



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 284 OF 2009

IN THE MATTER OF THE ESTATE OF THE LATE NJUGUNA THAGICU (DECEASED)

RENSON NYAGA NGUU.....PETITIONER

VERSUS

PERRIS MUTHONI.....1ST PROTESTOR

LUCY NJURU NGUU.....2ND PROTESTOR

MERCY WANYAGA NYAGA.....3RD PROTESTOR

JOSEPHAT NJERU GITHINJI.....4TH PROTESTOR

JUDGMENT

1. Letters of Administration in relation to the estate of deceased herein (Njuguna Thagicu) was issued to the petitioner, a grandson of the deceased. The certificate of confirmation of grant was issued on 18.02.2010. The property of the deceased include; land parcels NGANDORI/KIRIGI/2587 and NGANDORI/KIRIGI/2590 which were to be distributed to the beneficiaries herein. However the 4th respondent herein filed summons for revocation of the said grant which application was allowed in a ruling by Hon. Majanja, J. delivered on 29.05.2014 by Hon. Ong'udi.
2. On 16.11.2016, the court noted that the ruling by Hon Majanja, J. did revoke the grant but omitted to appoint an administrator but then, it was brought to the attention of the court that the estate had already been distributed therefore, the previous administrator remained put.
3. In compliance with the said orders, the petitioner filed summons for confirmation of grant dated 10.12.2018 and made his proposal in regard to the mode of distribution of the estate of the deceased. The summons was opposed by the protestors and instead, they proposed their own mode of distribution of the estate.
4. The court gave directions on filing of submissions and in compliance with the said orders, the parties herein filed their respective submissions wherein the petitioner submitted that he included all the beneficiaries who were entitled to inherit from the estate and that LR No. NGANDORI/KIRIGI/2588 was given to him, LR No. NGANDORI/KIRIGI/2589 was given to Ephantus Njagi Nguu and LR No. NGANDORI/KIRIGI/2590 was bequeathed to Moffat Njeru (petitioner's son). He further submitted that the married daughters ought not to inherit from the estate.
5. In a nutshell, the 1st to 3rd protestors submitted that the deceased's estate comprised of land parcels namely LR No. NGANDORI/KIRIGI/2587, 2588, 2589 and 2590. They submitted that the deceased in his life time transferred to his grandsons their shares and left the granddaughters' portion, in his name; that parcel number LR No. NGANDORI/KIRIGI/ 2588 was transferred to the petitioner herein while LR No. NGANDORI/KIRIGI/2589 was transferred to Ephantus Njagi Nguo. They further submitted that the only estate available for distribution are parcel number 2587 and 2590. The 4th protestor on the other hand submitted that the deceased was his maternal grandfather and that the deceased herein had 7 acres of land which before he died he allocated as follows; Renson Nyaga (petitioner) and Ephantus Njagi received 2 acres each for which they already have title deeds.
6. The remaining 3 acres is what is the subject of this succession cause and they comprise of LR No. NGANDORI/KIRIGI/2587 and LR No. NGANDORI/KIRIGI/2590 each measuring 2 and 1 acres respectively. He further submitted that the petitioner and one Ephantus Njagi had already benefitted from the estate while on the other hand, during his lifetime, he had been assigned 1 acre being his mother's share and so he welcomed the proposal of him retaining the 1 acre while his cousins (granddaughters of the deceased) share the remaining two acres.
7. I have considered the summons, affidavits of protest herein, the reply thereto and the rival submissions. The main issue for determination is the acceptable mode of distribution of the estate between the parties. I therefore proceed to determine the same.

8. It is not disputed that the parties herein are grandchildren of the deceased while the deceased had two children; Nguu Njuguna (father to the petitioner and 1st – 3rd protestors) and Elizabeth Wandu (mother to the 4th protestor).

9. I am guided by the death certificate of the deceased herein which indicates that he died in the year 1982 after the enactment of the Law of Succession Act and so the proper law that should govern the distribution of the estate herein is the Law of Succession Act (Cap 160 Laws of Kenya)

10. The deceased having died intestate, it means therefore that his estate and distribution thereof is subject to the rules of intestacy. Generally, the law contemplates that a person can either distribute his estate by way of a will or in absence of a will, the estate is subjected to the rules of intestacy. From the reading of Sections 35, 36, 38 and 40 of the Succession Act, the rules should apply where the deceased has passed on and left behind survivors. What this means, therefore, is that where a child of a deceased person has predeceased the deceased, then such a child cannot be said to be a beneficiary. The rightful beneficiary ought to be the spouse of the deceased child (who should hold the given estate in trust for the children of the deceased child) or where the deceased child is not survived by a spouse but has children, the right person as the beneficiary of the deceased's estate ought to be the grandchild of the deceased.

11. Musyoka J. in **Re Estate of Gathui Kamau Njango (Deceased) Nairobi P & A No. 172 of 2007[2013] eKLR** was of the view that where a child of deceased is dead, his or her children are entitled to take the share that ought to have gone to the dead parent.

12. The petitioner is of the view that the 2nd and 3rd protestors are not supposed to benefit from the estate of the deceased since they are married and further to that, the 4th protestor supposedly had lost his claim on the property since his mother also got married. At this point, it is of importance to remember that the mother to the 4th protestor was respectively a daughter and the petitioner a grandson to the deceased herein.

13. The petitioner further is of the view that his grandson (one Lewis Murimi Njeru) a great grandchild to the deceased herein should instead inherit LR No. NGANDORI/KIRIGI/ 2590 at the expense of the protestors.

14. Article 27 of the Constitution is on equality and freedom from discrimination which could either be directly or indirectly, based on sex, belief, culture; a further reference is made to children under Part V of the Act which outlines non-discrimination between sons and daughters or between married and unmarried daughters; in that regard, the argument that the married daughters ought not to inherit from the estate is therefore unfounded.

15. The principle of equality between children is no longer in doubt and the same was clarified in the Estate of **Lerionka Ole Ntutu (Deceased) [2008] eKLR** where the court found that married daughters are entitled to inherit from the estate of their late father. In this case therefore, the granddaughters are therefore entitled to a share of the estate of the deceased in equal measure as the grandsons. Such a share is a right and not a favour and can only be renounced by the protestors themselves of which in this case, that is not the position.

16. The protestors have testified and produced evidence before this court that indeed the petitioner had been bequeathed land measuring 2 acres prior to the deceased's death.

17. The determination of the manner in which the estate will be distributed will depend on the answer to the question whether the deceased had distributed some of his properties to some of his beneficiaries *inter vivos*? If indeed the deceased had bequeathed some of his assets to some of his beneficiaries by way of gift *inter vivos*, the court should take into account that fact.

18. Section 42 of the Law of Succession

42. Where-

(a) an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate, that property shall be taken into account in determining the share of the net intestate estate finally, accruing to the child grandchild or house.

19. In the case of **Samuel Maina Mwangi & 2 Others v Muthoni Kagiri [2013] eKLR** the Court of Appeal held in a case where the deceased had given the appellants (his sons) gifts *inter vivos* by way of first registration that: -

We are of the considered view that the said registrations in favour of the 1st and 2nd appellants were tantamount to gifts given by the deceased during his lifetime.....Therefore, the trial court was correct in holding that the parcels of land that were given to the appellant would be taken into account in distribution of the deceased's estate.

20. In the same breadth, the protestors attached a green card issued from the Land Registrar's Office in Embu showing that through transmission from the deceased herein one Renson Nyaga Nguu was the registered owner of Land Parcel No. NGANDORI/KIRIGI/2588 while Ephantus Njagi being registered owner of Land Parcel No. NGANDORI/KIRIGI/2589 measuring 0.77 ha and 0.80 ha respectively. These documents buttresses the submission made by the protestors that the deceased herein had bequeathed the petitioner land prior to his death which the petitioner equally concedes to.

21. I am guided by the two green cards which buttresses the evidence led by the protestors before this court that the petitioner herein had been bequeathed property prior to the death of the deceased and for that reason, he is not to lay claim on the remainder of the estate.

22. It is also important to note that the contents of these documents were never controverted nor disproved by the petitioner. In my

considered view, I am convinced that the mode of distribution proposed by the protestors is a fair way to dispose the estate of the deceased herein bearing in mind that the petitioner had already benefitted from the estate of the deceased herein.

23. In my considered view, I make the following orders that:

a) The 4th protestor to acquire Land Parcel No. NGANDORI/KIRIGI/2590 in whole.

b) Land Parcel No. NGANDORI/KIRIGI/2587 to be shared as follows;

i. Lucy Njura Nguo - 0.02 Ha.

ii. Perris Muthoni Nguu - 0.02 Ha.

iii. Mercy Wanyaga - 0.02 Ha.

iv. Charles Mukundi Njeru

v. David Muturi Njeru

vi. Morris Mbogo Nguu jointly to get the

vii. Diana Stacia Njeru remaining balance

viii. Wycliff Mumanthi Njeru

c) Certificate of confirmation of grant dated 18.02.2010 be and is hereby confirmed in terms of (a) and (b) above.

d) No order as to costs.

24. It is ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF NOVEMBER, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent