



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO.512 OF 2014

IN THE MATTER OF THE ESTATE OF REUBEN GATIMU NGARI - DECEASED

PERIS KARIKO.....1ST PETITIONER

GEOFFREY NGARI GATIMU.....2ND PETITIONER

VERSUS

JEREMIAH MIANO.....1ST PROTESTOR

CHARITY NYAKIO.....2ND PROTESTOR

JUDGMENT

1. This matter relates to the estate of the late **REUBEN GATIMU NGARI** who died intestate on 8.4.2014. A grant of Letters of Administration in his estate were issued to **GEOFFREY NGARI GATIMU** and **PERIS KARIKO GATIMU** on 22.9.2015. The two proceeded to file a summons for confirmation of grant dated 20.4.2016.

2. A protest against the confirmation of grant was filed by **CHARITY NYAKO GATIMU** and is dated 8.6.2016. A protest was also filed by **JEREMIAH MIANO GATIMU** and is dated 16.3.2019.

3. The court directed that the protest be heard by way of viva voce evidence. The parties adduced evidence.

4. The Petitioners in the summons for confirmation of grant had deponed that the deceased was survived by;

- **PERIS KARIKO GATIMU** - DAUGHTER
- **GEOFFREY NGARI GATIMU** - SON
- **CHARITY NYAKIO GATIMU** - DAUGHTER
- **JAMES MUNENE GATIMU** - SON
- **JOSEPH NJURAITA GATIMU** - SON
- **JEREMIAH MIANO GATIMU** - SON

These were also confirmed as the beneficiaries in the Chief's letter dated 9.6.2014.

5. The Petitioners identified the assets of the estate as follows;

- a) L.A. MUTIRA/KAGUYU/5022**
- b) L.A MUTIRA/KAGUYU/4669**
- c) ONE PERMANENT HOUSE**

d) MUNUNGA TEA FACTORY SHARES

e) BINGWA SACCO SHARES A/C NO.4107-0519591

f) FORTUNE SACCO SHARES A/C NO.4122-001803

g) MONEY IN BINGWA SACCO A/C NO.4107-0519591

h) MONEY IN FORTUNE SACCO A/C NO.0422001803

They proposed the mode of distribution as follows;

a) L.A. MUTIRA/KAGUYU/5022

CHARITY NYAKIO GATIMU - 0.12 HA

GEOFFREY NGARI GATIMU - 0.12 HA

JEREMIAH MIANO GATIMU - 0.12 HA

b) L.A MUTIRA/KAGUYU/4669

PHILIS KARIKO GATIMU - 0.12 HA

JOSEPH NJURAITA GATIMU - 0.12 HA

JAMES MUNENE GATIMU - 0.12 HA

c) ONE PERMANENT HOUSE

GEOFFREY NGARI GATIMU TO SHARE EQUALLY

PHILIS KARIKO GATIMU

JAMES MUNENE GATIMU

JOSEPH NJURAITA GATIMU

CHARITY NYAKIO GATIMU

JEREMIAH MIANO GATIMU

d) MUNUNGA TEA FACTORY SHARES

GEOFFREY NGARI GATIMU

PHILIS KARIKO GATIMU

JAMES MUNENE GATIMU

JOSEPH NJURAITA GATIMU

CHARITY NYAKIO GATIMU

JEREMIAH MIANO GATIMU

e) BINGWA SACCO SHARES A/C NO.4107-0519591

GEOFFREY NGARI GATIMU

PHILIS KARIKO GATIMU

JAMES MUNENE GATIMU

JOSEPH NJURAITA GATIMU

CHARITY NYAKIO GATIMU

JEREMIAH MIANO GATIMU

f) FORTUNE SACCO SHARES A/C NO.0422/001803

GEOFFREY NGARI GATIMU

PHILIS KARIKO GATIMU

JAMES MUNENE GATIMU

JOSEPH NJURAITA GATIMU

CHARITY NYAKIO GATIMU

JEREMIAH MIANO GATIMU

g) MONEY IN BINGWA SACCO A/C NO.4107-0519591

GEOFFREY NGARI GATIMU

PHILIS KARIKO GATIMU

JAMES MUNENE GATIMU

JOSEPH NJURAITA GATIMU

CHARITY NYAKIO GATIMU

JEREMIAH MIANO GATIMU

h) MONEY IN FORTUNE SACCO A/C NO.0422001803

GEOFFREY NGARI GATIMU

PHILIS KARIKO GATIMU

JAMES MUNENE GATIMU

JOSEPH NJURAITA GATIMU

CHARITY NYAKIO GATIMU

JEREMIAH MIANO GATIMU

6. The Protestor CHARITY NYAKIO GATIMU opposed the mode of distribution. Her contention is that the deceased owned land parcel No.MUTIRA/KAGUYU/405 which he sub divided during his lifetime into six portions which are MUTIRA/KAGUYU/4668, 4669, 4670, 4671, 4672 and 4673.

The deceased transferred these portions as follows;

MUTIRA/KAGUYU/4670 - JAMES MUNENE GATIMU

MUTIRA/KAGUYU/4671 - JOSEPH NJURAITA GATIMU

MUTIRA/KAGUYU/4672 - PERIS KARIUKO GATIMU

That the title deeds were issued as per the annexed copies of search marked CNG 2. These copies of certificates of official search support her averments.

7. It is the contention by the Protestor that JANES MUNENE GATIMU, JOSEPH NJURAITA GATIMU and PERIS KARIUKO GATIMU

are not entitled to claim anything more other than the house, Mununga shares, Bingwa Sacco shares and Fortune sacco shares. She proposes that she gets MUTIRA/KAGUYU/4669, GEOFFREY NGARI to get MUTIRA/KAGUYU/4673 and JEREMIAH MIANO GATIMU to get MUTIRA/KAGUYU/5022. She contends that she had not signed the consent on distribution as her signature was forged.

8. Jeremiah MianoGatimu also filed an affidavit of protest dated 16.3.2016. His contention is that he never signed a consent to the confirmation of grant as his signature was forged. He is opposed to the mode of distribution proposed by the Petitioners as it relates to Land parcel No.MUTIRA/KAGUYU/4669 as it is his inheritance which his father had transferred to him. He depones that he got into debts and he had to sell his car to repay upon which he transferred the land back to his father to hold in trust for him. The deceased died before he could transfer the land back to him. He lives on the land and has constructed his house thereon and planted tea bushes.

9. He further avers that the deceased owned 5.7 acres which he sub divided into six portions and gave parcel No.MUTIRA/KAGUYU/4672 to PERIS KARIUKO GATIMU, MUTIRA/KAGUYU/4673 was to be transferred to GEOFFREY NGARI GATIMU, MUTIRA/KAGUYU/4671 JOSEPH NJURAITA GATIMU, MUTIRA/KAGUYU/4670 JAMES MUNENE GATIMU, MUTIRA/KAGUYU/5022 is in the name of deceased and was meant to be transferred to CHARITY NYAKIO GATIMU.

10. He prays that land parcel No.MUTIRA/KAGUYU/4669 be transferred to him. That those who got their inheritance during his father's lifetime namely JOSEPH NJURAITA, JAMES MUNENE GATIMU and PERIS KARIKO ought not to inherit again. He has no objection to the mode of distribution proposed by the petitioners for the other properties.

11. In response to the protest, GEOFFREY NGARI depones land parcel No.MUTIRA/KAGUYU//4673 was transferred to him by the deceased during his lifetime. That the properties which are in the estate are MUTIRA/KAGUYU/4669 and 5022. That land parcel No.MUTIRA/KAGUYU/4669 was sold to JEREMIAH MIANO GATIMU by the deceased. That CHARITY NYAKIO should be contented with the proposed mode of distribution

12. The parties adduced evidence in support of the proposal made in their affidavits which I have analysed above. The issue which arises for determination is the distribution of the estate.

13. The distribution of the estate is governed by the law of Succession Act Cap.160 Laws of Kenya as the deceased died after the commencement of the act. Section 2(1) of the Act provides;

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons”.

14. The Act advocates for the distribution of the estate to the beneficiaries without discrimination on account of gender or other considerations. That is why the Act refers to Children without and distinction of male and female. Every child has a right to an equal share and has equal priority in the estate of his or her deceased parent(s). Section 29 of the Act gives the meaning of dependants. It provides;

For the purposes of this Part, “dependant” means:-

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death

Children are dependants of deceased who are entitled to inherit without prove that they were maintained by the deceased prior to his death. They are entitled to a share as of right.

The Act makes provision for distribution of the estate where a deceased is survived by children only. Section 38 of the Act provides;

Where intestate has left a surviving child or children but no spouse,

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

The court has a duty to ensure that the estate is distributed to the children equally as provided under the Act.

15. In this case there are facts which are not in dispute. These are;

1) That the Petitioners and the Protestors are children of the deceased.

2)The deceased had only one parcel of Land which is MUTIRA/KAGUYU/405 and which he sub divided during his lifetime and transferred four parcels that is MUTIRA/KAGUYU/4672, 4673, 4671 and 4670 which to PERIS KARIKO GATIMU, GEOFFREY

NGARI GATIMU, JOSEPH NJURAITA GATIMU and JAMES MUNENE GATIMU respectively.

3) Parcels No.MUTIRA/KAGUYU/5022 and 4669 are in the names of the deceased.

The dispute is on the distribution of land parcels No.5022 and 4669. From the facts of this case it can be presumed that the intention of the deceased was to give each of his children a piece of land. Where the wishes of the deceased can be discerned from the manner in which he has shared out his estate, the court will respect such wishes unless they are discriminatory or are repugnant to justice and morality.

16. From the above analysis those who did not get a share are Jeremiah MianoGatimu as his portion is in the name of the deceased and Charity NyakioGatimu. The Act allows court to make provision for dependants.

Section 26 of the Act provides;

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate”.

This means that the Court should ensure that each dependant gets a fair share of the estate. The **Act at Section 27** has given court unfettered discretion to order a specific share of the estate to be given to the dependant.**Section 28 of the Act** gives court what I consider as guidelines on what to take into account when making an order for the provision of dependants.

17. The deceased had settled part of the estate for some of the dependants. When considering the distribution of the net estate, the court takes in consideration such settlements. **Section 42 of the Act** provides;

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.

18. In this case two dependants had not received land. The 1st protestor JEREMIAH MIANO GATIMU claims parcel No.MUTIRA/KAGUYU/4669 which he testified that was given to him and has settled on it.

The 1st Petitioner confirmed this in his testimony and his affidavit in reply to the protest. The six sub divisions were equal in size. I find that the 1st Protestor should get parcel No. MUTIRA/KAGUYU/4669 so that he is at per with the other beneficiaries.

The portion measures 0.36 ha which is the same size with the rest.

19. The 2nd Protestor testified that he wants the land to be distributed equally. The Petitioners had said she would not get land as she is married. The only other portion which is remaining is parcel No.MUTIRA/KAGUYU/5022. The certificate of official search annexed to the affidavit of protest shows that it measures 0.36 Ha and is in the name of the deceased. The Protestor CHARITY NYAKIO GATIMU is a dependant who ranks in equal priority with the rest of the dependants as she is a child of the deceased. In distributing this parcel, consideration must be had to the properties which were settled to the other dependants during the lifetime of the deceased. The Protestor is entitled to a portion equal to what other beneficiaries received. In the circumstances the 2nd Protestor is entitled to parcel No.MUTIRA/KAGUYU/5022 so as to be at per with the rest of the children of the deceased and the only beneficiaries. The 1st Petitioner GEOFFREY NGARI GATIMU claims parcel No.MUTIRA/KAGUYU/4673 which is not in dispute. The contention by the Petitioner that the 2nd Protestor did not claim land from the deceased during his lifetime cannot stand. It is not right to claim an inheritance during the lifetime of the owner. It amounts to distributing the estate when the owner is still alive. That the Protestor did not demand land during the lifetime of the deceased is not a bar for her to claim the net estate. This is the right time for her to claim her share. Similarly an allegation that the deceased had sold a portion of the land to off-set loan by the 2nd Protestor, whose are matters which are not for consideration by this court as he did it when he was alive and he was at liberty to deal with his property the way he wished.

Embu HC Appeal 19/07 MwaiNdathi –Vs- Njoka, WanjiruKaranja Judge, (as she then was);

“Contrary to what some people seem to think, a parent has no responsibility whatsoever to look after and care for grown up adults as a matter of right. A parent does not work hard and buy land so he can give it to his children as a matter of right”

The Court deals with distribution of the net estate and takes into consideration as I have said earlier with the settlement made to beneficiaries during his lifetime. In any case the Petitioner did not discharge the burden to prove the allegations that 2nd Protestor had taken a loan or that a plot at Kagumo was sold. It is trite law that he who alleges bears the burden of proof. **Section 107 of the Evidence Act** provides;

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he

asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

I am in agreement with the finding that the proprietor has full right to deal with his property as he deems fit. The allegations by the Petitioner are not proved and must be ignored. His witness DW2 was of no help because he said the deceased sold what was his property in his lifetime. Furthermore the plot remained mysterious as no land parcel number was given. The evidence is of no probative value. There is nothing to prevent the Protestor from getting his entitlement from the estate.

The deceased as admitted by the Petitioner did not evict the Protestor in 2011 instead he allowed him to settle on the land and he built a house. The Petitioner stated that the Protestor could not seek permission to build because the land was his after his father gave him. The Petitioner has no right or authority to evict the Protestor from the parcel of land which he has admitted was given to him by the deceased. The Petitioner further admitted the deceased is the one who distributed the land and he lived after he sub divided the land. The clear intention of the deceased was to give each child an equal share. This is what court should enforce by ensuring that each child gets an equal share.

IN CONCLUSION

20. I hold that the Protestors are entitled to equal portion of the estate and since the deceased had sub divided his land into six portions according to the number of his children, the remaining two portions should go to the children who did not get anything during the lifetime of the deceased.

The Protestors did not come to court with clean hands. They displayed ill motives as they evicted the Protestor, destroyed his house and took possession of his portion. They intermeddled with the estate even before the grant was confirmed and yet the Petitioner admitted in cross-examination that his father did not tell him to take land parcel No.4669. This cannot be entertained.

I order that the 1st Protestor JEREMIAH MIANO GATIMU will get the whole share of land parcel No.MUTIRA/KAGUYU/4669 while the 2nd Protestor CHARITY NYAKIO will get the whole share of parcel No.MUTIRA/KAGUYU/5023.

This ensure equal distribution as follows;

- | | |
|---|---------|
| 1. JAMES MUNENE GATIMU – MUTIRA/KAGUYU/4670 MEASURING | 0.36 HA |
| 2. JOSEPH NJURAITA GATIMU - MUTIRA/KAGUYU/4671 | 0.36 HA |
| 3. PERIS KARIKO GATIMU - MUTIRA/KAGUYU/4672 | 0.36 HA |
| 4. GEOFFREY NGARI GATIMU - MUTIRA/KAGUYU/4673 | 0.36 HA |
| 5. JEREMIAH MIANO GATIMU – MUTIRA/KAGUYU/4669 | 0.36 HA |
| 6. CHARITY NYAKIO GATIMU- MUTIRA/KAGUYU/5022 | 0.36 HA |

21. Since there was no dispute on the distribution of the other assets, I order that they be distributed equally.

The protest succeeds. The grant shall be confirmed and a certificate be issued as per paragraphs 20 and 21 above.

Each party will bear its own costs.

Dated at KERUGOYA this 23rd day of January 2020.

L. W. GITARI

JUDGE