



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 794 of 1990

IN THE MATTER OF THE ESTATE OF EDITH WANGUI MUIRURI (DECEASED)

JUDGMENT NO. 1

A perusal of the record herein reveals that the proceedings herein started way back in 1989 in the lower court in Senior Resident Magistrate's court at Kiambu vide succession cause number 171 of 1989. It is apparent that the proceeding related to the estate of Edith Wangui Muiruri, the initial grant whose copy has been traced on this record, reveals that the grant was issued on 10th November 1989 to two persons namely Elizabeth Njeri Muiruri and Jane Waithera Kihara. The same was later confirmed infavour of the two whereby property parcel number Yetamaiyu/Kagwe/4665 devoured to the two applicants.

The current applicants became aggrieved and then moved to this court and obtained prohibitory orders issued by this court on the 1st day of July 1997 and extracted on 21st day of July 1992 and these read:-

- (1) That the sale, charging of transfer of land parcel no Gatamaiyu/Kagwe 465 stayed until the grant of letters of administration in respect of parcel number Getamaiyu/Kagwe/578 is obtained.
- (2) That Patrick Thuo Muruki and Jane Waithera do make a joint application for grant of letters of administration in respect of parcel No. Getamaiyu/Kagwe/578.
- (3) That the status quo in respect of parcel Nos. Getamaiyu/Kagwe/578 be maintained.

- (4) That in habitation be and is hereby registered against land parcel No. Getamaiyu/Kagwe/465 inhibiting any dealing with that land until further order of this court.
- (5) That any party be at liberty to apply for further orders.

Apparently, in pursuance to the said liberty to apply, 4 applicants have presented to this court an application by way of summons for the renovation of a grant, dated 5th November 2008 and filed on the 4th day of May 2009. The applicants are named as.

- (1) Rosemary Muthoni Chege
- (2) Hannah Wangari Methu
- (3) Margaret Kanithu Muiruri and
- (4) Agnes Wanjiku Muwiruri.

The respondents are named as

- (1) Elizabeth Njeri Muiruri and
- (2) Jane Waithira Kihara.

The prayers sought are:-

- (1) (a) That the proceedings to obtain the grant were defective in substance.
- (b) That the grant was obtained fraudulently by making a false statement and commitment from the court of facts material to the case.
- (c) That the grant was obtained by means of in the facts essential in a point of law.
- (d) That no consent was sought from the applicants.

(2) That the title deed issued to Elizabeth Njeri Muriki and Jane Waithira Kihara on the 10th day of December 1989 in respect of LR Gatamaiyu Kagwe/465 be revoked and the lands revert to the estate to the estate of Edith Wangui Muiruri for re-distribution.

(3) That costs of the application be provided for.

The summons in accompanied by a supporting affidavit sworn by one of the applicant Rosemary Muthoni Njoroge on behalf of the co-applicants on the 5th day of November 2008 and filed in court on 18th November 2008. The salient points of the same can be summed up thus:-

- (1) The applicants and respondents are all daughters of the deceased one Edith Wangui Muiruri.
- (2) They are entitled to get a share of the deceased estate property equally share holding as the Respondents.
- (3) The Respondents processed succession to their mother's estate and had the property devolve to them (respondents) without the consent and the knowledge of the applicants.
- (4) By reason of what has been stated above, they are genuinely aggrieved and they seek the relief sought herein.

The Respondents have responded vide a replying affidavit deponed by one Jane Waithira Kihara on behalf of the co Respondent deponed on 10th day of July 2009 and filed on the 7th day of July 2009. The salient features of the same are as follows:-

- (1) That indeed they pursued succession laws to the estate of their mother one Edith Wangui Muiruri, the deceased herein.
- (2) That plot No. Getamaiyu/Kagwe/465 was indeed property of the estate.
- (3) That previously to their late mother acquiring interest in the same, their late father had an interest in the same.
- (4) That the applicants were duly invited by the Respondents to participate in pursuing the said interests but the applicants retorted that they respondents will get nowhere in their claim.
- (5) That when invited to contribute towards the expenses for just the said rights they declined to contribute towards the same.
- (6) The applicants have also refused to cooperate with the respondents to pursue claim for land parcel number

Gatamaiyu/Kagwe/695.

- (7) That their brothers pursued land parcel number Gatamaiyu/Kagwe/578 and succeeded and have intimated tat they have no interest in the suit land.
- (8) That by reason of what has been stated above the position taken by the applicants is an after thought. They are noting but opportunists as they have not given any good reason as to why they have come at this late hour to seek revocation.
- (9) They deny concealment of material facts and maintain that all along they were oppressing the applicants of what was going on but they applicants appeared disinterested.

In response to the replying affidavit, the applicants put in a further affidavit whose salient features are as follows:-

- (1) Reiterate that the two applied for a grant without informing the other six siblings or obtaining their consent.
- (2) Deny ever holding discussions with respondents with respect to the succession subject of these proceedings.
- (3) That the respondents had previously attempted to evict the two brothers from the suit land but the court ruled that they brothers are also entitled to inherit the said land.
- (4) That the deponent of the replying affidavit had deponed in an affidavit in opposition to the brothers summons for revocation that their grand mother Njeri Gakinga Waruiru had declared that the land would belong to her grand children who are the applicants and the Respondents.
- (5) That the deponent went on further to depone that when their grand mother had the said land registered in the name of their late mother it was with an express understanding that the same had been so registered as trustee for her daughters who are the applicants and the Respondents.
- (6) It is their stand that the respondents having deponed so in oath with regard to the applicants entitlement to the share holding of the said parcel of land cannot now go back on tie oath.
- (7) Contrary to what the respondent have deponed it is this court which forced them to transfer land parcel number

Gatamaiyu/Kagwe/578 which the respondents had also secretly registered in their names.

- (8) They reiterate that the deponents having sworn that Gatamaiyu/Kagwe/568 was a trust for the 6 sisters the respondents cannot be allowed to go round that deponement.

It is on record that directions were taken herein do proceed on the basis of affidavit evidence.

The court has given due consideration of the rival arguments herein as gleaned from their deponements in addition to the court revising the entire record and the court is of the opinion that the following issues are not in dispute namely:-

- (1) That the applicants and Respondents are siblings.
- (2) That the property subject of these proceeding belonged to the deceased herein.
- (3) That applicants allage ignorance of the processing of succession proceedings which led to the suit property being devolved to the Respondents
- (4) That the deceased subject of these proceedings was the mother of the disputants herein.
- (5) That the respondents do not appear to strongly oppose the entitlement of the applicants but qualify that by saying that they applicants showed disinterest in the succession and the property and they Respondents are surprised at the change of heart, which change is nothing but an after thought.
- (6) Further that the applicants were unwilling to contribute the costs of processing the devocation of the property to them.

Due consideration has been made by this court of these undisputed facts and considered the same in the light of the rival arguments and is of the opinion that the issue for determination here is whether lack of interest and failure towards the costs of processing is rustication for disentitling one to his/her inheritance. In this courts opinion this will depend on the construction of the applicable principles of law governing the distribution of this estate. This is non other than section 38 of the Laws of succession Act Cap 160 Law Kenya. It reads “ *where an intestate left a surviving child or children but no spouse, the net intestate shall, subject to sections 41 and 42 devolve upon the surviving child if there be only one, or be equally divided among the surviving children.*” Simply requires that property devolving to a child be held in trust. Where as section 42 provides that when distributing the estate, the previous gifts inter vivos have to be taken into

consideration when determining the share of a dependent.

This court has given due consideration o these three provisions and considered them in the light of the rival arguments herein and the court makes a finding that lack of interest and failure to contribute towards the cost of processing succession does not disentitle a dependant to his or her inheritance. It therefore follows that the action of the Respondents stand faulted as it went contrary to a clear provision of law. If the Respondents felt aggrieved by lack of contribution they should have recovered the same through a civil action or with held the signing of the transfer documents infavour of the applicants until they pay their share of the processing costs.

There was the issue of consent and knowledge of the processing of the grant which the applicants have denied. Although this has been asserted by the Respondents there is no exhibition of citations having been served on to the applicants. Neither is there revelation as to where when and before when the applicants consents were given. There has been also no exhibition of a signed consent by the applicants disclaiming their inheritance or giving consent.

For the reasons given in the assessment the court is of the opinion that the applicants have proved their contention on a balance of probability and the court proceeds to make the following orders:

- (1) The grant of letters of administration issued in Kiambu Senior Resident Magistrates court succession cause No 171 of 1989 to Elizabeth Njeri Muiruri and Jane Waithira Kihare on the 10th day of November 1989 be and is hereby revoked for the reasons that:-
 - (a) The reasons for excluding the applicants from the inheritance went contrary to the provision of section 38 of the law of succession Act which requires all the surviving children to inherit the property equally – in equal shares.
 - (b) Issue of lack of interest and failure to contribute towards the processing of succession costs is not a disqualification under the said section.
 - (c) The Respondents have not exhibited any citation saved on to the applicants inviting them to either object or consent to their processing the succession meaning that the applicants assertions that they had no knowledge of the proceedings has been demonstrated.
 - (d) Further to number (c) above although the Respondents allege that the applicants gave consent, it has not been stated when, where and before whom the said consent was given. Therefore there is nothing to oust the assertion of the applicants that they did not consent to the processing of the succession.
- (2) An order be and is hereby granted that a fresh grant do issue in the joint names of Elizabeth Njeri Muiruri and Jane

Waithira Kihara of the one hand and jointly with 2 of the applicants namely the deponent Rosemary, Muthoni Njoroge and Hannah Wangari Mathu of the other hand.

- (3) That the confirmation of the said grant made by the lower court on the 21st day of May 1990 be and is hereby also set aside.
- (4) That the devolution of the property parcel number Gatamaiyu/Kagwe 465 from the deceased Edith Wangui Muiruri to the Respondents Elizabeth Njeri Muiruri and Jane Waithira be and is hereby revoked and set aside.
- (5) That the said property parcel No Gatamaiyu/Kagwe/465 be and is hereby ordered to reverse back to the original name of Edith Wangui Muiruri.
- (6) That upon the said reversal being effected as in number 5 above, the said property be and is hereby ordered to devolve to the applicants and the respondents in equal shares in accordance with the provisions of section 38 of the law of succession Act Cap 160 Laws of Kenya.
- (7) The Respondent will pay costs of these proceedings.
- (8) There will be liberty to apply.

Dated, Read and delivered at Nairobi this 17th December 2009.

R.N.NAMBUYE

JUDGE



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