REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO.9 OF 2018

IN THE MATTER OF THE ESTATE OF THE LATE M'THIGAI MUCHANGI (DECEASED)

KELLEN CIAMATI JUSTINE.....ADMINISTRATIX/APPLICANT

VERSUS

JAPHET GITARI NTHIGAI.....ADMINISTRATOR/PROTESTOR

J U D G M E N T

This matter relates to the estate of M'Nthigai Muchangi also known as M'Nthigai (deceased) who died intestate on 27th June 1997. A grant of letters of administration was issued to Kellen Ciamati Justin and Beatrice Kutheka and was confirmed on 12th April 2007 in the Resident magistrate's court at Runyenjes. The estate of the deceased was distributed as follows:-

A) Kellen Ciamati Justin

Land Parcel No. Magumoni/Thuita/1718- whole share.

B) Kellen Ciamati Justin- Magumoni/Thuita/1719- whole share.

1. Thereafter Japhet Gitari Nthigai filed a Summons for Revocation of Grant dated 20th March 2014 at the High Court Embu. His contention was that he was one of the two sons of the deceased. He was also contending that the Resident Magistrate had no jurisdiction to entertain the matter as the value of the estate exceeded his pecuniary jurisdiction.

2. The applicant had filed a similar application in the High Court of Kenya at Meru dated 26th February 2013. The matter which was filed at Embu High Court was transferred to Meru High Court. The matter was eventually transferred to this court on 21st May 2018.

3. When the parties appeared before Justice Limo, 18th September, 2018 he ordered that the grant be revoked as the trial magistrate lacked the necessary pecuniary jurisdiction to deal with the matter. The Judge also appointed Japheth Gitari Thigai and Kellen Ciamati Justin as joint administrator and administratix. He also reversed any transfers of land parcels Magumoni/Thuita/1718 and 1719 and ordered the properties reverted back to the estate of the deceased. The administrator and administratix were directed to file the summons for confirmation of grant before the expiry of the statutory period of six months.

4. Kellen Ciamati proceeded to file a summons for revocation of grant dated 12th February 2020. Her contention is that the deceased was survived by his wife Beatrice Kutheka (deceased) and the applicant who is his daughter- in – law by virtue of having been married to his only child Justin Nthuni Thigai who is deceased.

5. The applicant contends that her co-administrator is not a son of the deceased but is a son of the deceased's sister named Rose Mukari also deceased. She contends that her co-administrator has made false claims that he is a son of the deceased. She avers that she is the rightful beneficiary who is entitle to inherit the estate of the deceased comprised in Land Parcel No. L.R Magumoni/Thuita/1718and 1719.

AFFIDAVIT OF PROTEST

Japhet Gitari Thigai filed an affidavit of protest to the application for confirmation of grant. The said affidavit was sworn on 2/3/2020 and filed the same day. The deponent confirmed that his mother is Rose Mukari who is a sister to the deceased and she left him in the care of the deceased. He stated that he grew up with the deceased and even took his surname and has known no other home. He confirms that the deceased died on 27/6/1997 leaving his wife Beatrice Kutheka and son Justin Thigai who are now both deceased. He describes himself and his co-administrator as dependants of the deceased herein and cites **Section 29(b) of the Law of Succession Act**.

6. He also confirms the deceased's properties as Magumoni /Thuita/1718 (0.35Ha) and 1719 (0.405Ha). He states that the Applicant had benefitted from the deceased because her late husband had received a land parcel LR Magumoni/Thuita/1720 (0.528Ha) from the deceased during his lifetime which fact should be considered during distribution of the estate. He states that the proposed distribution is selfish and does not take into account the gift *inter vivos* received by the applicant's late husband. He also faults the proposed distribution for failure to give any land to the protester who has shown dependency on the deceased and who the deceased involved in all his business transactions. The protester also stated that he has been in occupation of parcel 1719 and has never been evicted by any person.

7. He proposes that the land be shared such that parcel 1718 is divided between the two administrators with Kellen Ciamati receiving 0.2acres while the protester receives 0.65 acres. He also proposes that he should receive parcel 1719 wholly.

APPLICANT'S REPLYING AFFIDAVIT:

The Applicant swore a replying affidavit on 3/6/2020. She stated that the parcel Magumoni/Thuita/1720 is a not a part of the estate and is not subject to these proceedings. She also stated that she took care of the deceased and his wife during their lifetime and she was left in charge of the household and it was the desire of the family that she should administer his estate. The applicant also depones that the protester's mother is still alive in her matrimonial home from which the protester should inherit. The Applicant states that she recalled the existence of other dependants and now wishes to revise her proposed mode of distribution. She now proposes that 1718 be divided among Mugambi Thuni (grandson), Mutwiri Thuni (grandson) with the Applicant and Mwende Thuni (great grand daughter) getting 0.4 acres jointly. She proposes parcel Magumoni/Thuita/1719 be distributed between Japhet Gitari Nthigai who shall receive 0.4 acres, Munene Nthuni (great grandson) to receive 0.3 acres and Mwenda Nthuni (great grandson) to receive 0.3 acres.

The parties agreed to dispose of the protest by way of written submissions.

PROTESTER'S SUBMISSIONS:

The Protester filed his submissions on 14/7/2020. He reiterated the position as to the dependants of the deceased being himself and his co-administrator. He also stated that he qualifies as a beneficiary under **Section 29(b) of the Act** of which he takes the position that the applicant does not qualify. He takes the position that the family accommodates the position of the Applicant because of her children who are grandchildren to the deceased. He named the grandchildren as Gatakaa Nthuni, Mugambi Nthuni, Murugi Nthuni, Kawira Nthuni, Kagendi Nthuni and Mutwiri Nthuri. The protester submits that the portion being given to the applicant should go to her children as she does not have letters of administration for her husband's estate thus she can only hold the same in trust. The protester identified himself as a nephew to the deceased and claims to have been treated as a son all through, even allowing him to build a house. He refers to a parcel named Magumoni/Thuita/1484 which was subdivided at the time parcel 1720 was given to the deceased's son and the protester adds that he would have received land, had he not been in jail. He also reiterated the mode of distribution herein save that the portions to his co-administrator should be held in trust for her children. He prays that the court do confirm the grant in the manner proposed by the protester.

APPLICANT'S SUBMISSIONS:

The Applicant's submissions were filed on 8/10/2020. The Applicant states that after the grant of letters of administration was issued to the two administrator and administratix, negotiations to file a summons for confirmation of grant were futile. The Applicant contends that as per the definition of consanguinity in the case of Immaculate ***Wangari Munyaga v Zachary Waweru Ireri (2016)eKLR*** the applicant ranks higher to benefit than the protester. She also pointed out that daughters-in-law were long established by the court as being dependants. She also referred to the case of ***Re Estate of Karuri Magu(deceased (2016)eklr*** where the court stated that the daughter in law can be recognized as a child of the deceased, by virtue of being married to a son of the deceased.

The Applicant admits that the deceased transferred parcel 1720 to her late husband and the same vests in the estate of her late husband and she holds it in trust for her children, therefore does not benefit from it. It does not form part of the estate herein. She submits that if the deceased regarded the protester as a son, he would have also given him a gift *inter vivos.*

The Applicant states that the deceased's wife in ***Runyenjes Succession Case Number 18 of 2002*** wished for the distribution as proposed by the Applicant. She also states that she needs the land more as she has 6 children who are dependent on her. She requests the distribution be done as per her proposal.

Analysis and Determination:

8. I have considered the protest, the reply to the protest and the submissions. The issues which arise for determination are;

1) Whether the applicant and the protestors are dependants of the deceased.

2) Distribution of the Estate.

9. Whether the applicant and the protestor are dependants:

The applicant claims to be a daughter -in- law of the deceased while the protestor claims that he is a nephew of the deceased and a dependant. There the deceased has died intestate and has not left behind a wife or children. The court has to determine the question as to who between the disputing parties is the closest to the deceased in terms of the degree of consanguinity and affinity. The **Law of Succession Act (Cap 160 Laws of Kenya)** to be referred to as the **Act** gives the court discretion to determine the person or persons to whom the grant of letters of administration shall be issued. This is provided under **Section 66 of the Act** which provides:-

" Preference to be given to certain persons to administer where deceased died intestate. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will."

The court is also guided by **Section 39 of the Act** which deals with the situation here the deceased has lest no surviving spouse of children. It is provided under the section –

(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-

(2) (a) father; or if dead

(3) (b) mother; or if dead

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(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 parties have stated their relationship with the deceased in their affidavits. The court will therefore exercise its discretion provided under **section 66 of the Act** based on the evidence before this court as deponed in the affidavit. Under **Section 39 of the Act** the order of priority where the deceased has left no spouse or children is set out. For the court to determine who among the applicant and the protestor is the closest to the deceased, the consideration is based on the degree of consanguinity and affinity. The kindred under **Section 39)1) (a)- (d)** does not present any difficulties . Under (e) the court has discretion to determine the relatives based on the nearest degree of consanguinity and affinity. In the case of ***Immaculate Wangari Munyaga -v- Zachary Waweru Ireri (2016) eKLR*** **Justice Mativo** stated while dealing with a similar issue- "***An examination of consanguinity and affinity chart below will help in determining the issue***."

The law requires that a person claiming to be entitle to the estate be related to the deceased from one common relative starting from the parents to the particular relative who is traced from the parent of that deceased. This will inform the court on the degree of consanguinity and affinity the claimant has to the deceased.

10. From the above chart, it is clear that the applicant has closer affinity to the deceased than the protestor's consanguinity. In ***Re- Estate of James Kiani Kiranga (deceased) 2020 eKLR*** **Justice Majanja** held that the deceased's grand children ought to be in priority to the deceased's daughter -in – law. It follows that grand children are entitled to share equally the portion which their parent would have received. The applicant who is a daughter- in- law ranks equally with the grand children in consanguinity and affinity. A daughter- in- law is a beneficiary of the estate of the deceased father- in- law in a situation where she has survived her deceased husband who is a child of the deceased (father- in -law) to whose estate the matter relates. In **Succession Cause No.34/2013** in ***Re-Estate of Karauri Magu (deceased) 2016 eKLR*** cited by the applicant, the court recognized a daughter- -n- law as a child of the deceased by virtue of being married to a son of the deceased. In view of the foregoing, the applicant ranks in priority to the protestor and is entitled to inherit the estate of the deceased.

11. The protestor claims dependency. The meaning of dependancy is defined under **Section 29 of the Act.**

It provides:-

" (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, grand-parents, 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."

There is a condition precedent which a person claiming dependency has to establish. It requires that the person claiming dependency must prove that he/she was being mainted by the deceased immediately prior to his demise. The protestor has deponed that the deceased had taken him as his son and he has not known any other home. The deceased died in 1997 and the protestor's identity card shows that he was born in 1962. He was 35 years old when the deceased died. I do not see how the deceased could have been maintaining him prior to his death. It has also emerged that the deceased gave his biological son Justin Nthuni Nthigai Land Parcel No. Magumoni/Thuita/1720 during his lifetime. If Indeed he considered the protestor as his son, he could have given him land during his lifetime. The protestor is not candid as he has sworn three affidavits which are at variance on the relationship he has with the deceased. He swore affidavit sworn on 20th February 2013 and claimed to be a brother of the deceased. On 20th March 2014 in an affidavit sworn in **Succession Cause No.53/2014** he depones that he was one f the two sons of the deceased. Finally in the affidavit of protest he depones that he is a nephew/dependant of the deceased. The protestor has not come to court with clean hands and it seems he wants to reap where he has not planted. The protestor has not proved that he is a dependant of the deceased as defined under **Section 29(b) of the Law of Succession Act.**

12. On the issue of land parcel No. Magumoni/Thuita/1720 it is registered in the name of Justin Nthigai who is now deceased. The land does not form part of the estate of the deceased. I am also not convinced that it was given to Justin Nthuni Nthigai as a gift inter vivos. This is because a green card, annexed to the affidavit of the protestor sworn on 20th March 2014 as JGNI shows that Justine Nthuni Nthigai paid consideration of Kshs.15,000/- for the land and a title deed was issued to him. The land parcel does not therefore form part of the estate of the deceased, it was not given as gift and cannot be part of the net estate of the deceased. The ownership of Magumoni/Thuita/1720 is not in dispute and should be left intact in the Estate of Justin Nthuni Nthigai.

13. The applicant has proved dependency as she was left on the land by the deceased where she lives with her children. She was left in charge of the estate by her parents in law and to administer it for the benefit of all the beneficiaries.

In conclusion I find that the distribution of the estate should be guided by the law and should only be distributed to rightful beneficiaries in - order to maintain peace and harmony in the families. Though the applicant had proposed to give a portion of land to the protestor, there is no justification as he has not proved dependency and has not conceeded to that mode of distribution. I find that the applicant and her children are the rightful beneficiaries entitled to the estate of the deceased. I find that the protest lacks merits.

I dismiss the protest with no orders as to costs. The estate of the deceased comprised in land Parcel No. Magumoni/Thuita/1718 and 1719 shall devolve to the applicant and her children. The applicant shall hold the properties in trust for the deceased's grand children.

Dated, signed and delivered at Chuka this 17th day of December 2020.

L.W GITARI

JUDGE