



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 99 OF 2017

IN THE MATTER OF ESTATE OF JAMES NJENGA MUIRURI (DECEASED)

RACHAEL RUKUNYA NJENGA.....PETITIONER

-VERSUS-

GRACE WANGARI NJENGA.....PROTESTOR

JUDGMENT

1. The petitioner **Rachael Rukenya Njenga** petitioned for grant of letters of Administration intestate of the estate of the deceased herein **James Njenga Muiruri** who died on 1st September 2004. She listed the following as beneficiaries:-

- i. Rachael rukenya Njenga Widow**
- ii. Grace Wangare Njenga Widow**
- iii. Daniel Kiarie Njenga Son**
- iv. Hannah Noki Njenga Daughter**
- v. Benson Mwangi Njenga Son**
- vi. Loise Wairimu Njenga Daughter**
- vii. Miriam Nyambura Njenga Daughter**
- viii. Samuel Maina Njenga Son**

2. The petitioner listed the following as assets left behind by the deceased:-

- i. LR.No.Nakuru/Rare/Kiriri/1023**
- ii. LR.No.Nakuru/Rare/Kiriri/1019**

3. The petitioner was issued with grant of letters of administration of the estate of the deceased herein on 26th June 2017. She later filed summons for confirmation of letters of administration dated 21st December 2018 on 15th January 2019.

4. Following filing of summons for confirmation **Grace Wangari Njenga** swore an affidavit of protest filed on 11th July 2019 opposing the mode of distribution proposed by the petitioner.

5. The protestor averred that the mode of distribution is against the deceased wishes as he had built her a house on plot no. Nakuru/Rare/Kiriri/1023 where she resides while the petitioner **Rachael Rukunya Njenga** resides with her children in plot no. Nakuru/Rare/Kiriri 1019.

6. The petitioner filed affidavit in response to the protest on 9th September 2019 where she averred that the affidavit of protest is baseless as the deceased died intestate and had not allocated the protestor plot no. Nakuru/Rare/Kiriri/1023. She averred that the protestor is selfish for denying the deceased's children access to their deceased father's land.

7. She further averred that the deceased built each wife a house for the interest of his children as the protestor had no child with the deceased and the deceased's her six children should be allowed to inherit from their deceased father as per the summons for confirmation of grant dated 21st December 2018.

8. The background of the matter is the protestor initiated the suit by filing a citation citing the petitioner and her children to take out letters of administration. The petitioner filed a summons for confirmation of a grant and the grant was issued on the 26th of June 2017.

9. The court directed that the matter do proceed through *viva voce* evidence. The protestor called 3 witnesses.

PROTESTOR'S EVIDENCE

10. The protestor **Grace Wangari** testified that she was the first wife of the deceased while the petitioner (**Rachael Rukenya**) is the second wife. She stated that the deceased left behind 2 parcels of land each measuring 5 acres and each wife was settled by the deceased before he died.

11. The protestor testified that she has no child while the petitioner has 7 children with the deceased and the deceased was buried in her plot. She further state that before the deceased purchased land and settled each wife in their respective parcels, both wives lived together in Githunguri and they shared a kitchen. She stated that she is not agreeable to the 2 parcels of land being shared equally and proposed to remain in her land.

12. On cross examination, the protestor confirmed she has no children with the deceased and that she is aware that LR 1019 and 1023 were for 2 brothers and stated that when the deceased was acquiring the plots, she sold 3 cows to buy the land. She denied that Njenga ever ploughed the land. She stated that she never left her marriage when Rachel was married. She said the deceased was assisted by **Ndungu** to purchase the land and Harun **Kinyagia Maragia** never contributed. She stated she has no documents to prove that the deceased gave her LR 1023.

13. The protestor's witness **John Gacheru Karatau** (PW2), who is village elder (Nyumba Kumi Chairman) in Mbagaria Kiru Rare village adopted his statement dated 7th February 2020. He stated that he knew the deceased **James Njenga Muiruri** since 1995 and **Grace Wangare** (protestor) as his 1st wife. He confirmed that the deceased had two wives, the protestor and Rachel Rukenya, the petitioner herein was his second wife.

14. PW2 testified that the deceased's two wives lived separately and confirmed that the protestor had no child with the deceased. He stated that Grace had one house while the petitioner/2nd wife has many houses in her land because her children have built in the land. The deceased had settled his wives separately and had told court the land where the protestor live is her land and the other parcel of land belong Rachel Rukenya the second wife.

15. The protestor's second witness **Meshak Mwai Kariuki** (PW3) testified that he resides in Mbagaria Kiru Rare village and that he knows the protestor who was married to James Njenga as the 1st wife.

PETITIONER'S EVIDENCE

16. The petitioner **Rachel Rukenya Njenga** adopted her affidavit dated 14th August 2019. She testified that **James Njenga Muiruri** was her husband and she was the second wife and were blessed with 7 children but only 6 are surviving and listed them as captured in paragraph 1 above.

17. The petitioner testified that at the time she got married, the protestor Grace Wangare was not living with her husband and that she came back to him after she (petitioner) had delivered the first child. She testified that the deceased sold the land they were living in, in Githunguri and came to Nakuru to buy the 2 parcels of land. The petitioner confirmed that she never contributed to the purchase of the two parcels of land.

18. The petitioner said the protestor was living alone in one parcel of land but Maina was ploughing it and that he was allowed to plough by the deceased. She said the protestor was ploughing half of the land and Maina was ploughing the other half. But conflicts have arisen since the deceased's death.

19. The petitioner testified that the deceased never said how she wished the land to be shared. She prayed that the 2 parcels be put together and divided equally among 8 beneficiaries (2 wives and 6 children).

20. **Harun Kinyagia Marongoi** a brother in law to the deceased stated that his testimony was merely to reiterate the averments of the petitioner.

PETITIONER'S SUBMISSION

21. The petitioner submitted that the protestor alleged that she sold 3 cows in order to purchase the land but no receipts were attached to confirm her allegation. Further that. She did not also provide any documentation to show that her husband gave her parcel no. 1023.

22. The petitioner further submitted that both witnesses availed by the protestor seemed not to know the deceased as they claimed as they failed to know some of his crucial information.

23. The petitioner restated evidence adduced and submitted that the deceased never divided the land and prayed that the 2 parcels be put together and divided among 8 beneficiaries and cited the case of **Irene Mabuti Gitari v Zacharia Njege Gitari (2017) eKLR** ...where the court opined that **it is not supposed to consider who was utilizing the land and who is not....**”

24. The petitioner further cited the case of **Mary Rono v Jane Rono 7 another (2005) eKLR** where **Amolo J** stated as follows: -

“...where the net intestate is to be distributed according to the houses being treated as a unit, yet the judge doing the distribution still has the discretion to take into account or consider the number of children in each house. If parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.

25. The protestor failed to file written submissions despite being given time from 3rd March 2020 up to 7th May 2021 to file her submissions. On 3rd March 2020, each party was granted 21 days to file and serve written submissions beginning with the protestor. On 21st January 2021, the protestor was granted a final chance to file submissions but the submissions were not filed until 7th May when judgment date fixed.

ANALYSIS AND DETERMINATION

26. I have considered evidence adduced and submissions filed. There is no dispute that the deceased left behind two wives and 6 children. There is also no dispute that the protestor never sired any children with the deceased and the children left behind by the deceased were children from his second wife, the petitioner. There is also no dispute that the deceased left behind two parcels of land; the two pieces measuring approximately 5 acres each and with two spear titles being Nakuru/Rare/Kiriri/1023 and Nakuru/Rare/Kiriri/1019.

27. What I consider to be in issue is the mode of distribution of the deceased’s property. The protestor’s proposal is for her to inherit parcel Nakuru/Rare/Kiriri/1023 and the petitioner to inherit with her children Nakuru/Rare/Kiriri/1019. It is not disputed that the petitioner lives in Nakuru/Rare/Kiriri/1019 and lived in the said parcel during the lifetime of the deceased while the protestor lives in Nakuru/Rare/Kiriri/1023.

28. The petitioner argues that her late husband never intended that the protestor solely inherit Nakuru/Rare/Kiriri/1023 and further argues that her son Maina has been ploughing the land and she prays that her children get a share of the land.

29. **Section 40** of the **Law Succession Act** deals with the distribution of the estate of a polygamous family and provide as follows: -

a. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net 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.

b. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

30. From the above provision, property in a polygamous marriage ought to be divided among houses according to the number of children in each house. It is not disputed that there are 6 children left behind by the deceased with two widows and is therefore made up of one unit while the second house is made up of 7 units.

31. There is no doubt that the two properties herein were in the name of the deceased at the time he died. It is not disputed that the deceased had settled each wife in a separate parcel but property remained in his name and he never left either written or oral will to the effect that he wanted the protestor/first wife would solely inherit Nakuru/Rare/Kiriri/1023.

32. The first wife however testified that she sold 3 cows to contribute in purchase of the land. She was asked for receipt for the sale of the cows which she responded that she did not have. On the other hand, the petitioner confirmed that she did not make any contribution to the purchase of the land. She however never disputed the protestors allegation that she sold three cows which formed part of contribution for purchase of the land.

33. As observed above, the 2 properties herein were in the name of the deceased. He never left behind a will. It is however not disputed that the second wife remained in parcel Nakuru/Rare/Kiriri/1019 during the life time of the deceased. The second wife however stated that one of his sons, Maina ploughed Nakuru/Rare/Kiriri/1023 where the protestor lived during the lifetime of the deceased.

34. No evidence is adduced to the effect that apart from her son ploughing part of Nakuru/Rare/Kiriri/1023, the second house utilized any other portion of that land.

35. It is unfortunate that the deceased never sired any child with the first wife but it will be unfair to disentitle her the portion of land the deceased settled and allowed her to use knowing very well that the second wife together with her 6 children were utilizing Nakuru/Rare/Kiriri/1019 with same acreage .I however take note of the fact that one son from the second house at some point was allowed to ploughing Nakuru/Rare/Kiriri/1023 during the lifetime of the deceased . My reading of that act is a desire to allow a portion of the land to benefit the children of the second house.

36. In my view, it would not be fair to count the first wife as a unit but allow her to inherit half of LR Nakuru/Rare/Kiriri/1023 the land where the deceased settled her. From the foregoing, I find that half of Nakuru/Rare/Kiriri/1023 be inherited by the protestor and the other half to go to the petitioner and her children.

37. FINAL ORDERS

1) Half of Nakuru/Rare/Kiriri/1023 to to the protestor.

2) Nakuru/Rare/Kiriri/1019 and half of Nakuru/Rare/Kiriri/1023 to be inherited by the second house. To be shared according to units in the second house being 7 units

3) Each party to bear own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 29TH DAY OF JULY, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Schola/Jeniffer - Court Assistant

Mr. Abuya for petitioner

No appearance for protestor