



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 255 OF 2001

IN THE MATTER OF THE ESTATE OF PAUL KAMAU NJOROGE (DECEASED)

SOPHIA WANJIRU GITAU.....PROTESTOR/1ST ADMINISTRATRIX

VERSUS

GRACE THIRA KAMAU.....APPLICANT/2ND ADMINISTRATRIX

JUDGMENT

1. The deceased herein Paul Kamau Njoroge died intestate on 30th October, 1999 leaving behind two widows namely; Naomi Wairimu Kamau (1st wife) and Grace Thira Kamau (2nd wife). Besides the two wives, he left twelve children seven of whom are from the 1st wife and five from the 2nd wife.

2. Vide a petition dated 1st February 2001, Naomi petitioned for a grant of representation thus listing the deceased's widows as herself (1st wife) and Grace Thira (2nd wife). She further listed children as follows;

- (1) Peter Kamau (son)**
- (2) M/s Sophia Wanjiru Gitau**
- (3) Mr. Ephrim Mbugua Kamau**
- (4) Miss Winnie Wanjiru Kamau**
- (5) Mr. Samuel Mbugua Kamau**
- (6) Mr. John Njega Kamau**
- (7) Mr. James Njihia Kamau**
- (8) Mr. Josephat Nguma**
- (9) Stephen Ndungu**
- (10) Mrs. Jane Wanjiku**
- (11) Mrs. Dorcas Wambui**
- (12) Miss Elizabeth Wambui**

3. The following assets were listed by Naomi as comprising the estate.

- (1) Kiambogo 4 acres**

- (2) Rumuruti – 5 acres – 1038**
- (3) Mai Mahiu – 2 acres 5164**
- (4) Plots Mutirithia wa andu Co. Ltd. No. 597 & 548**
- (5) Mwangaza – 5 acres Ngong**
- (6) Wendani Co-operative Society – Kajiado**
- (7) Kanini Kega – Two market stalls**
- (8) 1 Plot at Mutirithia**
- (9) Firms Rally Guards Security Co. (owned jointly with three others)**

4. On the other hand, Grace Thira also filed an objection dated 21st February 2001. Further, she filed an answer to petition and cross petitioned for a grant separately via a petition dated 29th March 2001. She also listed the following as the deceased's survivors;

- (1) Mr. Josephat Ngumba Kamau**
- (2) Mr. Stephen Ndungu Kamau**
- (3) Mrs. Margaret Wanjiru Kamau**
- (4) Mrs. Dorcas Wambui Macharia**
- (5) Mrs. Elizabeth Wambui Kamau**

5. She also cited the properties comprising the estate as hereunder;

- (1) Mai Mahiu farm 2 acres**
- (2) Rumuruti Farm 4 acres**
- (3) Kiambogo farm 4 acres**
- (4) 1 Residential Plot (50 x 60)**
- (5) 4 Rental plot (50 x 50)**

6. Consequently, by consent, the court made a grant of letters of administration jointly to Naomi Wambui and Grace Thira Kamau on 30th October 1999. Unfortunately, Naomi died before confirmation of the grant. Through a summons for rectification and confirmation of the grant dated 21st March, 2016, filed by Grace on 1st April, 2016, a prayer to substitute the deceased Administratrix (Naomi) was made. Subsequently, Sophia a daughter to Naomi was appointed as Co-Administratrix to Grace on 29th May 2001. Due to family differences, the matter was referred for mediation. However, the two houses could not agree.

7. Having disagreed, Grace swore an affidavit on 22nd August 2017 in support of the application for confirmation proposing distribution of the estate as follows;

- (1) First family to retain Nyandarua also known as Kiambogo Farm 1752 measuring 4 acres, matrimonial home for the 1st wife;**
- (2) Plot No. 597 Mutirithia wa Andu Co. Ltd. (developed) and also matrimonial home for the second house;**
- (3) That the properties registered in the name of the deceased be shared by the two families equally;**
- (4) That in the alternative, all properties registered in the name of the deceased be shared out equally including Nyandarua Plot and Plot No. 597;**
- (5) That plot No. 848 and land Rumuruti registered in her name be excluded from the list of assets as they never belonged to the deceased at any one time.**

8. Aggrieved by the proposed mode of distribution, Sophia (1st Administratrix) filed an affidavit of protest sworn on 14th May 2018 claiming

that the proposed mode of distribution was unfair. She averred that after her father the deceased married Grace, they started cohabiting at Kangemi, and later at Kasarani Nairobi. That her mother Naomi was also staying at Kiambogo

Farm at Nyandarua.

9. She stated that her father used to buy properties systematically in a way that those registered in his name were for the 1st house and those bought in the name of Grace belonged to the second house.

10. She therefore claimed that the properties referred to as Plot No. 597, Murithia wa Andu, Kangemi Mwangaza – 1 share, Kanini Kega – 1 share, Mai Mahiu to John Njega (son of Naomi) – 1 acre, Kiambogo Plot No. 1752 – 4 acres registered in the name of the deceased be shared out to the first house; That Plot No. 848 Mutirithia wa Andu, Kangemi Mwangaza – 1 share, Kanini Kega 1 share, Mai Mahiu Josephat Ngumba son of Grace Thira – 1 acre, and Rumuruti 1038 – 5 acres all in the name of Grace be distributed to the 2nd house.

11. That since Grace was unlawfully married before the dissolution of the first monogamous marriage, the deceased safeguarded her properties by registering them in her name.

12. She further averred that Plot Nos. 597 and 848 Mutirithia wa Andu were bought out of funds generated from mitumba business which the deceased established for Grace and thereafter assisted by John Njenga a son from the 1st wife. In her view, the mitumba business was a family business and the money generated therefrom was used to buy plot No. 848 which was

registered in the name of the deceased.

13. That after mitumba business collapsed, the family started a kiosk at bus station which was busy thus generating enough money to develop commercial houses on Plot No. 848 which their father intended to be his retirement asset after working with Narasha Wholesalers a beer distribution company as a foreman.

14. She claimed that Plot No. 597 was a family home for everybody and not Grace and her children alone. That she occupied a room in that plot until she got married. She further claimed that her brothers physically participated in the construction of Plot No. 848. That her grandmother also contributed Kshs 60,000 towards the development of that property. She claimed that she gave almost all her salary towards the construction of the property.

15. In her opinion, Grace should keep Plot No. 848 and leave plot No. 597 to the 1st house. She claimed that since 1999 when their father died, Grace has been collecting rent from the two properties (Plot No. 848 and 597 totalling to Kshs 6,936,000/=.

16. Touching on Plot No. 1752 Nyandarua, she stated that the same was bought long before the second wife one Grace was married. That it was the first wife's matrimonial home and therefore Grace is not entitled to a share.

17. As concerns Rumuruti Farm LR 1038 – 5 acres, she claimed that it was

bought for the 2nd wife Grace and registered in her name in recognition that Naomi the 1st wife had 4 acres in Kiambogo. Concerning Mai Mahiu 2 acres (LR 5164), the same was shared equally between John Njenga a son to the first wife and Josephat Ngumba a son to the 2nd wife. She stated that the two houses are in agreement that the two acres are properly owned by the two sons each from either house.

18. Concerning Kangemi Mwangaza 2 acres, she stated that each house has a share. As to Kanini Kega 2 shares, she also stated that Grace has one share registered in her name and one share in the deceased's name and therefore the 1st wife's share.

19. As to shares in Rally Security Guards, she claimed that they are non-existent as the company ceased operations long time ago. She therefore proposed that all the properties registered in the name of the deceased be registered in her name in trust for her siblings Peter Mwangi Kamau, Ephraim Kamau, Winnie Wanjiru, Samuel Kamau, John Njega and James Njehia Kamau.

20. During the hearing, Sophia Wanjiku (PW1) adopted the averments contained in her affidavit in support. On cross-examination, she stated that her father (deceased) was a security guard and that he never registered any land in her mother's name.

21. PW2 John Njenga a brother to Sophia corroborated her testimony in his affidavits sworn on 19th September 2018 and 4th June 2018. He claimed that while staying in his step-mother's house in Nairobi at Plot No. 597, he assisted her (Grace) in doing mitumba business. He proposed that all properties registered in the name of the deceased be given to the first house while those in the name of Grace be retained by her.

22. DW1 Grace Thira adopted the content contained in her affidavit sworn on 1st August 2017 and witness statement of even date. She claimed that Plot No. 848 was exclusively hers and is registered in her name. That she should retain her matrimonial home in Plot No. 597 and the 1st house retains Nyandarua Plot. She also claimed that she bought Plot No. 597 alone and without any contribution from anybody. On cross examination, she stated that if Nyandarua Plot was to be sold and proceeds shared equally she will have no problem.

Submissions

1st Administratrix's/Protector's Submissions

23. The firm of Kinyanjui Advocate appearing for the protestor (objector) filed their submissions on 3rd March 2020. Counsel reiterated the averments contained in the affidavit of protest. Mr. Kinyanjui contended that, Plot No. 597 which is highly contested was a family home where even the children of the 1st wife among them Sophia and John Njenga were brought up. That the funds used to develop the property were realized from mitumba business which was also jointly carried out by Grace and her step-children Sophia and John Njenga.

24. According to Mr. Kinyanjui, by Grace listing Plot Nos. 848, 597 and Rumuruti as assets comprising the estate yet they are registered in her name is proof enough that she understood them to be properties of the deceased. According to learned counsel, properties registered in Grace's name were gifts intervivos advanced by the deceased to her. He urged the court to distribute the estate as proposed in the affidavit of protest.

25. In support of the proposition that the court takes into account gifts intervivos and distribute the remaining estate equally, counsel relied on the holding in **Succession Cause No. 345/2003 in the matter of the estate of Gideon Kitivo Ndambuki (deceased), Succession Cause No. 1568/2009 Peter Kamau Kiriba vs John Muchiri Kiriba and George Ndungu Kiriba Nairobi High Court** where the court stated that:

“In light of the present circumstances, the deceased distributed part of his estate as gift intervivos to his sons. Therefore, the distribution of the net estate taking into account gift intervivos, shall be equitable not equal among the children of the deceased”.

2nd Administratrix's/Applicant's Submissions

26. Mr. Mugu appearing for Grace the 2nd wife (2nd administratrix) filed his submissions on 20th January 2020. Learned counsel basically adopted the averments contained in the affidavit in support of the mode of distribution.

27. According to Mr. Mugu, Plot No. 597 is the matrimonial home for Grace while LR 1752 Nyandarua should be retained by the first house being the first wife's matrimonial home. Counsel submitted that Plot No. 848 was allocated to Grace without anybody's contribution. That Grace bought and developed it using funds generated from her mitumba business.

28. According to learned counsel, there was no proof that Plot Nos. 597 and 848 were family property nor is there proof that the protestors made any financial contribution towards their acquisition and development. Mr. Mugu urged that properties not acquired in the deceased's name should be excluded from the list of assets.

Determination

29. I have considered the application for confirmation herein and protest thereof. I have also considered evidence adduced by both sides and submissions by their respective counsel. Issues that arise for determination are:

(a) Whether the properties not registered in the name of the deceased ought to be included in the list of assets owned by the deceased.

(b) Whether the properties registered in the name of the deceased should exclusively be given to the first house.

(c) Whether the properties acquired and registered in the name of the 2nd wife Grace are deemed to be gifts intervivos given to her by the deceased.

30. Since the three issues are somehow intertwined, I will handle them together. There is no dispute that the deceased died intestate and left two widows namely, Naomi Wairimu and Grace Thira.

31. In this case, the properties listed as the deceased's assets comprising the estate includes:

Plot No. 848

32. It is admitted by both parties that this plot was acquired by Grace and all payments for its purchase made by Grace in her name. Receipts dated 13th April 2000, 21st January 1987 were produced as proof of ownership. There is no proof of any contribution from anybody towards its acquisition. Grace stated that she raised funds from her mitumba business to purchase and develop the property. There is no proof of any contribution from the deceased. I am satisfied that Plot No. 848 was exclusively acquired by Grace and therefore her sole property. To that extent, that plot is not available for distribution and ought not to have been included in the list of assets for distribution.

Plot No. Mai Mahiu comprising two Acres

33. This property comprising two acres was shared out equally to John Njenga a son from the first house (one acre) and Josephat Ngumba a son from the second house (one acre). There is no contestation over this allocation which was a gift intervivos. I will not therefore interfere with this distribution arrangement and the same shall remain as such.

Kanini Kega Company 2 Shares

34. Regarding this property, parties are in agreement that one share already in the name of Grace remains in her name. However, Grace is

claiming a share in the one share registered in the name of the deceased. Again there is no proof that the one share acquired in the name of Grace was family property. There is no proof of contribution by the deceased during its acquisition. To that extent, the one share in Kanini Kega in the name of Grace should be removed from the list of assets as it did not belong to the deceased hence not a subject of distribution. However, one share registered in the name of the deceased is available for distribution in accordance with Section 40 of the Law of Succession.

Rumuruti 1038 – 5 Acres

35. This property is also registered in the name of Grace the 2nd administratrix as the absolute owner. This is not part of the deceased's estate and there is no proof that the deceased did contribute towards its acquisition. Was the property gifted to Grace? Section 42 of the law of succession Act provides that;

“Where-

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house;or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35,

that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

36. What then in law constitutes a gift *inter vivos*? **In the case of Re Estate of the late Gideon Manthi Nzioka(Deceased)(2015)eKLR** Nyamweya J stated that;

“In law, gifts are of two types. There are the gifts made between living persons (gifts *inter vivos*), and gifts made in contemplation of death (gifts *mortisa causa*). Section 31 of the law of succession Act provides as follows with respect to gifts made in contemplation of death:

...For gifts *inter vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by declaration of trust in writing. Gifts *inter vivos* must be complete for the same to be valid”

37. From the guidelines drawn from the above cited case law, it is trite that one cannot gift what he does not own. See **In re Estate of Chepkwony Arap Rotich(2018) eKLR** Where the court held that;

“As observed by the court in the above case, “a person cannot gift that which he or she does not own” It appears to me that the deceased in this case, not being the registered owner of the lands at issue, was not in apposition to gift them as gifts to his children from the first house”.

38. Having held as above, it is my finding that the deceased had not advanced any gift to Grace. If the position taken by the protestor that the deceased systematically bought land and had the first wife's property registered in his name and those for the second house registered in Grace's name, then, there is no good reason given why he could not register the property in his name directly in the first wife's name. Basically, I do not find any iota of evidence to suggest that the properties in the name of the deceased were intended to be the exclusive property of the first house. To that extent, plot No. Rumuruti 1038 like other properties registered in Grace's name do not belong to the estate for distribution nor were they gifted by the deceased to Grace.

Kangemi Mwangaza 2 Shares

39. Out of the two shares, one share is registered in the name of the deceased and another in the name of Grace. Again the share registered in the name of Grace is excluded from the deceased's list of assets. There is no proof of contribution by anybody towards the acquisition of that property. On the other hand, the one share in the name of the deceased is subject to distribution in accordance with Section 40 of the Law of Succession.

40. Having settled the issues of gifts *inter vivos*, the assets that comprise the estate as stated at Paragraph 3 of the protestor's affidavit of protest sworn on 14th May 2018 and filed the same day are:

(1) Mutirithia wa Andu – 597 – 5 Acres

(2) Kangemi Mwangaza – 1 share

(3) Kanini Kega – 1 share

(4) Kiambogo Farm LR 1752

(5) Mai Mahiu – 2 Acres

41. The assets comprising the estate having been ascertained, the key question that remains to be answered is, who is entitled to what share? As earlier stated, the deceased died intestate leaving two widows. The law then applicable is Section 40 (1) of the Law of Succession which provides:

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects are and the residue of the net intestate estate shall in the first instance be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children”.

42. In the circumstances of this case, there are two widows and 7 children in the first house and 5 children in the second house. Therefore, in accordance to Section 40(1) of the Law of Succession, the two widows are added as additional units making the total units to be 14 in number representing 8 units in the first house and 6 in the second house hence estate to be distributed in the ratio of 6:8.

43. To support the above proposition, I am duly guided by the holding in the case of **Francis Mwangi Thiong’o and 4 others vs Joseph Mwangi Thiong’o (2015) eKLR** where the court held that:

“Section 40 aforesaid states that it is any wife surviving the deceased that would be considered as an additional unit in the number of children”. That ground of appeal therefore succeeds as the Judge should have found that the first house had four units and the second, comprising the respondents had five units. The land should therefore have been sub-divided in the first instance along the ratio of 4:5.

44. Similar position was held in the case of **Irene Mabuti Gitari vs Zacharia Njege Gitari (2017) eKLR** and **Catherine Nyaguthii Mbauni vs Gregory Maina Mbauni (2009) eKLR** in which the court of appeal stated that:

“In the end, the view we take in the application of Section 40 to the estate of the deceased is that the net estate of the deceased should be shared out at the ratio of 3:5 which reflects the number of units in the houses of the deceased”

45. As stated earlier, parties are in agreement that Mai Mahiu property was given as a gift intervivos to the two sons one from each house. The two are John Njenga (1 acre) and Josphat Ngumba (1 acre). That arrangement shall remain save that it will be taken into account when the other properties are shared so that they do not benefit more than others. To that extent their gifts will be valued so as to get less that value out of the property allocated to them in the other properties.

46. As regards property No. 1752 Nyandarua Kiambogo, the same is in the deceased’s name. The protestor argued that it was acquired by her mother Naomi and her father before Grace was married. There was no evidence adduced to controvert this position. I will therefore find that, Grace did not make any contribution towards its acquisition. Since the property is 5 acres, I will remove half of that property which is 2 ½ acres and give it to the first house to share equally taking into account that John Njenga has already benefited from one acre in Mai Mahiu. The same will be valued so that John Njenga gets his fair share out of his entitlement in Nyandarua 1752 after taking into account the benefit already acquired in Mai Mahiu.

47. The remaining 2 ½ acres out of Nyandarua 1752, will then be shared out

according to each house in the ratio of 6:8 i.e. in favour of the 2nd and first house respectively.

48. The above calculation is based on the understanding that Grace cannot benefit from the whole parcel of Nyandarua 1752 as she did not contribute. She and her children are only entitled to a share out of the remaining ½ share being the deceased’s contribution towards its acquisition and therefore a share to which the entire family is entitled according to the number of units in each house.

49. In arriving at the above distribution, I am guided by the holding in the case of **Esther Wanjiru Githatu vs Mary Njeri Githatu (2019) eKLR** where the court of appeal upheld the decision of J. Kimondo in **Eldoret Succession Cause No. 2415/2006**. The court of appeal held that:

“.....we came to the conclusion that in addition to properties acquired by the deceased between

1968 and 1984 that is available for distribution. Thus we are in agreement that the finding of the learned Judge that only half of the immovable properties acquired by the deceased prior to the 1984 and all the properties acquired by the deceased thereafter shall constitute the free estate of the deceased to be divided in accordance with the Law of Succession Act”.

Plot No. 597,

50. This property was acquired by the deceased. It is also subject to distribution in accordance with Section 40 of the Law of Succession in the ratio of 6:8 in favour of the 2nd and 1st house respectively. The same principle shall apply to distribution of 1 share Kangemi Mwangaza and 1 share Kanini Kega all registered in the name of the deceased.

51. In a nutshell, the properties registered in the name of Grace are not subject of this succession cause as there was no proof that she was

gifted. Accordingly, the grant herein issued on 29th May 2001 is hereby confirmed and the estate distributed as follows:

(a) Nyandarua Kiambogo Plot No. 1757 to be shared as follows:

(i) 50% of the property to be given to the first house and the same be shared equally between the beneficiaries in that house with John Njenga getting less the value equivalent to one acre already benefited in Mai Mahiu plot.

(ii) 50% of the remaining portion out of Nyandarua Kiambogo plot to be shared amongst the 14 units in the ratio of 6:8 in favour of the 2nd and 1st house respectively taking into account the benefit of John Njenga and Josephat Ngumba who have already one acre each in Mai Mahiu property.

(b) Mai Mahiu property to be shared between John Njenga and Josephat Ngumba one acre each.

(c) 1 share Kangemi Mwangaza to be shared in the ratio of 6:8 in favour of the 2nd and 1st house respectively.

(d) 1 share Kanini Kega to be shared out in the ratio of 6:8 in favour of the 2nd and 1st house respectively.

(e) Plot No. 597 Mutirithia wa Andu to be shared out in the ratio of 6:8 in favour of the 2nd second and 1st house respectively.

(f) In the event the properties are not capable of sub-division, they shall be valued by a mutually agreed valuer, sold and the proceeds realized therefrom shared out in the manner or ratio directed above.

(g) Regarding costs, this is a family matter, each to bear own costs.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF JANUARY 2021.

J.N. ONYIEGO

(JUDGE)