



REPUBLIC OF KENYA



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**In re Estate of Peter Gicheru Kagocho (Deceased) (Succession Cause
376 of 1983) [2016] KECA 844 (KLR) (22 April 2016) (Ruling)**

Stanley Mathu Gicheru v Moses Muthiora Gicheru & 3 others [2016] eKLR

Neutral citation: [2016] KECA 844 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
SUCCESSION CAUSE 376 OF 1983**

REA OUGO, J

APRIL 22, 2016

BETWEEN

STANLEY MATHU GICHERU APPLICANT

AND

MOSES MUTHIORA GICHERU 1ST CROSS APPELLANT

MARY WANJIKU GICHERU 2ND CROSS APPELLANT

JANE HETA GICHERU 3RD CROSS APPELLANT

AND

JAMES KAMAU GICHERU RESPONDENT

RULING

1. In the summons dated the 18/6/15 the applicant Stanley Mathu Gicheru seeks the following orders:
 - i. That Susan Wairimu Gacheru be substituted with Stanley Mathu Gicheru as a Co-administrator of the deceased's estate and that the rectified grant issued on the 22/10/12 be rectified /amended accordingly.
 - ii. That the court to be at liberty to issue such other or further orders as it shall deem just to grant in respect of the estate and in regard to the assets due to the house of Susan Wairimu Gicheru and Service of the instant application upon some of the beneficiaries based out of Kenya through substituted service.
2. The application is supported by the affidavit of Stanley Mathu Gicheru a beneficiary, together with grounds stated on the face of the application. The application is brought under Rules 74 and 73 of the Probate and Administration Rules *Law of Succession Act* Cap 160.



3. On the 17/7/15 an application was filed by Moses Muthiora Gicheru, Mary Wanjiku Gicheru and Jane Heta Nielsen. The application is brought under section 47 of the Law of Succession Act Cap 160 and Rule 73. They too seek an order of substitution. Substituting the applicants as co-administrators to the deceased estate and they also seek a rectification of the grant dated the 25/10/11. Moses Muthiora Gicheru has sworn an affidavit in support of the said application.
4. On the 20/7/2014 James Kamau Gicheru one of the administrators of the deceased's estate filed a replying affidavit in response to the application dated the 18/6/15. On the 28/9/15 James Kamau Gicheru filed a replying affidavit to the application dated the 20/7/2015. On the 28/9/2015 Stanley Mathu Gicheru filed a response to the affidavit of Moses Muthiora Gicheru to the application dated 17/7/2015 and the 2 replying affidavits filed by James Kamau Gicheru.
5. Mr. Ojienda counsel for Moses Muthiora Gicheru, Stephen Kinari Gicheru, Mary Wanjiku Gicheru, Jane Heta Nielsen and Monica Wanjiku Collins beneficiaries of the deceased's estate filed their written submission on the 8/10/2014. Mr. Njenga for Stanley Mathu Gicheru a beneficiary in the estates filed his written submissions on the 17/1/15.
6. A brief background of this matter is that the deceased Peter Gicheru Kagocho died on the 29/4/1979 at Royal Free Hospital in London. On the 25/10/11 the court rectified a grant that had been issued to the administrators on the 8/2/89. The administrators of the said estate then were Susan Wairimu Gicheru and Karen Wambui Gicheru. As per the said grant Susan Wairimu Gicheru was to hold on her behalf and as trustee for her children namely James K Gicheru, Eliud K. Gicheru, Moses N. Gicheru, Stephen K. Gicheru, Stanley M. Gicheru, Waithira Gicheru, Wanjiku Gicheru. Iteta Gicheru and Wanjiru Gicheru, the properties listed. Karen Wambui Gicheru her co-administrator was to also hold on her own behalf and as trustee for her children namely; Edward Gicheru, John K. Gicheru, Moses K. Gicheru, Njeri Gicheru, Wanjiku Gicheru, Melli Gicheru, Wanjiku Gicheru and Wangari Gicheru, the properties listed therein. On the 22nd of October 2012 the confirmed grant was rectified again to include James Kamau Gicheru as a co-administrator to the deceased's estate. James Kamau Gicheru is from the house of Susan Wairimu Gicheru.
7. The applications before this court have been brought by the beneficiaries of the house of Susan Wairimu Gicheru who seem to have a problem in distributing their part of the estate.
8. This is what I gather from the affidavits filed by the applicants. They seek that the persons named in the applications be substituted to be the administrators instead of Susan Wairimu Gicheru. There is no dispute that Susan Wairimu Gicheru the current co-administrator is aged 88 and that her health is failing. This has even been confirmed by James Kamau Gicheru the Co-administrator.
9. The issues that have been raised in the affidavits is that the estate of the deceased's as relates to the house of Susan Wairimu Gicheru has not been distributed. From what is deponed there are allegations of beneficiaries disposing off properties or collecting rent and not sharing the proceeds. Stanley Gicheru depones that the assets gifted to them as the children of the deceased have not been shared amongst the beneficiaries. That inclusive of their mother they are 10 beneficiaries and that they have failed to agree on the mode of distribution of the assets. That their mother who is over 88 is ailing and cannot manage on her own and that the role of administering the estate cannot be left in the hands of the sole administrator James Kamau Gicheru and that an alternative administrator should be appointed to replace the ailing mother. He has deponed that as siblings they have differences which has led to some of them keeping their mother away from the others. That there is waste, wanton destruction and embezzlement of the estate and he has sat with some of his siblings and they have agreed that he be substituted to replace his ailing mother. He challenges Moses N. Gicheru and states that Moses has not shown that he has the consent of his co-applicants to seek the orders in his application. He denies the



- allegation made that he has disposed off properties L. R 36/111/88 and 36/111/89. He raises issues that his siblings who are abroad will not be able to administrator the estate.
10. James Kamau Gicheru a co-administrator opposes the 2 applications and depones that none of the applicants are worth being administrators of their late father's estate because of their conduct of selling the deceased property without the consent of the other members of the family. He accuses the applicants of being untrustworthy and depones that he is fit to remain as a co-administrator with Karen Wambui Gicheru their stepmother and that they will be able to administer. In response Stanley depones that the co-administrator has not distributed the estate and that is why he has come to court. He denies the allegations of misconduct made against him.
 11. Moses, Mary and Jane too want to be co-administrators. Their reasons are that their mother's health is failing but they object to have Stanley as a co-administrator and accuse him of intermeddling with the estate. They accuse Stanley of attempting to sell L. R No. 36/111/88 and 39. In a further affidavit dated the 30/1/15 James Kamau Gicheru narrates what has been happening to the properties gifted to their house by the deceased.
 12. Stanley in his submissions narrates why his application should be granted and states that it is in the best interest of the estate that he be made a co-administrator. He has relied on the provisions of section 56 of the Law of Succession Act and claims he is qualified as he is not of unsound mind and neither is he below 18 years old. He also relies on the provisions of Rule 7(1) 7(e) (iii) of the Probate and Administration Rules. He argues that being a child of the deceased he is entitled to be a co-administrator. He further argues that the application by the cross applicants does not have any substance but that it has been brought by sheer malice as no reason has been given why the applicant should not be made a substitute. That the malice is depicted in the fact that the deceased's estate has remained undisputed for over 36 years. That the allegations that he is inter meddling are baseless and that the cross applicants have failed to show how he has done so and that the court should not be swayed by unsubstantiated evidence. He relied on the case of the Estate of Jane Wanjiru Muthee HCSC 1745/00. He argues that since the law allows up to 4 administrators he should be appointed in place of Susan and the other 2 given to the 2 cross applicants bearing in mind factors like availability and practicability of one to administer the estate.
 13. The cross applicants in their submissions narrated what is being sought in the 2 application plus a summary of the facts. The Co-applicants have relied on Section 66 of the Law of Succession Act Cap 160 which they state grants the courts discretionary power on which the letters of administration intestate shall vest. That in exercising the said discretion the court is guided by the best interest of the beneficiaries and the order of hierarchy established under sub sections a –d. They submit that it has been shown that Stanley is not a reliable person and that there is reasonable apprehension that their interest in the estate will not be protected if Stanley is appointed as an administrator. The co-applicants relied on the case of Bob Njoroge Ngarama vs. Mary Wanjiru Ngarawa and another 2014 eKLR.
 14. I have considered all that has been deponed, the law and the cases cited. In the case cited by the co-applicants the issue raised was an objection raised on whether the applicants could inherit the deceased estate whilst his widow was still alive. This is not the issue in this case. In the case cited by the application of Jane Wanjiru Muthee (supra) the issue dealt with was one of substitution similar to the matter before this court. In considering the 2 applications am guided by the provisions of section 56, that provides for person entitled to a grant and section 66 of Cap 160. Section 56 of the Law of Succession Act gives the court the power to appoint not more than 4 persons in respect of a deceased's estate. There are 3 administrators in this matter. One Susan is said to be failing in health. This is not in dispute. It is evident that estate has not been administered that is the part that relates to the house of Susan. What I gather is that this has not happened because of difference between the beneficiaries. The condition of



administrator Susan has only made it worse. It is also apparent that there has been an attempt to sell plot no, 36/111/88 and 36/111/89. This is evident from the letters attached to the co-applicant's affidavit. In the letter dated 14/4/15 counsel for the co-applicants wrote to the advocates of the applicants cautioning them that Stanley had no authority to sell the property. Although Stanley denies this fact it is evident that he attempted to sell the plots mentioned. From a letter dated 21/4/15 counsel for Stanley writes that all the beneficiaries were aware of the sale. In the application dated 30/11/12 the co-administrator averred that he is not comfortable with the confirmation of grant rectified on the 25/10/11. That is not the subject of the current application. He however depones that those interested in administering the estate want to get hold of the income generating properties and be collecting the rent and he lists the said property. He details what he has done for the benefit of the estate. Should the court grant the application sought? It is evident from the confirmed grant that the deceased left a large estate. The part or portion belonging to Susan Wairimu Gicheru has not been distributed. She is said to be failing in health. The letter attached by the applicants dated 3/2/14 addressed to Waweru Gatonye and Company Advocates being a Psychiatric evaluation on her shows she is a known diabetic. She is hypertensive and suffers from dementia for the last 5 years. It further states that she is dependent on caregiver and that she is not able to own affairs. Therefore if it is evident that Susan can no longer administer the estate. Should this court grant the applications? An administrator of an estate should be a person of integrity one who has the best interest of the estate. The co-administrators seeks to have the 2 of them i. e himself and Karen as the only administrators. His other siblings want to join him. It is evident that there are acute differences in the family. Stanley is not the best choice as per his sibling due to his past conduct. This is evidence to show he attempted to sell the properties mentioned. I therefore find that he is not fit to administer the estate. What of the co-applicants? Moses is alive and is based in Kenya. Mary Wanjiru is married and resides in Kenya. Jane Heta Nelson is married and resides in Sweden. I agree with Mr. Njenga's submissions that in considering who should be administrator the court should consider the availability and practicability of one to administer.

15. Having noted the size of the estate and that the current administrators have not distributed the estate of the deceased, the portion belonging to the house of Susan, in order to cause some action to be taken I order substitution of Susan Wairimu Gicheru with the applicants' Moses Muthiora Gicheru and Mary Wanjiku. The four (4) administrators shall ensure that the estate of the deceased as relates to the house of Susan Wairimu Gicheru is distributed. Due to the length of time taken by the family to do so and their difference I further order that the family shall have a discussion on the same and file a report on the mode of distribution within 90 days from the date of this ruling. It shall be the duty of the administrators to collect and distribute the estate fairly and as agreed between the beneficiaries. If the beneficiaries cannot agree within 45 days then they shall present themselves for mediation before the Deputy Registrar of this division. Matter to be mentioned and on the 90th day to record compliance and further directions. Costs shall be in the cause. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 22ND DAY OF APRIL 2016

R. E. OUGO

JUDGE

In the presence of:

..... For the Applicant

.....For the Cross Applicants

..... For the Respondent

Charity Court Clerk

