



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 2 OF 2018

DAVID NGAHU GAKUU.....1ST APPELLANT

AARON RUHEINI GAKUU.....2ND APPELLANT

VERSUS

HILDA WANGUI MURIITHI.....1ST RESPONDENT

JOYCE WANJUGU NGAHU.....2ND RESPONDENT

(Being an appeal against judgement and decree in Chief Magistrate's Succession Cause No. 237 of 2018(Hon. Wendy Kagendo, Chief Magistrate) dated 18 July 2018)

JUDGMENT

This appeal arises out of a succession cause in the chief magistrates Court that culminated in the distribution of the estate of the late Geodeon Gakuu Ndirangu (the deceased) amongst his children or heirs.

The appellants were the petitioners for Grant of letters of administration intestate of the deceased's estate and according to their petition which was initially filed in this court on 2 May 2015, before it was transferred to the magistrate's court, the deceased died intestate on 18 July 1992; he was blessed with seven children five of whom were alive as at time the petition was filed. The appellants and the 1st respondent are three of those children while the other two were named as Samson Ndonga and Nancy Wanjiku Wachira.

Mary Nyangati was named as one of the two deceased children but she was herself survived by her own children who were named as Gedion Gakuu, Joyce Wanjugu (2nd protester) and Ruth Wangui Ngahu. The other deceased child was named as Rahab Nyawira Karanja and she too was survived by her daughter named in the petition as Faith Njambi Karanja.

The appellants proposed to distribute the deceased's estate which comprised land parcel known as **Title No. Thegenge/Karia/169** measuring approximately 1.52 hectares as follows:

1. David Ngahu Gakuu.....1 acre
2. Aaron Ruheni Gakuu.....1 acre
3. Samson Ndonga Gakuu.....1 acre
4. Gedion Gakuu Ngahu.....0.378 acre
5. Ruth Wangui Ngahu.....0.378 acre

The respondents were of the contrary opinion; they filed an affidavit of protest in which they proposed the deceased's estate to be distributed as follows:

1. Faith Njambi Karanja.....0.217 acres
2. David Ngahu Gakuu.....0.217 acres
3. Samson Ndonga Gakuu.....0.217 acres

4. Aaron Ruheni Gakuu.....0.217 acres
5. Geodeon Gakuu Ngahu.)
6. Joyce Wanjugu.)
7. Ruth Wangui Ngahu.).....0.217 acres
8. Nancy Wanjiku Wachira.....0.217 acres
9. Hilda Wangu Muriithi.....0.217 acres

According to this proposal, the deceased's grandchildren whose mothers had died were also allocated a share of the estate.

In her judgement, the learned magistrate allowed the protest and distributed to the estate in accordance with the scheme proposed by the respondents. In so deciding, the learned magistrate stated that she invoked section 38 of the Law of Succession Act cap 160. It is against this decision that the appellants appealed.

Looking at the grounds of appeal, the appellants are basically aggrieved that the learned magistrate's decision was against the weight of evidence and, in particular, the evidence to the effect that the respondents were not entitled to a share of the deceased's estate.

Prior to the transfer of the cause to the magistrates' court, directions had been taken to the effect that the cause be heard by way of oral evidence. However, looking at the record, none of the parties is recorded to have testified. All I can see are remarks made by the trial court but the basis upon which they were made is not that clear. In a nutshell, there is no evidence which this court has to consider afresh and come to its own conclusions in exercise of its appellate jurisdiction.

Strictly speaking, this would be a proper case to remit to the lower court for hearing afresh but looking at the summons for confirmation of Grant and the affidavit of protest filed against it, the only question for determination is the appropriate scheme to be adopted in the distribution of an intestate's estate amongst his children. This is more of a legal question which this court can decide without any need of taking evidence more so when the extent of the estate and the identity of the deceased's children are not in dispute. And for this reason it will not serve any useful purpose, least of all, meet the ends of justice if I was to remit the cause back to the magistrates' court when the cause revolves around a legal issue which this court is disposed to determine.

Section 38 of the Law of Succession Act which the learned magistrate applied reads as follows:

38. 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.

A reading of this Section is to the effect that the deceased's estate must devolve upon his surviving child or, must be distributed equally among his children, in a case where there is more than one child surviving him. The scheme of distribution, which is plainly couched in mandatory terms, is only subject to section 41 and 42 of the Law of Succession Act.

These two latter provisions of the law could not, however, apply to the distribution of the deceased's estate because, as far as section 41 is concerned, it only comes into play when the net intestate estate, or the residue thereof, is to devolve upon a child or children who are yet to attain the age of majority and their share of the estate has to be held in trust for their benefit until such a time they become of age. According to the affidavit sworn in support of the petition, the youngest of the deceased's children was aged 57 as at 2 May 2015 when the petition was filed. It is for this reason that section 41 will be taken out of the equation in the devolution of the deceased's estate.

Section 42, on the other hand, deals with such property as the deceased may have, during his lifetime, paid, given or settled to or for the benefit of a child, grandchild or has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of the Act. Such property would be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

Again this was not the case here; there was no suggestion or evidence that any of the deceased's children may have either benefited or was bound to benefit from the estate in any of the ways contemplated under section 42 of the Act.

It follows that the strict application of section 38 of the Act would have seen the deceased's estate distributed equally among his surviving children. As noted, these children are the appellants, the 1st respondent, Samson Ndonga Gakuu and Nancy Wanjiku Wachira.

There was a suggestion which the learned magistrate took on board that the deceased's grandchildren whose two mothers were deceased were themselves entitled to their deceased mothers' shares in the estate.

Ordinarily, there wouldn't be any trouble in giving such children a share of the estate that would have been given to their deceased mothers; however, in such a case, they had to demonstrate that they were personal representatives of their respective mother's estates. This was not done; there was neither the evidence that the persons alleged to have died were their mothers nor, and more importantly, that they represented their estates.

In any event, none of them filed any protest laying a claim on the estate on the basis that they represented their mothers' interests or in their

own right as dependants and therefore eligible beneficiaries of the deceased's estate.

It follows that if section 38 of the Act is anything to go by, there was no legal basis for sharing the deceased's estate to any other person than his own children. To the extent that this is what the learned magistrate did, she misdirected herself on the law and on that score the appeal will be allowed; the judgment and the decree of the learned magistrate are therefore set aside.

Accordingly, the deceased's estate which comprises **Title No. Thegenge/Karia/169** shall be distributed equally amongst his children who, for avoidance of doubt are as listed below:

1. David Ngahu Gakuu
2. Aaron Ruheni Gakuu
3. Hildah Wangu Muriithi
4. Samson Ndonga Gakuu
5. Nancy Wanjiku Wachira

The Grant made to the appellants on 29 December 2016 is confirmed in those terms. The dispute is amongst family members and therefore I make no order as to costs.

Dated, signed and delivered this 19 June 2020

Ngaah Jairus

JUDGE