



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**PROBATE AND ADMINISTRATION**

**SUCCESSION CAUSE NO. 4 OF 2013**

**IN THE MATTER OF THE ESTATE OF ESTHER KABARE (DECEASED)**

**AND**

**JOHN KABEGE NJOGU.....PETITIONER/APPLICANT**

**VERSUS**

**CICILY WANJIKU KABARE & 7 OTHERS.....RESPONDENTS**

**JUDGMENT**

1. This matters relates to the estate of Esther Kabare (Deceased) who died Intestate on 12-6-1996.A grant of letters of administration was issued to Cicily Wanjiku Kabare on 7-7-2015.

2. However, in a ruling by my brother Justice Limo, delivered on 7-7-2015, Cecily Wanjiku Kabare and Joseph Njiru Kabare were appointed as joint administrators.

3. The petitioners filed a summons for confirmation of grant dated 30/5/2016. In supporting affidavit, the petitioner listed the following beneficiaries.

(a) **Cicily Wanjiku Kabare**

(b) **Ann Muthoni Kabare**

(c) **Lucy Wangithi Kabare**

(d) **Joseph Njunu Kabare**

(e) **Samuel Wachira Kabare**

(f) **Veronica Micere Githaka**

(g) **Gladys Muthoni Githaka**

(h) **Daniel Kabui Kathigo**

4. She proceeded to propose that the estate of the deceased comprised in

(a) **Land parcel No. Mutira/ Kaiyei/46 free hold measuring 3.7 Ha be distributed as follows;**

(b) **Cicily Wanjiku                    0.40Ha**

(c) **Ann Muthoni Kabare        0.40 Ha**

(d) **Lucy Wangithi Kabare    0.40 Ha**

(e) Joseph Njunu Kabare 0.80 Ha

(f) Samuel Wachira Kabare 0.80 Ha

(g) Veronica Micere Githaka 0.40 Ha

(h) Gladys Muthoni Githaka 0.30 Ha

(i) Daniel Kabui Kathigo 0.20 Ha

5. This prompted protests against the proposed mode of distribution. The 1<sup>st</sup> protest was filed by Mary Wakiriro Gathua on 19-10-2016.

6. Her protest is based on the ground that her husband one Summary Karimi Gathua now deceased had entered an agreement with Reuben Githaka Kabare, Samuel Wachira Kabare and Joseph Njunu Kabare who are some of the beneficiaries herein to sell to him a portion of land measuring ¼ (quarter) of an acre out of Land parcel number: Mutira/ Kanye/ 46 at a consideration of Kshs; 22,000/=.

7. The consideration was paid and the beneficiaries agreed to transfer ¼ of acre during the confirmation of grant. Thereafter she came to hear of the intended confirmation of grant and she was not included. She proposes that she gets ¼ of an acre out of the estate.

8. The second protest was filed by John Kadege Njogu in an affidavit sworn on 9/10/2018 and filed in court on the same date. The protest is based on the grounds that the deceased was her grandmother by virtue of him being a son of Joel Njogu Kabare who was the 3<sup>rd</sup> born son of the deceased. He is the one who had filed the petition and cited the petitioners but the Court in the ruling dated 7-7-2015 removed him and appointed the two administrators. Upon being appointed the petitioners, filed the summons for confirmation of grant and proposed the mode of distribution.

9. He is opposed to the mode of distribution of the estate for the reasons that Daniel Kabui Kathigo is not of the family of the deceased and is therefore a stranger.

10. He has also stated that Veronica Micere Githaka and Gladys Muthoni Githaka are wives of Reuben Githaka and are entitled to the share of their husband. He submits that he is entitled to a portion of 0.52 HA.

11. The protest was heard by way of 'Viva Voce' evidence. Parties adduced evidence

12. PW1 John Kadege Njogu testified that he knows Esther Kabare who is his grandmother, my father is Joel Njogu Kabare meaning that he is related to Esther Kabare as he is the son. Esther had four brothers and three sisters. They are brothers and sisters of my father.

13. He had filed Succession Cause **No. 285 of 2010** at EMBU. I filed the case because he had summoned them to the Chief's office and they said they do not know him, and the matter was transferred to this court.

14. In cross-examination he testified he used the name Kadege but should have used the Kabare. He further testified that Justice Limo had ordered that he prove dependency. He has not filed summons for dependency and has not filed letters of administration in the estate of Joel Njogu.

15. He testified that he knew Esther Kabare and he was not her dependant, as he was a dependent of her mother Esther Muthoni Njogu, he testified that her mother is still alive who is Sophia Muthoni Njogu and he is aware that she has priority to claim from the estate. That she allowed him to come to the case as she is sickly, and she further said that she did not give her authority. and she had no marriage certificate to show that his mother was married to Joel Njogu and he had no DNA to show that he is a son of Joel Njogu.

He testified that his deceased father died in 1978. He did not produce a birth certificate.

16. Cicily Wanjiku Kabare DW1 testified that Joel Njogu is his third child. He died while at Kamiti prison, he had no wife and had no child, and nobody ever came to claim anything, he had about the case when he was summoned over his mother's shamba.

She was summoned to Embu Court several times, but they never saw the person who had sued them.

She later saw him at Kerugoya, they were summoned and they said they did not know him and he was removed as an administrator and as a beneficiary of the estate of the deceased and they were given letters of administration and told to wait for six months.

17. They had consented on how to share the estate, but when they came to court they found a protest which was filed by Kadege claiming land.

In cross-examination she told the court that the deceased had no wife and no children.

She further told the court that Kadege had no claim over the estate of the deceased.

18. She further told the court that Kadege never came to claim land from the deceased.

19. The submission by the protestor were filed by Igati Mwai & Company Advocate. That the petitioners have included Daniel Kabui Kathigo who is not a child of the deceased as evident from the affidavit to accept grant of letters of administration of the estate Esther Kabare.

20. He submits on the allegation that Joel Njogu Kabare had no wife or a child is a mere denial to circumvent the protestor to deny him his rightful share of his father.

21. He further submits that the chief's letter dated 20<sup>th</sup> of July, 2010 demonstrate the rightful heirs of the estate who include John Kadege Njogu.

22. He further submits that the protestor is not a stranger seeking to make a fortune but a rightful heir as supported by the chief's letter dated 20<sup>th</sup> July, 2010 and filed in court.

23. He is stating that the applicant is lying to the court, by stating that Daniel Kathigo is a member of the family and they submit that the said Daniel Kathigo is a purchaser who is sharing 0.4 ha with Gladys Muthoni Githaka. He relies on **Section 24** of the Law of Succession Act which recognizes grandchildren as dependants.

24. The protestor has legally filed his protest in court and he urges the court to find that the estate of the deceased be shared as proposed by the protestor.

**For The Petitioners' Submissions were filed by Cicily Wanjiku Kabare:**

25. She submits that the deceased Esther KAbare died on the 12<sup>th</sup> of June, 1996 and Cicily Wanjiku Kabare, and Joseph Njunu Kabare were appointed as administrators of the estate by Justice R.K. Limo in a ruling delivered on the 7<sup>th</sup> of July, 2015.

26. The administrator and all the beneficiaries filed a consent and summons for confirmation of grant and the protestor John Kadege filed a protest on 9<sup>th</sup> of October, 2018 and Mary Wakiriro Gathua filed an objection on 19<sup>th</sup> October, 2016.

27. The court ordered the protest by John Kadege be heard by 'Viva voce' evidence.

28. They submit that the issue for determination is whether the protestor is a dependant of the deceased and whether the protestor has locus standi in the proceedings and whether the objection by Mary Wakariro is tenable who should pay costs.

29. They submit that the protestor John Kadege is not a beneficiary of the estate as grandchildren do not inherit from their grandparents.

30. He further submits that the protestor has no 'locus standi in the proceedings as he has not obtained a grant of letters of administration in the estate of his alleged deceased father.

31. He further submitted that the protestor had no authority from his mother and sister to sue on behalf of the estate of Joel Njogu Kabare.

32. He further submit that under **Section 66 of the Law of Succession Act** it gives the order of reference on the persons to administer the estate intestate where the deceased died intestate. The protestor who is alleging to be a grandson has no beneficial interest.

33. On the objection of Mary Wakariro Githua she admitted that 1/8 of the suit property was sold to Sammy Murimi Gathua her husband with the blessings and the consents of all the beneficiaries and they were agreeable that the said portion been exercised from the suit property and all the beneficiaries do not have a problem of the said portion been exercised from the suit property.

34. They submit that the protestor should bear the cost of the suit.

35. They submit that costs follow the event unless the court orders otherwise.

36. They submit that they have proved that the protestor was not a dependant of the property of the deceased and his protest lacks merit.

**Submissions for the Objectors:**

37. They are submitting that the late Sammy Gathua purchased a parcel of land known as Mutira /Kanyei / 46 from Reuben Gitaha Kabare, Samuel Wachira Kabare and Joseph Njunu Kabare with the consent and blessings of all other beneficiaries. Sammy Gathua died in 18<sup>th</sup> April, 2011 before the said land could be legally transferred and registered in his name.

38. The administrators' erroneous included the land parcel Mutira / Kanyei /46 in the estate of administration though they knew that it had been sold to the late Sammy Gathua before his demise.

39. The administrators filed a summon for confirmation of grant dated 30<sup>th</sup> May, 2016 and it was opposed by John Kadege Njogu and Mary Wakiriro Gathua. Mary Wakiriro also filed an objection to the confirmation of grant on 19<sup>th</sup> of October, 2016.

40. They further submit that the protestor had no 'locus standi' to file Succession. He had no capacity and has failed to prove that he is a

grandson of the deceased.

41. The protestor failed to paternity to Joel Njogu Kabare. On the objection by Mary Gathua he submits that the administrator admitted 1/8 of the suit property was sold to Sammy Gathua husband Mary Wakirio Gathua with the consent of all the beneficiaries and they are agreeable to said portion been exercised from the suit property. The beneficiaries do not have a problem of the suit property been exercised from the property.

#### **ANALYSIS and DETERMINATION.**

42. I have considered all the evidence tendered before this court, and the submissions.

The issues which arise for determination are;

- (i) Whether the protestor is a dependant of the estate of the deceased.
- (ii) Whether the protestor has locus standi in this proceedings.
- (iii) Whether the objection by Mary Wakariro Gathua is tenable.

#### **1. Whether the protestor is a dependant of the estate of the deceased.**

The protestor that is John Kadenge during cross-examination testified that his mother is still alive, he had been authorized by his mother to file the suit, and he had not obtained letters of administration in the estate of his alleged father. The protestor did not produce any authority from his mother to pursue this matter on her behalf.

He admitted that he was not been maintained by Esther Kabare but was been maintained by his own mother. The protestor did not produce his birth certificate in court though alleging that he had one. He did not know when the deceased in this matter or Joel Njogu died.

Section **29 of the law of Succession Cap 160 Laws of Kenya** (The Act) makes provision for dependants.

#### **Defines a dependent**

“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, grandparents, 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.”*

Grandchildren are not firstline dependants. They are not entitled to a share of the estate of their grandparents, and where they claim dependency they must prove that the deceased had taken them into his family as his own. This is not the case with the protestor as he stated that he was being maintained by his mother throughout his life he has therefore not proved dependency.

In the case cited by the petitioners; **Estate of John Musombai Katumaga (deceased) 2014 eklr.** Justice Musyoka stated that children are not entitled to inherit from their grandparents so long as their own parents the children of the deceased are alive and themselves taking a share in the estate. Justice Musyoka further emphasized that a person claiming dependency must apply under Section 26 of the Act for the court to make provision for him as a dependant of the deceased.

The protestor is not a dependant as he is alleging that he is a grandchild of the deceased and has not filed a claim for dependency under section 26 of The Act.

The protestor admitted that his mother is the one who has priority to claim dependency.

He also stated that he has a sister, the protestor did not produce any authority from his mother to claim dependency on her behalf. His claim for dependency is only for himself as he has not included his mother and sister and the claim is not properly before the court.

The protestor bases his claim on the allegation that one Joel Njogu Kabare was his father. The protestor did not discharge the burden to proof that the said Joel Njogu is his father.

It is Trite that he who alleges must prove. He did not discharge the burden of proof as required under **Section 107 of the Evidence Act Cap 80 Laws of Kenya.**

Evidence Act provides;

**Burden of proof**

(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.**

**108. Incidence of burden The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side**

**109. Proof of particular fact The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

The protestor had the legal and evidential burden to prove that he is a son of Joel Njogu, this he did not prove. The protestor was at pains to explain why he called John Kadenge while the alleged deceased's father is Joel Njogu Kabare.

Though he said he had a birth certificate, it was surprising that he never produced it. He did not produce any DNA evidence, or any other evidence to prove that he is related to Joel Njogu Kabare.

The protestor was not credible because he could not even tell when the deceased Joel Njogu died raising doubts in the allegation that he was his father.

The said Joel Njogu died in 1978 while the deceased in this case died in 1996. So Joel Njogu pre-deceased the deceased in this cause and is therefore not a survivor in the estate of the deceased, and by extension the protestor has no basis to claim from the estate of the deceased.

**(ii) whether the protestor has locus standi to bring this proceedings**

Locus standi is a principle which gives a party the right to sue or to appear in proceedings before court.

The protestor has not obtained letters of administration to the estate of Joel Njogu and in the Case of: **Virginia Edith Wambui Otieno – versus- Joash Ochieng Ougo & Another (Cited by the Petitioners) C.A. No. 31 of 1987**

**The Court of appeal stated** that an action started by an intestates' intended administrator before the grant of letters of administration is incompetent at the date of its inception.

The Protestor has not produced any letters of administration in the estate of Joel Njogu Kabare to sue on behalf of his estate. He therefore has no right to bring any action or defend any action concerning the estate of Joel Njogu Kabare.

The protestor stated that he was acting on his own behalf. However, he cannot claim as a dependant as that is Contrary to what is provided under Section 29 of The Law of Succession Act.

The protestor admitted that it his mother who has priority to claim dependency in the estate of her husband. This is provided **under Section 66 of The Law of Succession Act** which has given the order of priority of persons to administer the estate where the deceased died intestate.

The Section is clear the person with priority is the surviving spouse and grandchildren have no priority in the estate of their grandparents (deceased).

The Protestor only alleged that his mother is sick and could not follow the case however, no evidence was produced to support that claim.

The case cited by the Petitioners in the matter of Aggrey Makanga **Wamira (Mombasa H.C. Succession cause 89 of 1996)** It was stated that Section 35 of the succession act derives that the estate shall devolve to the wife and there is no evidence as alleged that she was unable to administer the estate. Section 66 also refers to surviving spouse.....”

The law therefore emphasizes that the wife has priority and where for any reason the wife is not able to file the claim such evidence of her inability must be tendered in court even where a party is incapacitated due to illness there are procedures to be followed for a person to represent him/her as a guardian.

The respondents tendered evidence that Joel Njogu Kabare died in prison in 1978 and that he was not married, and he had no children.

This evidence was not rebutted and there was no reason for this court not to believe them.

All in all I find that the protestor has failed to prove that he has any lawful claim in the estate of the deceased. Although in his submissions a protestor relied heavily on a letter issued by the Chief Kanyekini location dated 5<sup>th</sup> July, 2010. I find that the letter is not sufficient to prove that he was a dependant of the deceased. It is noted that he obtained the chief's letter when he filed this succession in Embu without authority.

It is noted that he is the one who had obtained it, he did not call the Chief as a witness to proof or to show why he had included the protestor as one of the beneficiaries.

The Chief's letter is used to introduce the dependants. It is a matter of procedure that has developed over the years requiring parties to produce a Chief's letter when filing letters of administration.

It is not a document that can proof dependency and where it is challenged a party must adduce further evidence to proof that he is indeed a dependant in that estate.

In a ruling delivered by Justice Limo dated 7<sup>th</sup> July, 2015. Justice Limo stated that the applicant has no right to apply for letters of administration in the presence of administrator who have not renounced their right to apply for letters of administration in the estate of the deceased.

He further stated that the children of deceased have a right and priority to apply for the letters of the estate of the deceased. The only remedy available to the applicant is to prove the entitlement at the stage of distribution but not at this stage.

The protestor was aware of the ruling by Justice Limo. Subsequent to that ruling the applicant has not done anything to prove his entitlement.

He has however, not proofed that he was a dependant of the deceased and his protest is without merit.

(iii) Whether the objection by Mary Wakariro Gathua is tenable.

As regards the protestor Mary Wakariro she is claiming that she is entitled to a share of the estate as her husband who is now deceased had purchased a portion of land from the estate of the deceased.

Though the protestors have not opposed her claim, I find that no evidence was tendered to prove that she is the administratrix of her deceased husband. She has not produced any grant of letters of administration ad litem.

In her affidavit she has deposed that her deceased husband had bought land from the sons of the deceased that is ; Reuben Gitaha Kabare, Simon Wachira Kabare, and Joseph Njumu Kabare.

At the time of his death the land had not been transferred to him. The claim is specific to certain beneficiaries and can only be enforced against them in a separate suit.

The protestor Mary Wakariro is a stranger to the estate and no property can be distributed to her and there was no obligation to include her.

Furthermore her claims is not protected, **under Section 93 (1)** of The Law of Succession Act which provide that;

**of The Law of Succession Act provides:**

**“A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act. “**

The land was not sold to her by the administrator of the estate. Furthermore, under **Section 82 (b) (ii)** it is provided no immovable property shall be sold before confirmation of the grant.

Her objection to the making of the GRANT cannot be sustained and though the protestors have consented that she is entitled to the portion which was sold to her from the estate of the deceased it can only be transferred to her after the grant has been confirmed but not at this stage.

Strangers who are not beneficiaries to the estate should not be included in the certificate of confirmation of grant as this would set a bad precedent and is contrary to the law which clearly provide that no transfer of immovable property can be effected before the confirmation of the grant.

**IN CONCLUSION;**

- I find that the Protests by John Kadenge and Mary Wakariro Gathua are without merit and are dismissed.
- Summons for confirmation of grant is allowed.
- The Estate of the deceased shall be distributed as per paragraph 5 of the affidavit in support of summons for confirmation of grant of administration of the estate intestate.
- The GRANT shall be confirmed and a certificate shall be issued.
- Costs to the petitioner, to be met by the protestor and the objector.

**Dated, signed and delivered this 29th day of May 2020.**

**L.W. GITARI**

**JUDGE**