



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 185 OF 2014

IN THE MATTER OF THE ESTATE OF JOHN WACHIRA MWANIKI aka WACHIRA S/O MWANIKI (DECEASED)

ANNE WANGECHI GITHAIGA.....APPLICANT

-VERSUS-

ROBERT MWANIKI WACHIRA.....RESPONDENT

JUDGMENT

According to the order made by this honorable court on 5 November 2002, John Wachira Mwaniki alias Wachira son of Mwaniki, the deceased in the present cause, is presumed to have died on that particular date. On 18 February 2014, two of his children, one of whom is the respondent, petitioned for Grant of letters of administration of his estate.

In the affidavit in support of the petition, the petitioner listed himself and six other children of the deceased as having survived him. Of these children seven are sons and one is a daughter. The deceased's widow is indicated as having been deceased as well.

As far as the deceased's estate is concerned, property known as **Title No. Thegenge/Karia/346**, measuring approximately 5.5 acres, was listed as the only asset comprising this estate.

The Grant of letters of administration intestate was made to the respondent and his brother Peter Karanja Wachira on 29 April 2014. Subsequently, and in particular on 22 January 2015, the administrators filed a summons for confirmation of Grant dated 11 November 2014 proposing to distribute the deceased's estate equally amongst his seven children who, as has been noted, were listed in the petition as the only children who survived the deceased. The summons was allowed and the Grant confirmed on 19 May 2015 with each of the seven children getting 0.71 acres of the estate.

By a summons for a revocation or annulment of Grant dated 2 March 2016, the applicant sought to have the grant made to the respondent and his brother revoked or annulled. The primary ground upon which the summons was based was that the Grant was obtained fraudulently by the concealment of something material to the cause and in particular, the omission of the fact that the deceased was survived by ten, and not seven children listed in the petition.

In the replying affidavit filed in response to the summons, the respondent did not contest the fact that they omitted their sisters, including the applicant, from the petition and also as beneficiaries in the distribution of the deceased's estate. His justification for this omission was that his sisters were not interested in the affairs of their father's estate and, in any event, they have sufficient land where they are married.

On 24 July 2018, parties entered into a consent to the effect that the Grant made on 29 April 2014 to the respondent at his brother be revoked and that a fresh grant be made in the joint names of the respondent and the applicant. It was further directed that they were at liberty to jointly file summons for confirmation of Grant or, in the alternative, either of them could file within a period of six months from the date of the Grant.

The applicant took the initiative and by a summons dated 22 October 2018 she sought to have the grant confirmed and the estate distributed equally among the deceased's ten children whom she listed as follows: -

1. Robert Mwaniki Wachira
2. Francis Mugenyu Wachira
3. Peter Karanja Wachira
4. George Muriithi Wachira

5. Paul Waweru Wachira
6. Charles Ngatia Wachira
7. Agnes Wambui Wachira
8. Agnes Wangechi Githaiga
9. Irene Nyokabi Maina
10. Teresa Wangari Wagura

The respondent, in turn filed an affidavit of protest against the scheme of distribution of the deceased's estate as proposed by the applicant. According to him, the estate should be divided into seven equal shares each of which should be given the deceased's six sons while the remaining share should be registered in the names of his four sisters, including the applicant, as owners in common in equal shares.

And this is all that the present dispute boils down to; should the estate be shared equally amongst all the deceased's ten children or others, his daughters to be precise, should, for whatever reason, get less than their brothers?

The answer to this question is found in section 38 of the Law of Succession Act, cap. 160 which states 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.

Sections 41 and 42 are not in the equation for the reasons that section 41 deals with a property held in trust where the beneficiaries are children until such time that they attain the age of majority; going by the affidavit filed in support of the petition, the youngest of the deceased's children was 39 years as at 18 February 2014 when the petition was filed. Section 42 on the other hand deals with any property that has been appointed or settled or given for the benefit of any child in the intestate's lifetime; such a property ought to be taken into account in the distribution of the remaining estate. There is no evidence and neither was it ever suggested that that was the case as far as the deceased's estate is concerned.

I am satisfied that no reason, sufficient or otherwise, has been given why the deceased's estate should not be distributed equally amongst all his children as proposed by the applicant and, in any case, as prescribed section 38 of the Law of Succession Act. Accordingly, the respondent's protest represented in the affidavit sworn by the respondent on 19 December 2018 is dismissed; by the same token, the summons for confirmation of Grant dated 22nd October 2018 is allowed. The deceased's estate comprising **Title No. Thegenge/Karia/346** shall be shared equally among the following:

1. Robert Mwaniki Wachira
2. Francis Mugenyu Wachira
3. Peter Karanja Wachira
4. George Muriithi Wachira
5. Paul Waweru Wachira
6. Charles Ngatia Wachira
7. Agnes Wambui Wachira
8. Agnes Wangechi Githaiga
9. Irene Nyokabi Maina
10. Teresa Wangari Wagura

The Grant made in the joint names of the applicant and the respondent is confirmed in the foregoing terms. The dispute has been between siblings and therefore I make no order as to costs. Orders accordingly.

Signed, dated and delivered on the 16th day of June, 2020

Ngaah Jairus

JUDGE