



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CAUSE NO. 755 OF 2013**

**IN THE MATTER OF THE ESTATE OF BENARD MUHORO WANDAKA(DECEASED)**

**JERIUS NYOKABI NDUNG’U.....PETITIONER/1<sup>ST</sup> ADMINISTRATOR**

**SAMUEL MUHORO NDUNGU.....2<sup>ND</sup> ADMINISTRATOR**

**VERSUS**

**JOSEPH NDUNG’U MUHORO.....PROTESTOR**

**JUDGEMENT**

**Brief Facts**

1. The deceased in this cause died on 22<sup>nd</sup> May 1992 and the petitioner applied for letters of administration intestate on 22<sup>nd</sup> October 2013 which was subsequently issued. Thereafter she filed on 28/11/2013 summons of confirmation of grant dated 16<sup>th</sup> July 2014 which was contested by the protestor by filing an Affidavit of Protest dated 2<sup>nd</sup> September 2014. The protestor filed a further affidavit dated 2<sup>nd</sup> February 2016 and a supplementary affidavit of protest dated 28<sup>th</sup> March 2019. The petitioner filed a Reply to Affidavit of protest dated 29<sup>th</sup> January 2015 and further Reply to affidavit of protest dated 29<sup>th</sup> March 2019.

2. Directions were taken that the protest be heard by way of *viva voce* evidence. The protestor testified and called two witnesses PW1 and PW2. The petitioner was represented by the 2<sup>nd</sup> administrator during the hearing. He testified on his own behalf and on behalf of the petitioner.

**The Protestor’s Case**

3. PW1, Joseph Ndungu Muhoro relied on his statement dated 30/7/2017. He testified that he is a son to the deceased by his second wife Josephine Wangui. His siblings were Joseph Muchiri, James Kariuki and Veronica Nyakionyo. The second wife Wangeci Muhoro had two children who are both deceased namely Ndungu Muhoro who was the husband to the petitioner. The 2<sup>nd</sup> child Gakere Muhoro is survived by his widow Marata Gathoni Gakere.

4. The protestor further testified that L.R. No. Gatarakwa/Gatarakwa/Block III/314 measuring 11.98ha was owned by the deceased and his brothers despite having been registered only in the name of the deceased. He explained on cross-examination that the deceased’s brother, Misheck Gituku Macharia is the one who paid for his portion of land in full that measures twelve (12) acres. The portion of the deceased was measuring 16 acres.

5. PW2, Phoebe Watetu Muchiri relied on her statement dated 30/6/2017 and testified that she was the deceased’s sister in- law. She testified that the deceased had two wives and seven children collectively. She further testified that the suit property was purchased by the deceased and Misheck Gituku. She stated that her husband, Solomon Muchiri, a brother to the deceased, used to write down all the payments made. According to her, the deceased got the bigger share of the land because he paid more money for the purchase.

6. PW3, the area chief testified that the deceased had two wives both of whom are now deceased. The two children of the first wife are deceased. The 2<sup>nd</sup> wife Josephine Wangui had six children and one of them is deceased. On cross-examination, he stated that he became the Chief in September 2018 and he did not see any letter issued by the previous area Chief with regard to the deceased’s estate. The witness further testified that the letter issued herein did not acknowledge all the deceased’s family members and that the 2<sup>nd</sup> family did not live on the suit property but lived in a colonial village.

**The Petitioner’s case**

7. The petitioner in her affidavit stated that she was the daughter in-law of the deceased having been married to deceased's son Moses Ndungu who died in 2004. She was appointed administrator of the estate on 28/11/2013. She made an application to have her son Simon Muhoro Ndungu appointed as a co-administrator. The application was not opposed by the protestor and thus the court appointed him accordingly. Mr. Muhoro testified that the petitioner is his mother and the deceased is his grandfather and father to his own Moses Ndungu now deceased. He testified that the deceased bequeathed his estate to his father Moses Ndungu in 2004. He further testified that the deceased had only one wife namely Wangechi. He stated that he was not aware of existence of another wife by the name Josephine Wangui. The witness further testified that the suit property belonged to his grandfather and that it was bequeathed to his father through a will made on 17/01/87 before the area Assistant Chief.

8. On cross-examination, he testified that the suit property was registered in deceased's name on 16/6/1987. He admitted that according to the document he attached to his affidavit, it is indicated that the deceased had another wife whom he divorced in 1964. The witness stated that he did not know the protestor nor did he know whether his father held the land Gatarakwa/Gatarakwa Block III/314 in trust for one Misheck Gituku as claimed by the protestor.

9. Parties filed written submissions in support of their respective cases.

### **The Protestor's Submissions**

10. The protestor submits that the petitioner contends that the deceased made a will dated 17/1/1987, a fact contested by the protestor. In the said document, the deceased bequeathed all his properties to his son, Moses Ndungu Muhoro now deceased and further states that his other wife and children should not claim anything for he parted ways with her in 1964. It is the protestor's case that the said document cannot form a will as the petitioner did not call any witnesses who saw the deceased sign the document to verify its authenticity which in his view, contravenes Section 11 of the Law of Succession Act. It is further argued that the document was written in two languages which raises the question of whether the deceased was conversant with both. The protestor wonders whether the deceased understood the contents of the document. The protestor further submits that the deceased could not have disinherited other beneficiaries of his estate as shown in the document. In any event, in the case where former wives and children of such a union have separated, they do not cease to be heirs for the purposes of succession proceedings. Under Section 29 of the law of Succession Act, dependants are defined as wife, former wives, children of the deceased whether or not maintained by the deceased immediately prior to death. It was further argued that if a will existed, the deceased died testate at the commencement of these proceedings. Instead, she filed a petition for letters of administration intestate.

11. The protestor relies on the cases of **Nairobi High Court Succession Cause No. 33.04/2004 in the Estate of DKK** and **Nyeri high court Succession Cause No. 864/2011 In the estate of Magayu Kiama** to support this case

12. The protestor further submits that the mode of distribution as proposed by him in his supplementary affidavit of protest dated 28/3/2019 caters for the interest of the whole family including the family of Misheck Gituku Macharia who bought the land with the deceased. The proposal by the petitioner is inequitable as it proposes that only one child of the deceased benefits from his property to the exclusion of the others. As such, the protestor prays that the estate be distributed as proposed in the supplementary affidavit of protest dated 28/3/2019.

### **The petitioner's Submissions**

13. The petitioner submits that the facts that are not disputed are that:- the protestor and his family have never lived in the suit land nor claimed from the deceased for the occupation and they continue to live in the contemporary land in Bellevue village; no reason was availed why the protestor's family never took occupation of the land and contribution of money was produced before court and there was no trust registered or noted in favour of Misheck Gituku Macharia or his descendants. Neither the protestor nor the descendants of the said Misheck Gituku had obtained any limited grant for the purposes of suing on behalf of the said deceased.

14. It is the petitioner's submission that the claim that a share of 8 acres to be vested to Misheck's two sons, Bernard Gituki Macharia and Joseph Ndirangu Gituku must fail because there is nothing produced before the court as proof of a subsisting trust. Moreover, this court's jurisdiction does not extend to determination of the question of trusts. The Environment & Lands court has the jurisdiction to determine a trust. The petitioner relies on the cases of Re Estate of Njuguna Igwima where the court relied on **Succession Cause No. 432 of 2009, Monica Wangari Njiri & 4 others vs Eunice Wanjiru Igamba & another [2016]eKLR** and **Re Estate of the Late Jonathan Kinya Waititu [2017]eKLR** to buttress her point

15. The petitioner contends that the mode of distribution set out in the summons for confirmation of grant is the most appropriate. He further argues that the protestor did not prove fraud as regards to the Chief's letter dated 30<sup>th</sup> September 2012. The Chief called to testify admitted that he was employed in 2018 and he never issued a letter revoking the letter dated 30<sup>th</sup> September 2012.

16. The petitioner further argues that if the protestor and his family had any legitimate claim, they had never taken and occupied the portion they claimed during the lifetime of the deceased.

17. The petitioner states that she was unaware of the protestor and his family. That the declaration of the will dated 8<sup>th</sup> July 2007 was clear that the property of the deceased shall rest to his son Moses Ndung'u and since he was deceased, the property should devolve to their mother who was the wife of the deceased. That further it is clear from the declaration that no name of any former wife or children was included in the said will.

18. The petitioner submits that as regards the family of Johana Gakere, a child of the 1<sup>st</sup> house, they had their own land and none of the family members appeared before court claiming from the deceased's estate.

19. As such, the protest lacks merit and the petitioner prays that the same be dismissed and the grant be confirmed as per the summons for

confirmation of grant dated 16<sup>th</sup> July 2017.

### **Issues for determination**

20. After careful analysis, the main issues for determination are:-

- a) Whether there was a valid will of the deceased at the time of his death.
- b) Who should be appointed as the administrators of the estate of the deceased for purpose of execution of the grant.
- c) Identification of beneficiaries and their shares in the estate.

### **The Law**

#### **Analysis and Determination**

#### **The Law applicable**

#### **Whether the letter by the Assistant chief dated 17/1/1987 amounts to a will**

21. **Section 11 of the law of Succession Act** provides for the formal requirements of a valid will. It states:-

**No written will shall be valid unless:-**

- a) The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;**
- b) The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;**
- c) The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.**

22. The protestor contests the validity of the purported will dated 17/1/1987 as to its contents and form. The protestor states that the petitioner ought to have brought the witnesses to the will in court to authentic its validity and further that the will has been written in two languages, which questions whether the deceased understood the contents of the will. The protestor further argues that the deceased could not have intended to disinherit his children as was reflected in the purported will.

23. The petitioner argues that the will is valid and that the protestor should not assume that since the will reads any former wife or children, that the deceased was referring to the mother of the protestor and her children.

24. The purported will dated 17/01/87 was drawn by the Assistant Chief of Bellevue Sub-location who affixed his official stamp and was witnessed by three witnesses. The deceased affixed his thumb print as his signature. Once the purported will was contested, the petitioner had an obligation to call the witnesses who allegedly signed it. Further, the purported will was written in two languages Kikuyu and English which raises doubt as to whether the deceased comprehended what he was writing or not. This is also connoted by the statement that " I Mr. Muhoro Wandaka for a second time declare that". which statement raises doubt as to whether the deceased was writing this will for a second time or whether he wrote the will before writing this document. The contents of the will are also vague as the deceased states that he bequeaths all his land and cattle to his son Moses Ndungu. Moreover, the purported will introduces another wife and children whom the deceased claims should not inherit from his estate as they parted with her in 1964. Notably, the petitioner while applying for letters of administration stated that the deceased died intestate. If the petitioner was being truthful that a will existed, she ought to have applied for testate succession instead of petitioning for letters of administration intestate. The co-administrator when asked where he got the document said that he just found it in the house. How could the deceased write such an important document and leave it to lie in the house? This raises further doubts as to the authenticity of the document.

25. Section 11 of the Law of Succession Act provides for the requirements of a valid will. These are as follows:-

- a) Signature or affixed mark of the testator; or signature of some other person signing for the testator on his direction.**
- b) That the will is attested by two or more competent witnesses who must have seen the testator sign or affix his mark, or have seen other person sign the will in the presence or direction of the testator.**

26. In this cause, the only witness was the co-administrator who said he found the document in the house. It was not clear whether the document was found in the house of the deceased, or in the house of co-administrator that of the witness. Considering the requirements of the law, the co-administrator was not present when the document was made and as such he did not attest to the signature of the deceased or

affixing of his mark. Neither did he witness the making and the signing by the three witnesses named in the document. It follows that the co-administrator does not know who these witnesses are and this may have presented him with the inability to call the said witnesses to testify in his favour. The document which is in form of a letter was said to have been made before the area Assistant Chief who was not called as a witness. Furthermore the purported will was brought in this intestate Succession cause which is improper. The petitioner who is the mother of the co-administrator never mentioned this will in any of her pleadings in this cause. This means that either she was not aware of it when she filed this cause as intestate or that the document did not exist.

27. I am of the considered view that the said document does not pass the test of Section 11 of the Act is therefore not a will. It is my finding that the petitioner and the co-administrator have not proved that any valid will existed at the time the deceased died. This case is an intestate succession and will proceed as such.

**Who should be appointed as the administrators of the estate of the deceased.**

28. Upon finding that the purported will not a valid will, the question then arises as to who ought to be appointed as the administrators of the deceased's estate for purpose of execution of the grant. According to the petitioner, he states that his grandfather, the deceased married one wife and he does not know of the protestor's family. The protestor on the other hand contends that the deceased married two wives a fact that was supported by his witnesses PW2 and PW3. The document dated 17/1/1987 also introduces a former wife and children who the deceased claims they parted ways in 1964. Although the administrators deny knowing the protestor and his family, they do not deny that the deceased had a former wife and children. The existence of the first house of Wangui Muhoro was confirmed by evidence of PW3 the chief of the area who knows the family of the deceased and PW2 a daughter in law of the deceased from the second house.

29. Section 29 of the Law of Succession Act provides:-

For the purposes of this Part, "dependant" means-

- a) **The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to death;**
- b) **Such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**
- c) **Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.**

30. Therefore, pursuant to section 29 of the Law of succession Act, a former wife and children are considered as dependants of the deceased regardless of whether the deceased was maintaining them immediately prior to his death.

31. **Section 66 of the Law of Succession Act** is also instructive and it provides:-

**When a deceased has died intestate, the court shall, save as otherwise (1) expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general rule the following order of preference.**

- a) **Surviving spouse or spouses, with or without association of other beneficiaries;**
- b) **Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by part V;**
- c) **The Public Trustee; and**
- d) **Creditors**

32. It is noted that the protestor has not applied for revocation of the grant issued in favour of the petitioner and her son Samuel Muhoro Ndungu. His only claim is his share, those of his siblings, the purchase Joseph Ndungu Njogu and of his deceased uncle Meshack Gatuku Macharia Gituku. The protestor has not proved any fraud on part of the 1<sup>st</sup> petitioner. Should this court find it appropriate, it may disturb the current status on the administration of the estate for purpose of ensuring smooth implementation of the grant that will take care of the interests of all beneficiaries.

**Are the 3<sup>rd</sup> Parties Entitled to any shares in the deceased Estate?**

33. The protestor purported to represent the family of Meshack Gituku Macharia who is deceased and whom he claims is entitled to eight(8) acres in the only asset of the deceased L.R Gatarakwa/Gatarakwa Block III/314 on grounds that he jointly purchased the land jointly with the deceased. The protestor's mode of distribution includes two sons of the late Meshack Gituku Macharia as beneficiaries.

34. It is imperative to note that the protestor and his witness PW2 did not produce any documentary evidence in favour of the claim of Meshack Gituku in the land that was registered in the name of the deceased as the proprietor in what appears to be first registration. As such, except the word of mouth of the protestor and his witness, there was no evidence to support such a claim.

35. Similarly, there was no evidence adduced to support the claim of the purported purchaser Joseph Ndungu Njogu who was introduced in this case in the supplementary affidavit.

36. If the protestor is claiming that eight acres were held by the deceased in trust for Meshack Gituku Macharia, the right court to approach is the Environment & Land Court(ELC). This court has no jurisdiction to hear and determine the issue of trust.

37. Furthermore, the protestor did not produce any evidence to show that he has been appointed the personal representative of the estate of the deceased Meshack. For one to pursue any interest in the estate of a deceased person, he/she ought to obtain a limited grant as a personal representative of the estate of the person he is claiming for.

38. The big question that remains unanswered is why the sons of Meshack are not interested in claiming their late father's interest in this estate? How come that none of them was called by the protestor as his witness?

39. In conclusion, I find that this court lacks jurisdiction to determine the issue of trust. On the same breath, the protestor lacks *locus standi* to claim on behalf of the estate of Meshack.

40. Consequently, the said claims by the protestor in favour of the deceased Meshack and the purported purchaser have no legal or factual basis.

#### **The Identification of the beneficiaries and their shares**

41. The petitioner and co-administrator denied that the deceased had a first house of one Wangui who had six(6) children. However, this denial was self-defeating in that the document produced by the co-administrator mentions a former wife who parted ways with the deceased. The 2<sup>nd</sup> family being the protestor and PW2 did not deny that the petitioner was the daughter in-law of the deceased. The existence of this 2<sup>nd</sup> family was supported by the evidence of PW3 the area Chief who said that it was an oversight of his predecessor not to include the 2<sup>nd</sup> family in the Chief's letter

42. It is my finding that the protestor and his four(4) siblings namely Haron Gichure Muhoro, Joseph Muchiri Muhoro, James Kariuki and Veronica Nyakiunyu are the children of the deceased herein. This makes five(5) beneficiaries from the 2<sup>nd</sup> house. There was no evidence adduced by the petitioner to prove that the 2<sup>nd</sup> family had been allocated land by the deceased during his lifetime to lay a basis for the application of Section 42 of the Act.

43. The 1<sup>st</sup> house has two beneficiaries being widows of the two sons of Wangeci Muhoro with the deceased namely Jerius Nyokabi Ndung'u the petitioner and Marata Gathoni Gakere. The Gakere family was said to be living on another parcel of land whose particulars was not given. Neither was it said that the deceased ever gave his son Johana Gakere any land during his lifetime.

44. Having identified the beneficiaries who are the five(5) children of the deceased and two daughter in-law, I hereby proceed to apply the relevant law in distributing the estate.

Section 38 of the Succession Act provides:-

**“where an intestate has left a surviving child or children but no spouse, the net interstate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children”**

45. In regard to the provisions of the law, I hereby order that the distribution of the estate of the deceased L.R. Gatarakwa/Gatarakwa/Block III/314 shall be shared equally among the seven(7) children of the deceased as follows.

Jerius Nyokabi Ndungu - 1.711ha

Marata Gathoni Gakere -1.711ha

Joseph Ndungu Muhoro -1.711ha

Harun Gichure Muhoro -1.711ha

James Kariuki Muhoro -1.711ha

Joseph Muchiri Muhoro -1.711ha

Veronica Nyakiunyu Muhoro -1.711ha

46. The protestor Joseph Ndungu Muhoro is hereby appointed a co-administrator of the estate alongside the petitioner Jerius Nyokabi Ndungu for purposes of implementing the grant. The appointment of Samuel Muhoro Ndung'u a grandson of the deceased, is hereby revoked. A fresh grant to issue in the names of Jerius Nyokabi Ndungu and Joseph Ndungu Muhoro.

47. A certificate of confirmation grant do issue in the foregoing terms.

48. It is hereby so ordered

**DELIVERED, DATED AND SIGNED AT NYERI THIS 27<sup>TH</sup> DAY OF JANUARY, 2022.**

**F. MUCHEMI**

**JUDGE**

**JUDGEMENT DELIVERED THROUGH VIDEOLINK THIS 27TH DAY OF JANUARY, 2022.**