



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 537 OF 2014

IN THE MATTER OF THE ESTATE OF NAFTALY WACHIURI WAMUGUNDA (DECEASED)

IRENE NJERI WACHIURI.....PROTESTOR/ 2ND PETITIONER

VS

PATRICK WAMUGUNDA WACHIURI.....1ST PETITIONER

JANE MUTHONI MURAGURI.....3RD PETITIONER

RULING

1. The estate relates to the late **NAFTALY WACHIURI WAMUGUNDA (DECEASED)** who died on the 31/10/2012; he died intestate and his estate is comprised of the properties listed hereunder:

(i) Nyandarua/Pesi/1243

(ii) Nyandarua/Pesi/658

(iii) Nyandarua/Pesi/573

(iv) Nyandarua/Pesi/710

(v) Nyandarua/Pesi/576

(vi) Nyandarua/Pesi/577

(vii) Nyandarua/Pesi/574

(viii) Nyeri/Mweiga/1149

(ix) Nyeri/Mweiga/1156

(x) Nyeri/Mweiga/1155

(xi) Nyeri/Mweiga/1153

(xii) Nyeri/Mweiga/1154

(xiii) Nyeri/Mweiga/1160

(xiv) Nyeri/Mweiga/1669

(xv) Muruai Scheme Plot No.457 Nyandarua

(xvi) Eusonyiro/Suguroi Block VIII/701

(xvii) Shares in Taifa Sacco Ltd Vide Account number 6020500327

2. As set out in the Chiefs letter dated the 10/03/2014 the deceased was survived by the following children;

- (i) Mary Wanjiku Ndungu - daughter
- (ii) Jane Muthoni Muraguri – daughter
- (iii) Patrick Wamugunda Wachiuri– son
- (iv) Philip Wachiuri Wangechi - grandson
- (v) Mercy Wangui Wangechi –granddaughter
- (vi) Mary Wanjiru Wangechi - granddaughter
- (vii) Isaac Wachiuri Wambui –grandson
- (viii) Alice Nyambura Kuria – daughter
- (ix) Peter Mumunya Wachiuri – (now deceased)
- (x) Nancy Wamuyu Wachiuri – daughter
- (xi) Irene Njeri Wachiuri - daughter

3. Four (4) of the children of the deceased petitioned for Letters of Administration and a Grant was issued to them jointly on the 22nd September, 2014 this Grant was later revoked due to the demise of one of the petitioners named Peter Mumunya Wachiuri and a fresh Grant was issued on the 16/03/2016 to the remaining three petitioners namely Patrick Wamugunda Wachiuri ('Patrick'), Irene Njeri Wachiuri ('Irene') and Jane Muthoni Muraguri ('Jane'); the Petitioners Patrick and Jane applied for the Confirmation of the Grant 21/06/2017 and therein proposed their mode of distribution; the petitioner Irene filed her Affidavit of Protest against the summons for confirmation on the 28/06/2017 and therein gave her reasons for protesting and included her own proposed mode of distribution of the deceased's estate.

4. Directions were taken that the matter proceed for hearing by way of 'viva voce' evidence; after the hearing hereof both parties were directed to file and exchange written submissions; hereunder is a summary of the respective parties claims.

THE PROTESTORS' CASE

5. The protestor is a co-administrator and a daughter to the deceased; she testified and called three (3) witnesses; her claim was that the application for confirmation was prepared and filed without her knowledge, consent or input; she further stated that the respondents never sought for the consent of one of the beneficiaries named Ricarda Mumbi Ndiritu who was a daughter in law of the deceased; in short both were never consulted and therefore the proposed mode of distribution was unacceptable;

6. Her grievance was that the respondents had awarded themselves bigger shares than what they were entitled to; and according to her calculations she had been given less than what she was entitled to; her entitlement consisted of 1.5 acres in Nyeri/Mweiga also referred to as Rabura Scheme which she had occupied from the time her father was alive and had been in occupation thereof for the last eleven (11) years; the respondents had allocated it to a sister Nancy Wamuyu who had moved in and destroyed her crops; she further testified that there were two siblings named Mary Wanjiru and Alice Nyambura who had already been gifted by the deceased during his lifetime; yet the respondents propose to give them additional portions;

7. Her proposal was that the estate of the deceased be distributed in accordance with the Will made by the deceased on the 25/03/2012;

8. To buttress her case the protestor called her sister Mary Wanjiru Ndungu (**PW2**) as a witness; who stated that even though she had signed the consent she had a problem with the mode of distribution as it was setting her on a collision course with the protestor; reason being that the deceased had left Irene in the homestead situate on Nyeri/Mweiga/1669 because she was unmarried; the witness's evidence was that this arrangement should remain and she was willing to take any portion situate anywhere else apart from her father's homestead;

9. Joseph Ndungu Wanjuki (**PW3**) stated he was a cousin to the deceased and was the Chairman of the clan; he confirmed that he had written a Will with the deceased and that he had signed it together with the deceased; the deceased died five (5) months after writing the Will and its contents were read out to the deceased's children on the 8/12/2012;

10. The original Will was given to the 1st respondent who had explained to him the difficulty he had in implementing the Will as he thought it was defective as some siblings had been left out; he gave the example of **PW2** who had been left out of the Will because the deceased had already gifted her during his lifetime; his position was that despite there being persons left out the Will ought to be followed;

11. John Muriithi Wanjuki (**PW4**) stated that he was the deceased's cousin and also a clan member; that he was present at the reading of the

Will and there was no objection raised by the children; that **PW2** and Nyambura were both present and though they had been left out on that day they had raised no complaints; reason being that the deceased had provided them with their portions during his lifetime;

12. Thereafter he had been summoned to the Chiefs Office as the beneficiaries were not in agreement and had been constantly called upon not to help in distribution of the deceased's property but to resolving their conflicts;

13. After this witness testified the protestor closed her case; it was her submission that the estate of the deceased be distributed as per the wishes of the deceased which were set out in the Will; and prayed that the court dismisses the respondent's application which she deemed to be selfish; and prayed that the protest be allowed;

RESPONDENTS CASE

14. In response to the protestors claims the 1st respondent testified and supported their proposed mode of distribution as outlined in the Supporting Affidavit annexed to their application for confirmation of the grant at paragraph 5(a) – (m); and all the beneficiaries supported the same except for the protestor and Ricarda Mumbi Ndiritu;

15. He stated that the protestor had two sets of proposals which were unreasonable; one set was contained in the Affidavit of Protest and the other set emerged in her evidence pertaining to a Will; the proposal set out by the protestor in the Affidavit of Protest was to have the estate distributed equally among all the beneficiaries; but in her testimony the protestor abandoned her affidavit of protest with regard to the distribution of the deceased's estate; and together with her witnesses they made reference to a document that they referred to as a Will of the deceased and proposed that the distribution be effected as per the alleged Will; and when cross-examined the protestor confirmed that she partly supported the respondents proposal as it was in line with the deceased's wishes;

16. The respondent contended that the protestors two sets of proposals did not recognize the rights of the purchasers who had bought part of the estate from the deceased; which rights the respondent had recognized and had allocated to them their due and respective shares; he stated further that the protestor did not take into consideration the fact that the beneficiaries had been in occupation and had developed parts of the estate which had been allocated to them by their late father;

17. That parties are bound by their pleadings and that the protest should be dismissed as the protestor had failed to prove the same; he prayed that the estate be distributed as proposed by the respondents which proposal had been accepted by all the other beneficiaries;

ISSUES FOR DETERMINATION

18. After hearing the presentations of the respective counsel and reading the written submissions this court has framed the following issues;

- (i) Whether the Will made by the deceased on the 23/05/2012 is valid;
- (ii) Distribution of the estate

ANALYSIS

Whether the Will made by the deceased on the 23/05/2012 is valid;

19. The court record reflects that the deceased herein was survived by the eleven beneficiaries named hereinabove; the deceased is alleged to have died leaving behind a Will that is dated the 23/05/2012; that four (4) of the children of the deceased had petitioned for a Grant of Letters of Administration Intestate and the court record reflects that none of them applied for a Grant of Probate of any Will of the deceased; no objection having been raised a Grant of Letters of Administration Intestate was issued to the four (4) jointly on the 22nd September, 2014; this Grant was later revoked due to the demise of one of the petitioners named Peter Mumenya Wachiuri and a fresh Grant was issued on the 16/03/2016 to the remaining three petitioners namely Patrick Wamugunda Wachiuri ('**Patrick the 1st respondent**'), Irene Njeri Wachiuri ('**Irene the protestor**') and Jane Muthoni Muraguri ('**Jane the 2nd respondent**');

20. The respondents proceeded to apply for the confirmation of the Grant and the protestor accordingly lodged her Protest in which she proposed that the estate be distributed equally among the beneficiaries; when testifying it was at this point that the issue of the Will was raised by the protestor and together with her witnesses wanted the Will to be adhered to; and contended that the respondents had made their own alterations thereto;

21. This court is perfectly alive to the fact that the alleged Will had never been probated; and bearing these circumstances in mind and from the evidence tendered this court can safely conclude that the will alluded to was at all material times meant to be a written Oral Will;

22. The question then arises as to whether the oral will made by the deceased is valid? Apart from the respondents submitting that a party is bound by their pleadings there was no real challenge to the Will by them; and it is therefore left to this court to ascertain whether the Will alluded to by the protestor is properly established in law and should therefore be adhered to by the beneficiaries;

23. The applicable law is found at Section 9 of the Law of Succession Act.

24. The Will was drafted in the Kikuyu language and translated to English and a copy of the will and the translation were both annexed to the protestors Affidavit of Protest; the deceased herein made the Will on the 23/05/2012; his date of death is not disputed as being the 31/10/2012; a copy of the death certificate is in the court record and it verifies the date of death; the documents demonstrate that the period

from the making of the will to the date of the deceased's demise translates to a period of five months; in his evidence **PW3** also confirmed that the deceased died five months after they made the Will;

25. The law provides that the oral will shall be valid if the testator dies within a period of three (3) months from the date of making the will; secondly, the evidence of the protestor and **PW3** was that the Will was prepared by her father and that he signed it together with **PW3** (Joseph Ndungu Wanjuki); again the law provides that for a such a will to be valid it must be made before two or more competent witnesses;

26. The respondent in his testimony stated that he had taken the Will to an advocate who had confirmed that it was defective;

27. This court concurs that the Will is defective as the requirements of a valid Oral Will have not been met; and for those reasons the Will made by the deceased on the 23/05/2012 is found to be invalid.

Distribution of the estate

28. The will has been found to be invalid therefore there can be no distribution in terms of the will as proposed by the protestor; there being no agreement between the parties on the mode of distribution of the deceased's estate this court is therefore tasked with this duty;

29. The respondent's application for confirmation indicates the beneficiaries as listed hereunder;

- (i) Mary Wanjiku Ndungu
- (ii) Jane Muthoni Muraguri
- (iii) Patrick Wamugunda Wachiuri
- (iv) Philip Wachiuri Wangechi
- (v) Mercy Wangui Wangechi
- (vi) Mary Wanjiru Wangechi
- (vii) Isaac Wachiuri Wambui
- (viii) Alice Nyambura Kuria
- (ix) Peter Mumenya Wachiuri—(deceased) survived by Ricarda Mumbi (wife)
- (x) Nancy Wamuyu Wachiuri
- (xi) Irene Njeri Wachiuri

30. The protestor testified that the respondents never sought for the consent of one of the beneficiaries named Ricarda Mumbi Ndiritu who was a daughter in law of the deceased and a widow of Peter Mumenya Wachiuri; the respondents countered this by stating that the said Ricarda had proved to be difficult as she was siding with the protestor so as to cause trouble;

31. Upon perusal by this court of the respondent's affidavit in support of the application for confirmation it is noted that the name of Ricarda Mumbi wife to the late Peter Mumenya Wachiuri appears as one of the persons entitled to benefit from the estate; the provision made for her is as set out hereunder;

- (i) 1 acre in Nyandarua/Pesi/1243/573/710/658
- (ii) Share in Compensation from Kenya Government
- (iii) 3 acres in Nyeri/Mweiga/1669
- (iv) 0.25 acres in Nyeri/Mweiga/1669 to be held jointly with the protestor, respondents and others;
- (v) 0.1ha in Nyeri/Mweiga/1669;
- (vi) Shares in Taifa Sacco Ltd

32. The above distribution to Ricarda amounts to seven parcels of land with a total acreage of 7.3 acres; but it is noted that the Consent document is devoid of her signature; though handsomely provided for Ricarda did not append her signature on the Consent; the exact reason why Ricarda hadn't signed the Consent did not come out clearly in the protestors evidence; the 1st respondent alluded to Ricarda siding with the protestor so as to cause trouble; but from the evidence tendered the courts presumption is that there was trouble on the ground arising from encroachment and swapping and that Ricarda was not in agreement with the respondents mode of distribution;

33. The protestor contends that there was discontentment amongst the family members as the 1st respondent had allocated to himself more portions and more acreage than the portions distributed to the protestor and the other family members; hereunder is the extract of the 1st respondents proposed mode of distribution to himself;

- (i) Share in Government compensation
- (ii) Nyeri/Mweiga/1156 – 0.05 Ha
- (iii) Nyeri/Mweiga/1155 – 0.05 Ha
- (iv) Nyeri/Mweiga/1669 – 4 acres
- (v) Nyeri/Mweiga/1669 – 0.25 Ha
- (vi) Shares in Taifa Sacco Ltd

34. His parcels are four in number and the total acreage is approximately 4.3 acres; whereas the shares the respondents propose to distribute to the protestor are four parcels of land totaling to approximately 5.3acres; an extract of the protestors proposed portions is as follows;

- (i) 0.5 acres in Nyandarua/Pesi/1243/573/710/658
- (ii) Government compensation
- (iii) 3 acres in Nyeri/Mweiga/1669
- (iv) 0.25 acres in Nyeri/Mweiga/1669 – jointly with all the family members
- (v) 0.1 Ha in Nyeri/Mweiga/1669
- (vi) Shares in Taifa Sacco Ltd

35. Clearly the forgoing breakdowns negates and controverts the protestor's submission that the 1st respondent proposed to allocate to himself more portions and more acreage than what was distributed to the protestor and the other family members;

36. From the evidence it is not the size of the portions that has caused the disagreements; the seed of the dispute and the acrimony appears to have been planted by the 1st respondent in the proposed encroachment and distribution of parcel no. Nyeri/Mweiga/1669 where the family home stead is located and the portion of land measuring three (3) acres where the protestor had been cultivating; the 1st respondent under cross-examination confirmed that there was encroachment; the respondents appear to have placed **PW2** and Nancy on the portion claimed by the protestor; who contends that it was allocated to her by the deceased during his lifetime and that she had possession and occupation thereof; **PW2** corroborated this evidence and stated that where the respondents had also placed her (**PW2**) that this had set her on a collision course with her sister; she confirmed that their late father had granted the protestor possession of the family homestead and that the protestor had been in occupation of the same;

37. **PW2** alluded to trouble on the distribution on the ground; **PW4** also alluded to being constantly called to resolve the family disputes related to the estate; the protestor also brought up the clash with her sister Nancy who had invaded her property and destroyed her crops;

38. There is no dispute as to the properties that comprise the estate of the deceased; there is also no dispute as to the properties that had already been sold to some purchasers by the deceased during his lifetime; although these purchasers are not set out in the liabilities section of the petition nevertheless there being no objection raised by the protestor or the other beneficiaries this court will overlook this factor and will not interfere with the proposed mode of distribution to these persons;

39. It is not a disputed fact that there is no surviving spouse therefore the applicable law for the distribution of the deceased's property is found at Section 38 of the Law of Succession Act; the section provides for distribution of an intestates' state in equal shares amongst the surviving children of the deceased;

40. In this instance the portions that are earmarked for distribution to the purchasers shall remain as proposed by the respondents;

41. This court has taken into account the undisputed fact that the protestor is the last born in the family and the fact that her rights to the homestead stem from possession and occupation and that these rights override the interests of the other beneficiaries; **PW2** is agreeable to being reallocated elsewhere; and the respondent did not deny that there had been swapping; therefore this court deems it fit that the respondents make provision of the family home to the protestor within her share of the deceased's estate; and that there should be no sharing or swapping of this portion;

42. Distribution of the estate after taking out the purchasers shares and the 0.25 acres where the family homestead stands, the net remainder of the estate shall be distributed equally amongst all the beneficiaries;

43. The upshot is that this court finds the protest is found to be partially meritorious; the respondents proposed mode of distribution is found to be unfair and unreasonable.

FINDINGS AND DETERMINATION

44. For the afore-going reasons this court makes the following findings and determination;

- (i) The Will made by the deceased on the 23/05/2012 is found to be invalid;
- (ii) The Protest is found to be partially meritorious;
- (iii) The respondents proposed mode of distribution is found to be unfair and unreasonable;
- (iv) The properties comprising the estate of the deceased shall be distributed in terms of paragraphs 41 and 42 hereinabove; the Grant is hereby confirmed accordingly.
- (v) The parties are at liberty to apply;
- (vi) This being a family matter each party shall bear their own costs.

It is so ordered.

Dated, Signed and Delivered at Nyeri this 30th April, 2020.

HON. A. MSHILA

JUDGE.