



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 194 OF 1999

IN THE MATTER OF THE ESTATE OF MANG'ANG'A ITHENYA (DECEASED)

RAHAB WANJA MANG'ANG'A.....PROTESTOR/PETITIONER

VERSUS

JANE WANGARI MAINA.....APPLICANT/PETITIONER

RULING

Background facts

1. This cause was filed on 6th May 1999 by the petitioner/protestor Rahab Wanja Mang'ang'a. The deceased died in 1992 and was survived by six(6) children as named in the petition and in the area chief's letter. On 14th March 2003, the grant was confirmed and the estate L.R. Othaya/Kiandemi /762 distributed in equal shares to four of the children including the petitioner and one Tiras Ithenya Mang'ang'a the then husband of the applicant.
2. Tiras filed summons for revocation of grant dated 5th July 2004 on grounds that the grant was fraudulently obtained. Upon death of Tiras, the applicant was substituted in his place. The grant was revoked on 25/06/2007 and the matter sent for arbitration before the District Officer Othaya who failed to file any award.
3. On 05/07/2018, Rahab Wanja Mang'ang'a and Jane Wangari Maina were appointed as co-administrators of the estate. Jane Wangari filed summons for confirmation of grant dated 18th December 2018 while Rahab filed hers dated 1st February 2019. The two administrators presented contrasting modes of distribution of the estate which led to this cause being referred for mediation on 19/02/2019 but parties failed to reach an agreement.
4. On a second mediation attempt through referral dated 19/02/2019 the parties failed to agree on distribution thus leading to taking directions for hearing in court. The summons of Rahab dated 01/02/2019 was treated as the protestor while that of Jane Wangari dated 18/12/2018 was treated as the application for confirmation. The case was heard by way of viva voce evidence.

B.The Protestor's Case

5. The protestor testified that she is a daughter to the deceased and that the deceased's estate comprises of only one asset L.R. Othaya/Kiandemi/762 which she proposes to be shared equally amongst the four children with the applicant included.
6. The protestor further stated that the deceased had called for a meeting whereby he stated that the suit property be divided amongst his 6 children. After the deceased's demise, two of his children passed away namely Tiras Ithenya and Rachael Wanjiku. Tiras Ithenya was the husband of the applicant and they have 10 children whereas Rachael Wanjiku is survived by one child, namely Jane Muthoni. On cross-examination, the protestor told the court that she and her sisters occupy 3 acres of the land whereas the applicant occupies 3.5 acres of the land.
7. **PW2, Beatrice Wangui Mwangi** is a daughter of the deceased. She testified that she agrees with the protestor's mode of distribution. She further confirmed that the deceased stated that his land ought to be shared equally amongst his children. She added that she opposes the mode of distribution as proposed by the applicant as it is against the deceased's wishes. On cross-examination, the witness stated that she and her sister Esther Nduta were the only ones present in the meeting by the deceased when he stated that the land ought to be shared amongst all his children.
8. **PW3, Esther Nduta Maina**, is a daughter of the deceased and she testified that the deceased had 6 children namely: Rahab Wanja; Beatrice Wangui; Tiras who is deceased and whose wife is the applicant, herself, Jane Njoki and Rachael Wanjiku who is deceased and is survived by Jane Muthoni. PW3 further stated that she and PW2 attended the meeting called by the deceased whereby he stated that upon his

demise his land should be shared equally amongst his children. She further stated that she opposes the mode of distribution as proposed by the applicant and supports that of the protestor.

9. Basically, PW2 and PW3 did not claim any share in the deceased's estate as they supported the mode of distribution proposed by the protestor in her protest dated 1st February 2019. This renunciation of inheritance rights was also contained in the mediators further agreement dated 28/03/2018.

C. The Applicant's Case

10. The applicant states that the deceased is her father in law, she was married to his son Tiras Ithenya who is now deceased. She proposes that the estate Land Parcel No. Othaya/Kiandemi to be shared into two equal halves with one half to be shared by the deceased's daughters and the other half to be allocated to her. She adds that the suit property was divided by the deceased in 1981 together with clan elders. She further adds that when the deceased was subdividing his land, the deceased had separated from his wife and his wife with the daughters moved away to reside at Mucharage Village.

11. The applicant further stated that the daughters came back to the land in 1992 after the deceased had died and they occupied the portion where the deceased was residing and cultivating. She further stated that the deceased had a meeting with his two daughters whereby he told them not to interfere with the land portion that the applicant resides on currently. She further adds that a ceremony was held where her husband gave the deceased a bull so that the deceased could give his son the piece of land. After the ceremony, the elders demarcated the land into two and they moved on one half and started living there. She further reiterated that the deceased was clear that his daughters should take the said half portion that the deceased was cultivating before his death.

12. DW2, **Joseph Waitara Gathenji** a friend to Tiras Ithenya, testified that he knew the deceased and all his children. He relied on his statement which provides that sometime in 1981, the deceased's son Tirus Ithenya, demanded to be given land as the deceased had sold a portion of his land which had tea bushes that Mr. Ithenya had planted. He therefore wanted to be compensated for the tea bushes sold with the deceased's land. The witness further states that at that time, the deceased's wife had left the matrimonial home together with the daughters. The witness stated that there was a ceremony where a bull was slaughtered for the clan members because the deceased's wife had gone back to her parents' home. The said bull was brought by the deceased's son so that he could give his son land. The said clan members were named as Moses Mbuki Macharia, Jonathan Muthui and David Wanjima Kiruki.

13. DW2 further stated that the clan members told the deceased to give his son land as he had honoured the conditions set by the deceased. The elders divided the land into two and the deceased showed his son his piece of land and the remaining portion the deceased stated that if his married daughters came back to the home, they should get that portion of the land.

14. On cross-examination, the witness stated that Mr. Ithenya slaughtered the bull so that the deceased could give him land since his mother had left the home. He states that the ceremony was according to clan traditions where a wife separates from her husband and leaves her son behind.

D. The Submissions

15. The applicant reiterates her testimony arguing that the wishes of the deceased cannot be ignored. Ignoring the deceased's wishes would disrupt the lives of the applicant and her family. The applicant adds that the protestors knew all along the wishes of the deceased and never challenged them during his lifetime. Further, the applicant submits that the allegations by the protestors that the land was to be shared into four portions is tainted with falsehoods. As for PW2, she was not married at the time the deceased told her about the sharing ratio yet if she was not married she should not have been left out of the sharing ratio. The applicant prays that the court uphold the wishes of the deceased and relies on the case of **Joseph Wairuga Migwi vs Mikielina Ngina Munga [2016] eKLR** to support her contention.

E. Issue for determination

16. The issue for determination is what the mode of distribution of the deceased's estate ought to be.

F. The Law

G. Analysis & Determination

17. It is not disputed that the deceased died intestate and had 6 children of whom two are deceased. His son Tirus Itheya is survived by his widow the applicant herein while Jane Muthoni stands in place of her late mother Rachael Wanjiku.

18. Although both parties state that the deceased shared his estate during his lifetime, the bone of contention is the mode of distribution. According to the applicant the deceased shared out his estate on 26/9/1990 whereas the protestor contends that the deceased changed his mind and shared out his property at a later date which she did not specify when.

19. As such, the question arises as to whether the deceased distributed his property during his lifetime and if he did should such distribution be taken into account. Contentions that the deceased distributed his property during his life time by just declaring his wishes is a subject that has been addressed by courts based on the facts of each case.

20. **Section 42 of the Law of Succession Act** provides that:-

Where:-

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

Property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35 of this Act;

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

21. In the event that the court finds that the deceased indeed pronounced his wishes on distribution of property, the court has a duty to consider whether such wishes were discriminatory to some beneficiaries and whether they serve the interests of justice in terms of the constitution and the Law of Succession Act.

22. In this case, the applicant says her late husband one Ithenya a beneficiary of the estate was given half of the deceased's estate while the other half was to be shared by the remaining children who are now four(4) in number including one Jane Muthoni a grandchild and whose mother Rachael Wanjiku passed on. The respondents/protestor and the rest of the siblings want the land to be shared equally between all the children. This one is based on the wishes of the deceased pronounced a few hours before he died in presence of two of his children. It was indicated that the deceased changed his mind and renounced the earlier wishes relied on by the applicant.

23. The only asset of the deceased is L.R Othaya/Kiandemi/762 measuring 6.64 acres. If the applicant's mode of distribution is confirmed, she will take 3.32 acres while the other three children will only have 3.32 acres to share with each getting 1.106acres.

24. The High Court Nyeri Succession Cause No. 580 of 1999 dealt with an issue similar to the facts of this cause. Makhadia J as then was held:-

“Unless it can be demonstrated that the wishes of the deceased were illegal, unfair or discriminatory to the beneficiaries or some of them, his wishes should be respected.”

25. The court rejected the wishes of the deceased for the reason that they were discriminatory and unfair against some beneficiaries. In this case, the applicant's proposal on distribution is contrary to the law and discriminates against the other beneficiaries in favour of one. The respondent's on the other had treats all the beneficiaries equally and is supported by the law.

26. Section 38 of the Law of Succession Act provides that all the children of the deceased will be given equal shares in the estate.

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

27. The deceased died leaving six(6) children some of whom passed on. Consequently the beneficiaries are hereby identified as follows:- Rahab Wanja Mang'ang'a, Jane Wangare Maina, Jane Njoki Mwangi and Jane Rose Muthoni who is a daughter of Rachael Wanjiku, a deceased daughter of the deceased. As I said earlier on this judgement, two daughters of the deceased namely Beatrice Wangui Mwangi and Esther Nduta Maina have renounced their rights of inheritance.

28. It is my finding that the law of distribution in intestacy succession ought to be applied in this case.

29. Consequently, Summons for Confirmation of grant dated 1st February 2019 is hereby allowed in the following terms:-

L.R Othaya/Kiandemi/762 to be shared equally among the four beneficiaries thus:-

- | | |
|---------------------------|-------------|
| a) Rahab Wanja Mang'ang'a | 1.66 acres |
| b) Jane Wangari Maina | 1.66 acres |
| c) Jane Njoki Mwangi | 1.66 acres |
| d) Jane Rose Muthoni | 1.66 acres. |

30. The certificate of confirmation to issue in the said terms.

31. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF AUGUST, 2021.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 25TH DAY OF AUGUST, 2021