



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NUMBER 73 OF 2015

(IN THE MATTER OF THE ESTATE OF GAKINYUA NDEGWA (DECEASED))

MARGARET WANGARI MWANIKI.....APPLICANT

-VERSUS-

JACKSON MAINA NDERITU.....PROTESTER

JUDGMENT

Gakinyua Ndegwa, the deceased in this cause, died intestate on 4 June 1989 aged 80. He hailed from Kamakwa location in Nyeri County and was domiciled in the Republic of Kenya.

The deceased's only survivor was his wife Annah Nyagachatha Gakinyua and who, in that capacity, petitioned for Grant of letters of administration intestate for the administration of his estate. According to the petition filed in this Honourable Court on 29 January 2015, the only asset comprising the estate is a parcel of land known as Title Number Tetu/Kiritu/576 measuring approximately 1.72 hectares.

She obtained the grant on 16 March 2015 and on 19 November 2015 she filed a summons for confirmation of the Grant. Unfortunately, she did not live long enough to prosecute the summons for she died on 30 November 2015, less than two weeks after her summons was filed.

By a summons dated 8 February 2016 and filed in court on 10 February 2016, the protestor sought to be substituted in this cause in place of the deceased's widow; the reasons for his bid in this regard appear in paragraphs 3 and 4 of the affidavit he swore in support of the summons. These paragraphs read as follows:

“3. That since the deceased was barren and had no child throughout her life my parents advised me to go and stay with the deceased and be assisting her as nobody else was willing to stay with the deceased. The deceased used to treat me like her child during the time I have been staying with her at her home. (sic).

4. That when I grew and became an adult I joined the school and when I completed my education I joined teaching profession and for all that period I have been teaching I have been sharing part of my salary for maintenance of the deceased till her death.”

A similar application for substitution was filed by Miriam Nyawira Magu on 20 July 2016. She sought to be substituted in place of the deceased's widow because she was her sister-in-law; the deceased, Gakinyua Ndegwa, was her brother and therefore she was the deceased's and his widow's closest relative alive.

In the face of these competing summonses, the court appointed both the protestor and Miriam Nyawira Magu as the joint administrators of the deceased's estate but the court was clear at the very outset that this appointment did not in any way confer any inheritance rights to any of them until after the confirmation proceedings.

On 14 June 2017, Miriam filed a summons for confirmation of the Grant made in their joint names and proposed that the deceased's estate devolve upon her absolutely.

Just as he had done with respect to the application for substitution, the protestor filed his own summons dated 27 September 2017 for confirmation of Grant and proposed to inherit the deceased's estate to the exclusion of any other person.

He described himself in the affidavit in support of the summons as “a nephew adopted son and a creditor to the estate” all rolled into one.

He also filed an affidavit of protest in which he reiterated that he was the deceased's adopted son and a creditor to his estate. He swore further that after the death of the deceased, his widow was left destitute with no means of support. He stepped in to support her in various

ways including bearing her medical expenses when she was ill. He also took the responsibility of the funeral and burial expenses when the deceased's widow finally died. The deceased's widow, according to him, regarded him as her son. He asked this Honourable Court to consider his version of the summons for confirmation of Grant as a protest.

As fate would have it, Miriam Nyawira Magu also died on 7 March 2018 before her summons for confirmation of Grant was heard. Her daughter, the present applicant, applied to be substituted in her stead. This was by a summons general dated 7 November 2018; it was allowed on 12 November 2018.

Owing to Miriam Nyawira Magu's death, the grant made to her jointly with the protester stands revoked because, in the wake of this death that grant became useless and inoperative through subsequent circumstances. (See section 76(e) of the Act). In order to put this matter into its proper perspective and in exercise of the powers with which this Honourable Court is clothed, I appoint the applicant as the sole administratrix of the deceased's estate. The reasons for this appointment will become apparent in due course.

At the hearing of his protest, the protester testified that the Anna Nyagachatha Gakinyua was an elder sister to his father. He testified further that when Nyagachatha petitioned for Grant of letters of administration of her late husband's estate, he executed a guarantee as a personal surety undertaking to make good any loss that may arise as a result of breach of the administratrix's responsibilities in the administration of the deceased's estate. Although he regarded himself as the deceased's widow's son, he admitted that he had his own parents whom he named as Samuel Ndiaga Maina and Anne Wanjiru Ndiaga. He admitted that Miriam was an elder sister to Gakinyua Ndegwa and that Margaret, the present applicant, was Miriam's daughter. He also admitted that he was not related to Gakinyua Ndegwa by blood but was only related to him through his aunt. He concluded his testimony by stating that he should get a share of the deceased's estate because he catered for his wife's upkeep.

The applicant testified that Gakinyua Ndegwa was a brother to her mother. It was her evidence that the protestor is a son to Nyagachatha's sister. However, she denied that the protester assisted the deceased's widow in any way or was entitled to a share of the deceased's estate.

What emerges from the evidence by the applicant and the protester is that they are both related to the deceased albeit in different capacities. Taking the protestor at his own word, his father was a brother to Anna Nyagachatha Gakinyua, the deceased's wife. To that extent, it is true that Ann Nyagachatha Gakinyua was his aunt or that he was her nephew. Bearing this fact in mind and having admitted that he had his own parents one of whom is still alive, it simply cannot be true that the protester was the deceased's son. There is also no evidence that he was formally admitted in the deceased's family in that capacity.

And if at all the protester was the deceased's son as he claims or was, for one reason or the other, entitled to his estate, then the protester did not give any reason why his aunt did not list him as one of the deceased's survivors who was entitled to a share of his estate either as such a survivor or a dependant when she petitioned for grant of letters of administration of the deceased's intestate estate. It was his own evidence that his role in the petition was limited to that of a guarantor only and nothing more.

His claim to the estate on the basis that he is a creditor also appears to be misconceived. It is misconceived because it is founded on the allegations that he maintained or catered for the deceased's wife upon the death of the deceased; apart from what he stated in the affidavit in support of his summons for substitution, he stated as follows in his testimony:

“I should get a share of the estate because I catered for my aunt when she was alive and when she died, on funeral expenses.”

While it may be true that the protester may have helped the deceased's wife in one way or the other or incurred expenses relating to her funeral and burial when she finally died, the appropriate estate for any sort of reimbursement would be her aunt's estate. The present cause relates to Gakinyua Ndegwa against whom, or against whose estate the protestor does not have any claim at all.

It follows that the only pertinent question whose answer should resolve the protester's protest is whether he would be entitled to the whole or any part of the deceased's estate for the sole reason that he was related to the deceased's wife.

The answer to this question would be found in section 39 of the Law of Succession Act, cap. 65 which states as follows:

39. (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority -

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs

(a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

The applicant, being a child to a sister of the deceased would fall under the category of persons described in section 39. (1) (c). The protestor, on the other hand, would fall under the category of what I would miscellaneous relatives to which reference has been made in section 39. (1) (e). Since the applicant ranks higher than the protester in the order of priority, she would be entitled to inherit the deceased's estate together with her siblings whom she named as John Magu and Kagure Elizabeth.

As there is no other question pending for resolution in this cause and considering that it has been pending in this court for close to five years, I would confirm the grant I have made to the applicant in these terms notwithstanding that six months have not lapsed from the date of the grant. Thus, Title Number Tetu/Kiritu/576 shall be shared equally between the following as absolute owners:

1. Mary Wangari Mwaniki
2. John Magu
3. Kagure Elizabeth

Parties will bear their respective costs. It is so ordered.

Signed, dated and delivered on 22 July 2020

Ngaah Jairus

JUDGE