



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI

Civil Appeal 141 of 2008

VIRGINIA NJOKI NJUGUNA1ST APPELLANT

FESTUS GITHIRI NJUGUNA2ND APPELLANT

AND

FLORENCE WARUGURU NJUGUNA1ST RESPONDENT

WANGUI NJUGUNA GITHIRI2ND RESPONDENT

RICHARD GITHIRI3RD RESPONDENT

TIMOTHY KARIUKI NJUGUNA4TH RESPONDENT

(An appeal from the order of the High Court of Kenya at Nyeri (Makhandia, J.) dated 23rd April, 2008

in

H.C.SUCC. CAUSE NO. 514 OF 2006)

JUDGMENT OF THE COURT

Francis Njuguna Githiri alias Njuguna s/o Githiri, was the registered owner of two parcels of land, the subject of this appeal, namely land parcel No. **Githi/Muthambi/1078** and **Githi/Muthambi/68**. He was also the husband of *Virginia Njoki Njuguna* and *Wangui Njuguna Githiri*. With Virginia he sired *Festus Githiri Njuguna*, the second appellant in this appeal whereas with Wangui, he sired *Florence Waruguru Njuguna*, *Richard Githiri* and *Timothy Kariuki Njuguna*, the first, third and fourth respondents respectively. Wangui is the second respondent whereas *Virginia Njoki Njuguna* was the first appellant but is now deceased and her son Festus Githiri though not officially substituted in her place, has obtained Letters of Administration in respect of her estate. *Francis Njuguna Githiri* died intestate on 23rd July, 1995, leaving both wives and his children mentioned herein. As we have stated, after his demise and

before the appeal was heard *Virginia Njoki Njuguna* also passed on.

Over eleven years after the death of *Francis Njuguna Githiri*, the appellant, through his then advocates ***Rika & Co. Advocates*** issued citation to accept or refuse Letters of Administration intestate pursuant to **rule 21** of the Probate and Administration Rules. That citation dated 5th October, and signed by the Deputy Registrar of the High court, was issued to the first, second, third and fourth respondents. The first respondent, on behalf of all the other respondents entered appearance to the citation to accept the Letters of Administration intestate. Thereafter the appellant and his mother petitioned for Letters of Administration intestate by filing forms ***P & A 80, P & A5, P & A12, P & A57*** and ***P & A11***. The record shows that an attempt was made to file consent for the making of a Grant of administration intestate to persons of equal or lesser priority but that did not achieve any results as none signed that consent letter although it was apparently made for the first respondent to sign. Thereafter Notice of the application was issued in the Kenya Gazette vide ***Gazette Notice No. 1746***, of 2nd March, 2007.

On 27th March, 2007 the first respondent on her behalf and on behalf of all other respondents, filed Notice of objection to the making of a grant. The main grounds of objection were that the deceased was a polygamist and his second wife and all her children were thus beneficiaries of the estate of the deceased and were entitled to share the estate of the deceased with the appellant but, notwithstanding that, they were not informed that the appellants were filing the petition. She thereafter filed an answer to the petition on 27th May, 2007. In that answer to the petition, the first respondent sought that the estate of the deceased be shared equally between the two wives of the deceased or that it be shared out among all the children of the deceased who would include the appellant. Together with that answer to the petition, the first respondent also filed petition by way of cross-application or petition seeking a grant of Letters of Administration intestate of the deceased. In the affidavit in support of that cross-petition, the first respondent set out the names of the two wives who survived the deceased and their children. She also set out *Land Parcel No. Githi/Muthambi/1078* and *Githi/Muthambi/68* as the properties left behind by the deceased. The record shows that on 26th June, 2007, Grant of Letters of Administration intestate was granted to *Virginia Njoki Njuguna, Festus Githiri Njuguna and Florence Wangui Njuguna*. That was pursuant to a court order issued on 26th June, 2007 on request of Mr. Rika, the appellants' then advocate. Thereafter vide summons for confirmation of Grant dated 21st January, 2008, for some unknown reasons, *Virginia Njoki Njuguna and Festus Githiri Njuguna* applied for confirmation of the Grant on their own. We say for "*reasons unknown*" because, Grant of Letters of Administration was issued to the appellants together with the first respondent, yet application for confirmation was done by *Njoki and Festus* only whereas in the body of the application they state that Letters of Administration was granted to the three, yet they do not state any reasons why first respondent was not one of the applicants for confirmation of grant. Be that as it may, in the affidavit in support of that summons for confirmation of grant, which was sworn before a Commissioner for Oaths and was drawn by *Rika & Co. Advocates*, and signed by both *Virginia Njuguna* and *Festus*, the following was set out at paragraph 5.

“5. The identification and shares of all persons beneficially entitled to the said estate have been ascertained and determined as follows: Githi/Muthambi/1078 measuring 5 acre, Githi/Muthambi/68 measuring 3.74 acres registered in the name of the deceased be shared equally among the two homes absolutely.”

That application was made as we have stated on 21st January, 2008 and the affidavit in support of it, parts of which we have reproduced above, was also sworn on 21st January, 2008. On the same day *Florence Wangui Mwangi*, the first respondent signed consent for confirmation of Grant form **rule 40 (8)**. That consent was also drawn by *Rika & Co. Advocates* who were acting for the appellants. Vide summons for confirmation of Grant dated 22nd January, 2008 and filed on 12th February, 2008, *Florence Wangui Njuguna* also applied for confirmation of Grant. That summons was served upon *Rika & Co. Advocates* for the appellant. Paragraph 5 of the affidavit in support of that application stated as follows: -

“5. The identification and shares of all persons beneficially entitled to the said estate have been ascertained and determined as follows. The lands Nos. Githi/Muthambi/1078 comprises of 7 acres or thereabouts and Githi/Muthambi/68 comprises of 4 acres or thereabouts be shared as follows: -

1. **Githi/Muthambi/1078 - (a) Wangui Njuguna Githiri** To be shared

(b) Virginia Njoki Njuguna in equal shares.

2. **Githi/Muthambi/68 (a) - (a) Wangui Njuguna Githiri** To be shared

(b) Virginia Njoki Njuguna in equal shares.”

That summons together with the affidavit of the first respondent part of which is reproduced hereinabove was also filed together with a consent for confirmation of Grant dated the same 22nd January, 2008 and filed on 12th February, 2008. The consent was duly thumb-printed by *Virginia Njoki*, the deceased first appellant and **Wangui Njuguna Githiri**, the second respondent who is the mother of the first respondent. It was signed before a Commissioner for Oaths. Second appellant **Festus Githiri Njuguna** and **Florence Wangui Njuguna**, the first respondent did not sign it. We need to add here that earlier on 5th April, 2007, the court fixed summons for directions in the matter to be heard on 26th June, 2007 and on that day Rika, the learned counsel for the appellant proposed that both the petitioner and the objector be appointed joint administrators and the court obliged as we have stated above, making a further order that all or any of them could move the court for confirmation of Grant at an appropriate time. We think this explains why only the late Virginia and Wangui thumb-printed consent for confirmation filed on 12th February, 2008. The summons for confirmation of Grant dated 21st January, 2008 and summons for confirmation of Grant dated 22nd January, 2009 were both fixed for hearing before the learned Judge of the High Court on 23rd April, 2008. On this date, the record shows that Mrs. Rika appeared for the petitioners and the first respondent was also present. We reproduce the entire record of what took place on that date here below as we think it is at the core of the entire appeal. It is as follows:

“Mrs. Rika: There are 2 applications for confirmation of grant filed. One is dated 21.1.08 and the other is dated 22.1.08. I have looked at both application (sic) and they are in agreement with the mode of distribution. I seek the grant be confirmed.

Objector: The estate should be distributed as per the houses.

M.S.A. MAKHANDIA
JUDGE

Court: I have looked at both applications. It is common ground that the parties are in agreement that the estate of the deceased be shared on house to house basis. There are two homes involved. Accordingly I will confirm the grant on the basis that land parcel Nos. Githi/Muthambi/1078 and Githi/Muthambi/68 be shared equally between the two houses i.e the house of Virginia Njoki Njuguna and Wangui Njuguna Githiri.

M.S.A. MAKHANDIA
JUDGE”_

That is the order which offended the appellant. It is not easy to understand why he felt aggrieved by that order of the court which was given at the request of his erstwhile lawyer but whatever were the reasons, he felt offended by that order and has appealed to this Court against the same order vide this appeal premised on three grounds which are that: -

“1. The learned Judge erred in law and fact in failing to appreciate the provisions of law relating to distribution.

2. The learned Judge erred in law and fact in failing to give the petitioner the opportunity to protest to the mode of distribution.

3. The learned Judge erred in law and in fact in failing to give directions in the succession cause.”

The second appellant prosecuted his appeal before us in person. He told us as we have stated that the first appellant is deceased but as he is her son, he would represent her estate. In his address to us, the appellant said he was the one who contributed the finances that were used for purchase of land parcel *No. Githi/Muthambi/1078* and his father gave him two (2) acres of the land. He further said, the deceased subdivided the land and set aside two acres for him and put a boundary setting out the two acres which boundary the deceased said should never be interfered with. As for *Githi/Muthambi/68*, he said his deceased mother was given 0.268 hectares and it was called Iganjo so that it could be consolidated with the other piece of land.

The respondents, led by *Florence Waruguru Njuguna* opposed the appeal and stated that the learned Judge's order was proper as the deceased was polygamous and that being the case the distribution of the two parcels had to be in accordance with the houses of his two wives. The other three respondents supported her views.

In our considered view, we see no merit in this appeal. All the matters raised before us by the appellant were in effect new evidence that the appellant did not apply for leave to adduce and certainly never got leave to adduce in this appeal. The appellant, through his then lawyer Mr. Rika, filed summons for confirmation of consent dated 21st January, 2008 and the affidavit sworn by both himself and his mother on the same date 21st January, 2008 proposed as we have set out above, that each of the two parcels of land be shared equally between the house of Virginia and the house of Wangui and that was sworn before a Commissioner for Oaths. He cannot renege on that. The respondents made their proposals on the next day 22nd January, 2008 and accepted his proposal. That is final. As if that is not enough, their advocate asked the court as we have shown above to confirm the distribution as suggested by both parties and the court did just that. We are hearing this matter on appeal and as no additional evidence was applied for and granted pursuant to **rule 29** of this Court's Rules, and further as in any case what the appellant said in his address were nowhere borne out by the record before us, we find it impossible in law to base any decision on the alleged disposition or oral will which was never adduced and proved before the trial court.

As to the ground that alleges that he was not given opportunity to protest to the mode, we see no substance in it because, first no opportunity was sought by the appellant or his advocate and refused by the learned Judge and secondly, it was the appellant's then counsel who sought the orders that were rightly granted by the court as both the appellant and the respondents made similar proposals on the mode of distribution in their respective summons for confirmation of grant and in their affidavits in support of the same summons.

The appeal has no merit. It is dismissed with costs to the respondents.

DATED and DELIVERED at NYERI this 5th day of JULY, 2012.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR