



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

SUCCESSION CAUSE NO. 348 OF 2013

(FORMERLY EMBU SUCCESSION CAUSE NO. 369 OF 2008)

IN THE MATTER OF THE ESTATE OF BEDAN GACHUBIRI KATHAMARI (DECEASED)

CYPRIAN NYAMU BEDAN.....PETITIONER

VERSUS

MICHEAL NYAMU BEDAN.....1ST PROTESTOR

JOSEPH NJAGI.....2ND PROTESTOR

JUDGMENT

1. This matter relates to the Estate of Bedan Gachubiri Kathamari (deceased). The deceased who died inte-estate on the 18th December, 1999. A grant of letters of administration was issued Cyprian Nyamu Bedan, Micheal Nyaga Gachubiri, and Solomon Gachoki Bedan on 4th June, 2010.

2. Cyprian Nyamu Bedan filed a summon for confirmation of grant dated 15th November, 2010, a further summon for confirmation of grant was filed by Micheal Nyaga Gachubiri on 2nd November, 2010.

3. On 15th of February, 2015 the applicant in the application dated 15th of November, 2010 was listed as a protestor by **Cyprian Nyamu Bedan**.

4. He proceeded to file an affidavit of protest against confirmation of grant sworn on th December, 2010. Directions were taken that the affidavit of protest be heard by way of Viva Voce evidence. The parties then proceeded and adduced evidence. For the protestors evidence was adduced by Solomon Gachoki Bedan (Pw1) who testified that Bedan Gachoki Gachubiri now deceased is his father, he had two wives who are now all deceased. He had seven sons and three daughters from the two houses, all the daughters were married. The deceased had a parcel of land Ngariam/ Kabare/ 129 which measures 10 acres. The deceased had sub-divided his land and distributed to his five children and that is the way they have occupied the land and developed it.

5. The deceased had applied for the consent of land control board proposed to sub-divide his land into six portions, five portions measuring 1.8 acres, and one portion measuring 1.5 acres. He obtained a consent to sub-divide the land on 8th of December, 1992.

6. A surveyor was instructed and mutation was done. Sub-dividing the land into six portions.

7. The deceased ensured that each person settled on his respective portion. Cyprian Nyamu settled on; Parcel number 443,

Micheal Nyamu settled on parcel number 444

Monica Njoki settled on parcel number 445

William Icoigo settled on parcel number 446

Solomon Gachoki settled on 447 and Solomon Njagi settled on 448.

8. The deceased made sure that they settled on their respective portions. Cyprian Nyamu lodged a caution and so the new numbers could come out, and the deceased died before the Title deeds could be issued.

9. Before the deceased died he called all the members of the family and said that the land will stay how it was sub-divided, and he had said that when he was not sick or drunk.

10. Cyprian had a case with the deceased at Nyeri number 107 of 1993 and he was sued together with Cecily Muthoni, and he wanted the deceased to give them land more than what the deceased had given.

11. The deceased refused and the proceedings Exhibit number. 4 were produced in court. They lost the case and they were ordered to pay cost. The costs were Kshs; 76,400/= and they did not pay the costs.

12. The deceased was also sued by Fausto Mugo Bedan who is now deceased, in the District Tribunal but the case was dismissed and the Tribunal said he could not be given land because he had been given land at Karaba. Fausto is not entitled to get anything out of Ngariama/Kabare.

13. The deceased (Bedan Gachubiri) was living on land parcel number; 445. The deceased had gone before an advocate to make a **will**, and the witness (Pw1) was a witness when the deceased made the will, in respect of parcel number 445 and bequeathed it to Monica Njoki Lucas. He produced the will made on 8th December, 1998 as exhibit. 6. At paragraph 22 of his affidavit he has proposed how the land should be distributed. Cyprian should get one portion.

14. The second witness called by the protestor is Micheal Nyamu and his testimony is that the deceased Bedan Gachubiri is his father and he adopted the evidence of Pw1. He has sworn an affidavit of protest on 29th of April, 2014 which he adopted as his evidence. He testified that the deceased had distributed his land and had shown each beneficiary his or her portion.

15. He further told the court he is aware of a written will by his father giving his sister 1.5 acres out of land parcel number **Ngariama/ Kabare/ 129**. Fausto Mugo was not given a share of that land because he had been given land by his father at Mwea. He further testified that he was present when his father was taken to hospital and he said the way he distributed the estate is how they should live. He was taken to Karira hospital where he was admitted and he affirmed that the way he distributed the land is how it should be.

16. The deceased was in hospital and after one day he passed away. The deceased had three daughters and apart from Monica the other daughters were not given land as they were married. Monica was given land because she is the one who took care of him when he was sickly. Monica Njoki (Pw3) testified that the deceased is her father and before he died he owned land parcel number **Ngariama / Kabare/ 129** measuring 10 acres. She told the court that she is aware before the deceased died he had sub-divided the land into several portions.

17. One of the portions is Ngariama / Kabare/ 445. The deceased made a will and he gave that portion of land to her. The land parcel number was registered in the land office. Cyprian Nyamu Bedan had placed a caution on the land, and she produced the will which was made by the deceased. She told the court that the deceased gave her a parcel of land because he wanted peace at home, and she used to assist the deceased and take care of him.

18. For the petitioner Cyprian Nyamu Bedan (Dw1) testified that he filed a summons for confirmation of grant and a supporting affidavit which he asked the court to look at. He told the court that the deceased had 10 ½ acres of land and his proposals that the brothers and sisters share the land equally. He told the court that he was not aware of a will by his deceased father giving his sister a piece of land and he was not present when the surveyor came to the land.

19. He further told the court that he does not live on the land and he had placed a caution on the land because the deceased had given land to one house and omitted one house. He had sued his father because of giving some children land and he ruled that he gives them land. He further told the court that his brothers were objecting that Cecily and Lakada should not get land, I wanted them to get land. Fausto had land at Mwea and living in Mwea. He told the court that he did not know when his father was ailing and was told he had already passed away. He testified that the deceased had allocated land, his house was destroyed and things carried away and he filed Succession.

20. In cross - examination he admitted that he had sued his deceased father and Cecily at Nyeri High Court. He said he wants to be allocated land with his sister. He denied that the case was dismissed. But admitted that he was told to pay him costs. He also admitted that he was aware that the deceased went to the land board for consent to sub-divide the land, but he said he was not aware he given consent. He admitted he was given 1.8 acres, Fausto Mugo Bedan who is his step -brother has land which he was allocated by the Government and not by his deceased father.

21. He further stated that the deceased had sued him so that he could go to his land at Mwea at the Tribunal, and he was told by the Tribunal to leave his father's land and go to his land at Mwea. He further confirmed that he is aware that Fausto moved to Mwea. He further stated that the deceased did not make a will. The deceased had talked, and said he will give his all children land including daughters. He stated that he was not present when the deceased was taken to hospital.

22. Dw2 Simon Nyaga Mugo testified that his Father is Fausto Mugo and his mother was Salome Fausto who is deceased. He testified that he was representing the family of Fausto and he told the court that he supports the evidence of Cyprian Mugo that the land be shared equally. He told the court that his deceased father was told to go to his land, and to date they have never seen

the land. The land is said to be in Mwea but he does not know where it is and that he does not know how (Fausto) he got the land.

23. He further told the court that they were chased from the land of the deceased in 1994 they went and rented a house, and later they bought land at Kariru parcel number 126 and 127 and they are claiming 1 ½ acres from the land of the deceased (Gachubiri Bedan).

24. In cross-examination he admitted that his deceased father had a land dispute with the deceased in the Land Dispute Tribunal. They have not leaving on the land of the deceased as they were chased away and left their house on the land. He also admitted that the land was sub-divided by his grandfather and they don't have a place they can get land on the grandfather's land.

25. Cecily Muthoni (Dw3) testified that she is a daughter of the deceased and told the court that she would like the land to be shared equally.

26. In cross-examination she admitted that they had sued the deceased in Nyeri, claiming land from him and they were told to go back and he gives them land. The deceased did not give them land. She also admitted that the Court ordered her brother to pay costs and she further told the court that she is not aware that the deceased had sub-divided land because they were not called, and she told the court that she would not agree with his wishes because she belongs to the home.

27. At the close of the Petitioner's case the parties agreed to put in written submissions, and for the protestors' submissions were filed by Macharia Muraguri Advocates, while those of the petitioner were filed by Anne Thungu & Company Advocates.

28. For the Protestors it is submitted that they have proved their protest as required and pray for Judgment to be entered in their favour and they propose that land parcel Ngariama/Kabare/ 129 be distributed as follows;

(i) Cyprian Nyamu Bedan 1.8 acres.

(ii) William Ichigo Bedan 1.8 acres to be given to his wife Ann Wawira Ichigo who was substituted after her husband died.

(iii) Micheal Nyamu 1.8 acres

(iv) Solomon Gachoki Bedan 1.8 acres

(v) Joseph Njagi Bedan 1.8 acres

(vi) Monica Njoki 1.5 acres.

29. For the Petitioner it is submitted that the deceased died inte-estate as he left no written will and the cause is filed as inte-estate succession and no will was produced to show the deceased wishes.

30. The protestor produced a mutation showing the deceased land had been given new numbers, he also produced letter of consent dated 8th December, 1992 showing that the land control board had given consent for **Ngariama/ Kabare/ 129** to be divided into five portions of **1.8** acres each and one portion of **1.5** acre.

31. That the consent was given under mysterious circumstances as the land was cautioned by the Petitioner on 27th November, 1991 yet the board gave consent for sub-division to caution the land.

32. The protestor said they brought a surveyor in the ground behind the petitioners back and subsequently he was relocated and Fausto Mugo left without land. However, the sub-divisions were not registered. The deceased died having not distributed his land or written a will, and he urged the court to distribute his land according to the law. He relies on **Section 38 of the Law of Succession Act**. Which provides that:

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

33. He submits that the mode of distribution made by the Petitioner is in accordance with the law and makes provision for all the children and they urge the court to confirm the Grant in those terms. The proposed mode of distribution by the Protestors' have left out some of the children.

34. On the issue of the married daughters, the proposed mode of distribution by the married daughters is contrary to Section 38 of the Law of Succession Act in that it has left out the daughters of the deceased from the first house namely ALICARANDA WAGATWE BEDAN and SICILY MUTHONI and the children of the late FAUSTO MUGO.

35. The protestors in their evidence stated that the married daughters were not supposed to inherit and that is why, they left

out their daughters of the first house. He submits that this is contradictory as Monica Wanduma of the Second house who is married wants to inherit 1.5 acres of the deceased land, a married daughter of the deceased to inherit.

36. Further the issue of married daughters not to inherit was a Kikuyu Custom which is now against the law, morality, repugnant and overtaken by the Constitution of Kenya 2010 which provides that all individuals are equal within the Law. That **Section 38 of the Laws of Succession Act** does not discriminate between children of the deceased. One inherits regardless of whether one is male or female married or unmarried.

37. **On the issue of the case that** the deceased (Bedan Gchubiri) had at Nyeri High Court with Cyprian Nyamu and Sicily Muthoni who wanted their father to give them land during his lifetime. It is peculiar that the protestors did not attach a decree of the court or a judgment to show how the case was determined or that the Petitioner was found liable to pay costs to his father amounting to Kshs; 76, 410/=.

38. It is therefore strange for the protestors to claim that the court had ordered the deceased to transfer 1.8 acre to the petitioner, and that the court had held that SICILY MUTHONI could not inherit land as she was married.

39. It is further submitted that land parcel Ngariama / Kabare/ 129 is still in the name of the deceased and there was no order lodged against the Title to show that it was sub-divided by an order of the court.

40. On the issue of the case with FAUSTO MUGO the protestors and Fausto Mugo are from the same house, and the protestors also testified that that Fausto Mugo should not inherit his father's land as they had a case with the deceased at Gichugu Land District Tribunal which was between FAUSTO MUGO and his father BEDan GACHubiri and the award was made on 27th January, 1992 that FAUSTO MUGO should not force his mother to give him land, but should approach his father with humility.

41. It is not true as alleged by the protestors that the award stated that Fausto Mugo should not get land from his father. The deceased died in 1998 and no one can tell if FAUSTO MUGO approached his deceased father with humility and desired to give him land. Most importantly there is no evidence that the award was filed in court and adopted as a court order. The award has no legal standing concerning this case, as there is no order availed to this court made by the Land District Tribunal or Gichugu law that can affect how land **Ngariama/ Kabare / 129** as to how it should be distributed.

42. It is further submitted that Fausto Mugo was not given land at Mwea. Simon Nyaga who is his son clarified that his father was not given any land by the clan, but had balloted for land in Mwea Scheme, but he was never allocated the land by the Government.

43. That the son of the FAUSTO MUGO testified that the protestors evicted the family from the land when FAUSTO MUGO died and live on rented premises.

44. IT is further submitted that one cannot fail to inherit his father's property due to the fact that he has other land whether given by the clan or not.

45. On the issue of the activities during the day that the deceased died, petitioners submit that the deceased stated that his married daughters should not inherit. It is peculiar that he did not call the said daughters or the petitioner to witness their father's words and yet they stayed in hospital that day. The Protestor stated that their father was very sick and one wonders if he was thinking, and stating in his pain how his daughters of the first house could not inherit. One wonders if he was in a somber mental state in his sickness to declare how his earthly properties were to be distributed.

On the issue of Monica Wanduma's contribution;

It emerged that she is a married daughter of the deceased, and the contention that she used to take care of the deceased cannot be true as it emerged that the deceased's wife Salome was alive and lived after his death and she is the one who used to take care of her husband. It is submitted that Monica helped her parents freely and not so that she can be rewarded with an inheritance, and she urged the court to disregard the evidence of Monica Wanduma.

46. I have considered all the evidence adduced and the submissions by the counsels for the parties in this matter. The issues which arise for determination are;

- I) Validity of an oral will
- II) The deceased will
- III) The distribution of the Estate.

ANALYSIS AND DETERMINATION

1. Validity of an oral will

Under Section 5 (1) of The Law of Succession Act (to be referred to as the act). Any person who is of sound mind and not a minor may dispose of his free estate and may dispose off all or any of free property (estate) by will.

The relevant rule on validity of an oral will is **Section 9 (1) of the Act** and it provides;

“(1) No oral will shall be valid unless

(a) It is made before two or more competent witnesses, and

(b) The testator dies within a period of three months from the date of making the will.

Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.

(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by section 18 and 19.”

The requirements for an oral will to be valid shall be made before two or more competent witnesses and it must be proved that the testator dies within a period of three months from the date of making the will.

No oral will shall be valid if it is contrary to any written will which the testator had made either before or after the date of the oral will and which has not been revoked with accordance with the act.

In the case of : **Rufus Ngethe Munyua (deceased) Public Trustee -versus- Wambui (1977) KLR 137** the court held that witnesses present during the making of an oral will, will make a record of the terms of the oral will so long as it meets the requirement of Section 9 or be made in the presence of two or more competent witnesses and the maker dies three months of making the oral will. Such a will, will be considered valid.

47. In the Estate of; **Evanson Mbugua Thong’ote (deceased) Succession cause 225 of 1998 (2016) eKLR** while contemplating the requirements of an oral will, Justice Musyoka stated as follows;

“ an oral will is made simply by the making of utterances, orally, relating to disposal of property. In assessing whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will.

The other consideration is whether the utterance was to be made in the presence of two or more persons.”

Applications for proof of an oral will are supposed to be made under **Rule 13 of the Probate and Administration Rules**. Which provides as follows;

“ 1. An application for proof of an oral will or of letters of administration with a written record of the terms of an oral will annexed shall be by petition in Form 78 or 92 and be supported by such evidence on affidavit in Form 4 or 6 as the applicant can adduce as to the matters referred to in rule 7, so far as relevant, together with evidence as to

(a) The making and date of the will

(b) The terms of the will

(c) The names and addresses of any executors appointed

(d) The names and addresses of all the alleged witnesses before whom the will was made

(e) Whether at the respective dates both of the making of the will and of his death the deceased was a member of the armed forces or merchant marine engaged on the same period of active service

(f) Whether the deceased at any time executed or cause to be executed a written will

(2) Subject to the provisions of sub rule (1) the provisions of these Rules relating to applications for probate of written wills or of letters of administration with such wills annexed shall apply in relation to application for the proof of oral wills.”

48. This rules provide the relevant provisions of an application seeking to proof the existence of an oral will.

49. There are indications that the deceased did not make an oral will. What the protestors are relying on are the fact that the deceased had applied to sub-divide his land into six portions which he intended to distribute to his sons and one of the married daughters. However, the fact that he had obtained consent to sub-divide his land is not prove that he wanted to distribute his estate to the exclusion of the petitioner and his siblings.

50. By the time he was doing the sub-division the land had a caution, the deceased did not apply to have the caution removed during his lifetime and the Estate comprising of land parcel number Ngariama/ Kabare/129 remained in his name and has remained like that to date.

51. The protestors who had also filed a summon for confirmation of grant had filed the succession as an Inte-estate Succession and there is no prove that the deceased had made an oral will in the presence of two witnesses three (3) months prior to his death.

52. The protestors are alleging that the deceased made the oral will on the date they took him to hospital which was a day before his death, they never called the other children of the deceased.

53. The claim that he made an oral will a day before his death cannot possibly be true, and such a will is not valid under Section 9 of the Act which I have quoted above.

54. What has emerged from the evidence left FAUSTO on the land and he was evicted by the Protestors and in view of the foregoing the evidence tendered by the protestors has not met the threshold required for proof of an oral will.

I find that the deceased had not made an oral will which this court can enforce.

2. The deceased will

The protestors allege that the deceased had made a written will bequeathing one acre of his land to Monica Wanduma and this will was produced as Exhibit 6 and the contents of the will are as follows;

(i) I revoke all my former wills and condicils' and declare this to be my last will.

(ii) I appoint my daughter Monica Njoki Lucas to be the sole executrices of this will

(iii) I give and derise (sic) my parcel of land number Ngariama/ Kabare/445 comprising of 1.5 acres or thereabouts to my daughter Monica Njoki.”

The will is purported to have been made on 8th of December, 1998. This will seems to portray some treachery by the Protestors for the reason that it is their contention that the deceased had made it clear that none of his married daughters should get land and yet he was ready and willing to write a will giving one of his married daughters a piece of land.

55. Secondly, it is stated as the last will of the deceased, and yet the protestors' wanted this court to believe that the deceased had made an oral will bequeathing his Estate to some of his sons.

56. Thirdly, at the time of making this will the deceased did not own any land known as land parcel Ngariama/ Kabare/ 445. If we were to believe the protestors had not intended to give his married daughters land, then this will can only be a forgery or if the deceased indeed signed it he was coerced to writing that will.

57. The reason which is stated for the deceased giving Monica Njoki land was allegedly because she took care of the deceased. This is doubtful because the wife of the deceased was still alive and Monica was married far away from home and this are circumstances which raise doubt as to whether this piece of document has a valid will made by the deceased.

Section 7 of The Act provides that:

“ A will or any part of a will, the making of which has been caused by fraud or coercion or by such importunity as takes away the free agency of the testator or has been induced by mistake is void.” and this seems to have been the situation in this case, and I find that the alleged will is not valid.

58. I have also considered the issue that the Petitioner had filed a suit against Cyprian Nyamu and Sicily Muthoni had filed a case against the deceased at Nyeri High Court. The Petitioner and Sicily admitted during cross-examination that they had filed a case at High Court Nyeri.

59. In the case the Petitioner and Sicily were seeking an order that the deceased gives them half a portion of the land parcel number Ngariama/ Kabare/ 129 for the family of one of his wives who was deceased Loice Wanjui this is shown on the protestors exhibit number 4. Originating summons in **High Court of Kenya at Nyeri Civil case No. 29 of 1993**. None of the parties availed to this court the decision of the High court in the matter said to state that petitioner was ordered to pay costs which he has not paid to date.

60. However, the petitioner seems to have lost the case as he has not availed the proceedings and judgment in the case. For **Fausto Ndambiri** the deceased had filed a case in the Land District Tribunal claiming that the land in dispute was his. The deceased directs that Fausto Mugo Ndambiri was given **10** acres by the clan during the land demarcation but in the proceedings before the Tribunal he was demanding one (1) from the deceased, and the Tribunal held that;

- Fausto was an adult and no legal right to force his Father to give him property.

- These cases were during the deceased's lifetime and they were filed against the deceased.
- The Petitioner was not given land neither was FAUSTO MUGO.

61. Fausto was given land during land demarcation which was independent of the land of the deceased, and the two i.e Fausto and Petitioner who were sons of the deceased, and were beneficiaries to share the estate of the deceased.

3. The distribution of the estate

There is no dispute that the protestors and the petitioners are children of the deceased.

62. The Act does not make a distinction between male and female children when it comes to distribution of the Estate of The Deceased. **The Act at Section 29** defines the meaning of a dependant.

It provides as follows;

“ for the purpose of this part dependant means;

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

63. Children are defined as a first line beneficiaries after wives. In this case the deceased died; 18th December, 1999 **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”

64. The Act came into force in 1981 and therefore the estate of the deceased is governed by the provisions of the act. the deceased is survived by his children and it is not in dispute that the protestors and the petitioners are the surviving children of the deceased.

65. The distribution of the estate is supposed to be as provided under **Section 38 of the Act** which I have quoted above and provides that;

“the estate shall be divided equally amongst the surviving children.”

66. In conclusion I find that; the protest by Cyprian Nyamu which seeks to have the estate distributed between the two houses of the deceased is without merit and is dismissed.

67. The petitioners at paragraph 6 of the supporting affidavit had proposed a similar mode of distribution that Cyprian Nyamu Bedan, Alicaranda Wagatwe Bedan and Sicily Muthoni Bedan 4 acres jointly,

Micheal Nyamu Bedan, Joseph Njagi Bedan, Solomon Gachoki Bedan, Monica Wanduma, William Gichogo Bedan 6 and ½ acres.

68. This mode of distribution is now in accordance with **Section 38 of the Act.**

69. I therefore make an order that;

1. The estate of the deceased comprised in **Land Parcel No. Ngariama/ Kabare/ 129** shall be distributed to all his children equally.

2. This Children are;

- (i) Cyprian Nyamu Bedan
- (ii) Alicaranda Wagatwe
- (iii) Sicily Muthoni Bedan
- (iv) Micheal Nyamu Bedan
- (v) Joseph Njagi Bedan

(vi) Solomon Gachoki

(vii) William Gichigo

(viii) Monica Wanduma

(ix) Fausto Mugo (deceased) Simon Nyaga Mugo to be registered to hold in trust for the family.

(x) William Gichigo (deceased) Substituted by Ann Wawira Gichigo to hold in trust for her family

3. The funds of the deceased in Kirinyaga Farmers Sacco Society be distributed to all the children of the deceased equally.

4. I will make no orders on the alleged sum of KShs; 76,400/= which Cyprian Nyamu is alleged to have been ordered to pay as costs to the deceased because this has not been proved to the required standard.

5. I order that the GRANT of letters of administration be issued and confirmed in those terms.

6. Finally since the disputes involves members of the same family, I make no orders as to costs, each party bears its own costs.

Dated, signed at Kerugoya this 29th day of May 2020

L. W. GITARI

JUDGE