirimu Githara is still outstanding, the court can order it to be paid out of the estate. Indeed section 83(d) of the Law of Succession Act provides:-

Personal Representatives shall have the following duties:-a. -b.-c. -

d. To ascertain and pay out of the estate of the deceased, all his debts. It doesn't require a court order to pay debts out of the estate of the deceased. It shall be the statutory duty of PETER and DAVID, after confirmation of this grant today, to ascertain all the deceased's debts and to pay them out of the estate.

The third ground of opposition is that PETER KAMAU GITHARA has been collecting rent from plots DAGORETTI/RIRUTA/T.333 and 471 as from February, 1998 to date, and the amount now stands at KShs.80,000 per month. SCHOLASTICA did state in her affidavit that she bought these properties with her own money but due to the respect she had for the deceased husband, she registered them in his names. Proof of any such transactions has not been made through production of relevant documents. Plots Dagoretti/Riruta/T.333 and Dagoretti/Riruta/T.471 are duly registered in the deceased's names.

SCHOLASTICA, who states that she is old and sickly, has claimed that she has no source of income whatsoever, that PETER and DAVID have not been assisting her in any way although the deceased left behind a good estate generating good income. This is of course denied by PETER and DAVID. And if it is

true that they have been neglecting SCHOLASTICA and not providing for her, it may be because the grant was not confirmed and their powers were thus limited. Things must change from today and this court would like to see PETER and DAVID make adequate provision to Scholastica out of the estate on a monthly basis for her upkeep and welfare, this to include provision for food, clothing and medical care. What is adequate provision; I would leave it to the administrators to decide, within their discretion, depending on the financial state of the estate at any given month.

I will however, give leave to SCHOLASTICA to apply to this court for such provision if non or insufficient of the same is forthcoming. Indeed the principle behind the law that a deceased's estate should be inherited by his sons, and not the married daughters, is that the sons will always be on the estate, able to manage it on their own behalf and for the benefit of the deceased's dependants, particularly a widow. It is to preserve the estate within the deceased's family for the good of those who are left there. Married daughters are expected to leave that home and cling to their husbands. So in this case PETER KAMAU GITHARA and DAVID KIMANI GITHARA have a responsibility to provide for Scholastica until her death.

There is some dispute over money held in A/C No. 1-11-0Q581 4 at EAST AFRICAN BUILDING SOCIETY. In my view this money was given to PETER KAMAU GITHARA by his late father as shown in the Pass Book. It belongs to him.

For these reasons I grant the prayer in this Chamber Summons and do hereby confirm the grant issued by this court on 14th August, 1998 in the joint names of SCHOLASTICA WANJIKU GITHARA, PETER KAMAU GITHARA and DAVID KIMANI GITHARA as prayed.

The estate of the deceased shall be distributed in the manner proposed at paragraph 7 of the joint affidavit of PETER KAMAU GITHARA and DAVID KIMANI GITHARA.

Costs of this application shall be paid out of the deceased's estate. It is so ordered. Dated this 28th September, 1999.

A.G.A . ETYANG' JUDGE

28.9.99

Delivered this 28th September, 1999 in the presence of Mr. Nyangoro Advocate for the Applicants Mr. Wachira for the Respondent. Helen Wanja Court clerk interpreting: Kikuyu/English.

A .G .A. ETYANG'

JUDGE 28.9.99

Mr. Macharia: I pray for stay of the orders for thirty days. Secondly I seek leave to appeal to the court of Appeal for today's Ruling.

A. G. A. ETYANG 'JUDGE

28.9.99

Mr. Nyangoro: I oppose the application for stay as prayed. I ask the Respondent do make a formal application if he so wishes.

A .G .A . ETYANG'

JUDGE

28.9.99

Mr. Machira: The reason for the oral application is for the stay of the order to operate the A/C in E.A. Building Society. If stay is not granted the appeal will be rendered nugatory.

A. G. A. ETYANG'

.JUDGE28.9.99

RULING

The court had already ruled that the grant issued to the Applicants be confirmed and the distribution of the estate of the deceased be as per paragraph 7 in supporting affidavit.

The court has also ruled that it has sufficiently been shown that the funds held in the E.A. Building Society A/C do not form part of the estate as that had been given to the 1st Applicant as shown in the pass book.

The court will not frustrate the disposal of those funds by issuing restraining orders. In the circumstances of the oral application before me, I decline to order a stay as prayed.

I will, however, give the Respondent leave to appeal against this decision to the Court of Appeal as prayed.

It is so ordered.

A. G. A. ETYANG'JUDGE

28.9.99