

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 32 OF 2018

IN THE MATTER OF THE ESTATE OF ESTHER NJOKI MUHWANGA (DECEASED)

ANTHONY MUHWANGA WAMBUI.....APPELLANT

-VERSUS-

JOSEPH MAINA MUHWANGA.....1ST RESPONDENT

PETER MUKUYA MUHWANGA.....2ND RESPONDENT

(An appeal from the Judgment the Chief Magistrate's Court at Thika (C.A. Omondi, P.M.)

in Thika P&A Cause No. 20 Of 2011 dated 29th January, 2018)

JUDGMENT

1. The genesis of this Succession Cause is the petition for grant of Letters of Administration intestate in respect to the estate of **ESTHER NJOKI MUHWANGA alias ESTHER NJOKI deceased**. A petition was filed by **JOSEPH MAINA** (hereafter **Joseph**) and **PETER MUKUYA MUHWANGA** (hereafter **Peter**). **Joseph and Peter and Consolata Wambui Muhwanga (deceased)** were the three children of the deceased in this matter. **Consolata Wambui Muhwanga (deceased)** was mother of **Anthony Muhwanga Wandia** (thereafter **Anthony**). Anthony was the grandson of the deceased in this matter.

2. The dispute resolved by the trial court, the subject of this appeal was an affidavit of protest filed by Anthony. Anthony protested over the application of confirmation of grant by Joseph and Peter.

3. In the application for confirmation of grant dated 11th June, 2013, **JOSEPH** and **PETER** stated that the deceased was survived by them two, and not anyone else. They proceeded to distribute the deceased's estate for the two of them by sharing the properties of the estate equally. Those properties are:-

(i) L.R. LOC.4/GAKARARA/894

(ii) L.R. LOC.4/GAKARARA/726

(iii) PLOT NO. 6 KANDARA MARKET

(iv) PLOT NO. SSS/4/77 – (THIKA MUN/BLOCK 2/70)

4. **Joseph and Peter** proposed in their application for confirmation of grant the above properties be shared equally between the two of them.

5. Anthony filed an affidavit sworn on 16th July, 2013 to protest against the above proposed mode of distribution. Anthony in his affidavit of protest proposed that each of the aforesaid properties of the deceased estate, except the Thika plot, be shared equally amongst the three of them, namely, Joseph, Peter and Anthony.

6. After the matter was part heard before different magistrates, it began to be heard *de novo* on 11th April, 2014.

7. Peter testified as the first witness for the petitioners. He confirmed that their deceased mother had three children as stated before and that all the properties distributed in the application for confirmation of grant were all registered in the deceased's name. He testified that those properties should be registered in the two names of himself and Joseph. He confirmed that Anthony was a son to his unmarried sister who was deceased. He stated that their deceased mother in her life time called a meeting attended by the assistant chief, and the elder of the clan and in that meeting, the deceased said she had given her property L.R. LOC.1/MUKARARA/1340 to Anthony which is about 1½ acres. Peter stated that the deceased said her other properties were to be divided equally between himself and Joseph.

8. On being cross examined, Peter confirmed that he and Joseph were each given land by their late father in his lifetime and each of that land was 13 acres. He also confirmed that the land, the subject of the succession cause was their late mother's inheritance from their late father's estate.

9. In further evidence and what is not entirely clear to this Court, Peter stated while being cross examined:-

“The Thika Municipality plot is in the name of Esther Njoki (deceased).

Certificate of confirmation of grant Succ.80/1988 CMCC Court Thika Plot SS477 was confirmed to Anthony Muhwanga.”

10. The second witness called by the petitioners was **Pancras Wairachu Kimani**. He said he was from 1994 to 2010 the chairman of *Agashiku a bari ya Nguwe*. The deceased was a member of that clan. He stated that the deceased told him that Joseph and Peter were not getting on with Anthony. He advised the deceased to process title of the land she had given her daughter, Anthony’s mother, and for that title to be issued in the name of Anthony. On 20th September, 2010 the deceased called for him and when he went to her home, deceased informed him that she had processed the title in the name of Anthony. This witness stated that thereafter that the rest of her properties would be for Joseph and Peter.

11. On being cross examined, he said that the meeting where deceased pronounced her wishes/oral Will, there were no other officials of the clan present. He further stated that customarily, an unmarried woman gets less share of the properties of her parents.

12. Anthony in his evidence stated that the estate should be divided equally between Joseph, Peter and himself.

13. Anthony narrated how the deceased transferred into his name, in her lifetime, LOC.1/MUKARARA/1340. He said he got that Mukarara property as a reward for taking care of the deceased, his grandmother.

14. The trial court delivered its judgment on 29th January, 2018. The trial court made an order confirming the grant as follows:-

NO.	PROPERTY	BENEFICIARY	SHARE
a	L.R. NO. LOC 4/GAKARARA/80 (1.17 Ha approx.. 2.891133 acres)	Anthony Muhwanga Wambui Joseph Maina Peter Mukuya Muhwanga	½ acre to share balance equally.
b	L.R. NO. LOC 4/GAKARARA/80 (1.17 Ha approx. 2.891133 acres)	Anthony Muhwanga Wambui Joseph Maina Peter Mukuya Muhwanga	½ acre to share balance equally.
c	Plot No. 16 Kandara Market	Joseph Maina Peter Mukuya Muhwanga Anthony Muhwanga Wambui	To share equally.
d	Plot No.SSS/4/77 (Thika Municipality/block 2/70)	Joseph Maina Peter Mukuya Muhwanga Anthony Muhwanga Wambui	Jointly as tenants in common

15. Anthony has filed this appeal against the above determination. He has brought forth the following grounds of appeal.

(a) **THAT** the learned magistrate erred in law and fact by finding that Plot No.SSS/4/77 (Thika Municipality Block 2/70 formed part of the estate of Esther Njoki Muhwanga which was erroneous.

(b) **THAT** the learned magistrate erred in law and fact by making a determination that the appellant herein was not of equal and /or priority beneficiary as the respondents.

(c) **THAT** the learned Magistrate erred in law and fact by failing to evaluate the entire evidence on record thereby disinheriting the appellant whose mother was a sister to the respondents entitled to an equal share of the Estate.

16. The prayers in that Memorandum are:-

(a) Land Reference Number Thika Municipality Block 2/70 be expunged from the estate of Esther Njoki Muhwanga and for the same to revert to the appellant herein.

(b) THT LR. No. LOC. 4/GAKARARA/726, L.R. LOC 4/GAKARARA/804 and PLOT NO. KANDARA MARKET be distributed equally between the appellant and the respondent.

ANALYSIS

17. Although the petitioners alleged the deceased had left an oral Will, they did not petition before the trial court for probate of a Will. Perhaps much more however, is that no existence of a valid oral Will was proved. **Section 8 and 9** of the **Law of Succession Act** provides as follow:-

“8. A Will may be made either orally or in writing.

9. (1) No oral Will shall be valid unless:

(a) It is made before two or more competent witnesses and

(b) The testator dies within a period of three months from the date of making the Will.

Provided ...

(2) No oral Will shall be valid if, and so far as, it is contrary to any written Will which the testator has made, whether before or after the date of the oral Will, and which has not been revoked as provided for by sections 18 and 19.”

18. Although the chairman of the deceased clan stated that the deceased gave her wishes within the three months before her death that chairman however said that when the deceased made her oral will there was no one else present except him. Note that under **Section 9(a)** above, an oral will must be made in the presence of two or more competent witnesses. It would follow that the petitioners therefore failed to prove a valid Will of the deceased since their evidence is that the oral Will was pronounced in the presence of the clan chairman alone.

19. It is therefore my finding that the deceased died intestate.

20. There are two issues that arise from the grounds of appeal; that is:-

(i) Did the trial court err in making distribution of the deceased’s estate?

(ii) Did the trial court err in including the Thika property into this estate?

21. Clear evidence was adduced that Joseph and Peter obtained their inheritance from their late father of land, 13 acres each of them. Their mother the deceased of this estate who was then alive, also obtained her inheritance from their late father and her husband. It is that inheritance that is the subject of this appeal.

22. Anthony stated in evidence that he obtained 1½ acres land in Mukarara as a gift from his late grandmother who was also the late mother of Joseph and Peter. Anthony’s claim for equal share of the estate is based on ground that he was entitled to the inheritance of his mother who was the daughter of the deceased in this estate and who was a sister to Joseph and Peter.

23. The chairman of the clan intimated in his evidence that daughters were not entitled to equal share of their parents’ estate with their brothers. There is no doubt that such a custom or practice is discriminatory against the daughters and is not in keeping with the Law of Succession Act. This indeed is what *Justice Lesiit* (as she then was) in the case **ELISEUS MBURA M’THARA VS. HARRIET CIAMBAKA & ANOTHER (2012) eKLR** stated thus:-

“The Law of succession Act does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person. It is therefore irrelevant that the 1st Objector was married at some point. What has been proved before this Court is that she has been in occupation of the suit land since birth, and apart from the small period of time when she was married, she continues to occupy the land by living there and that land is her sole means of livelihood.

24. I am also persuaded by the holding of *Justice Mumbua T. Matheka* in the case **In re ESTATE OF FLORENCE MUKAMI KINYUA (DECEASED) (2018) eKLR** where the learned Judge stated:-

“A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren

get into the shoes of their deceased parents and take the parent's share in the estate of the grandparents. This was stated in Re Estate of Wahome Njoki Wakagoto (2013) eKLR where it was held:-

“Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

25. In view of the above, I find and hold that the trial court erred in distributing unequally the deceased’s estate between the sons of the deceased and her grandson. This is in view the evidence adduced that the sons Joseph and Peter inherited 13 acres each from their late father.

26. I have considered the properties of the estate and keeping in mind that Joseph and Peter obtained property from their father each getting 13 acres while Anthony got land 1½ acres from his grandmother, I find that the just distribution of this estate is that **Anthony gets Plot No. 804 whose size is 2.891 acres and Joseph and Peter who obtained 13 acres each from their late father shall both get Plot 726 in equal shares, whose size is 0.015 acres. The three beneficiaries, Joseph, Peter and Anthony shall share equally plot No. 16 Kandara.**

27. On the second issue identified above, I find that the petitioners did not provide evidence that the Thika land belonged to the deceased. The letter written without a letterhead indicating the office of the writer, does not suffice as evidence that the land belonged to the deceased. Courts cannot order distribution of property where there is no proof that such property belonged to the deceased. Accordingly, I find the trial court erred to have distributed that property when there was no proof at all it belonged to the deceased. That Thika property shall be excluded from this estate.

28. Taking the above discussion to account, the appeal filed by Anthony succeeds. However, since this is a family matter, I will order each party to bear their own costs of this appeal and of the trial court.

DISPOSITION

29. The judgment of this Court is as follows:-

(a) **L.R.NO. LOC.4/GATAKARARA/804** to Anthony Muhwanga Wambui – Whole

(b) **L.R. NO. LOC 4/GATAKARARA/726** to be shared by:-

(i) Joseph Maina

(ii) Peter Mukuya Muhwanga in equal shares

(c) **Plot No. 16 KANDARA MARKET** to be shared equally between:-

(i) Joseph Maina

(ii) Peter Mukuya Muhwanga

(iii) Anthony Muhwanga Wambui

(d) There shall be no orders as to costs of this appeal and of the trial court.

JUDGMENT DATED and DELIVERED at KIAMBU this 31st day of MARCH, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Maurice

For Appellant : - N/A

For 1st Respondent : - Miss Wanjuru H/B Mr. Wachua

For 2nd Respondent : - Miss Wanjiru H/B Mr. Machua

JUDGMENT delivered virtually.

MARY KASANGO

JUDGE