



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO.889 OF 2014

IN THE MATTER OF THE ESTATE OF NDIRANGU S/O NJAMA (DECEASED)

SIMON KARIUKI NDIRANGU.....PETITIONER

PETER NDIRITU.....PROTESTOR

RULING

Ndirangu son of Njama died in 1960. There was no certificate of death but the same was confirmed vide a letter dated 17th October 2014 by Mr. James N. King'ori, the Chief Karima North Location. He had a plot of land known as Othaya/Gura/461 measuring approximately 4.5 acres and was survived by the following children:-

	Name	Age (years)	Relationship with the deceased
1.	John Murage	72	Son
2.	Peter Nderitu	70	Son
3.	Simon Kariuki	69	Son
4.	Charles Wachira	62	Son
5.	John Mugi (DECEASED) (No survivors)		son
6.	Daniel Mahuthu	60	son
7.	Patrick Makari	55	Son

On 22nd December 2014 Simon Kariuki Ndirangu filed this cause for grant of letters of Administration intestate with the consent of all other beneficiaries except Charles Wachira Ndirangu and Peter Ndiritu Ndirangu who were properly cited. The grant was issued to the Petitioner on 16th March 2015. On 29th September 2015, the Petitioner filed the summons for confirmation of the grant in which he proposed that the deceased's property be shared equally among all beneficiaries. Again he had the blessings of all the other beneficiaries except the same Charles Wachira Ndirangu and Peter Ndiritu Ndirangu.

Peter Nderitu Ndirangu protested the confirmation of the grant contesting the mode of distribution of the deceased's property through the affidavit of protest dated 4th October 2016. His position was that their father's land had been shared out into eight equal portions in 1984 when their mother and brother were.

When their mother died in 1985, her portion was shared equally among the surviving children. Though there was no certificate of death he deponed that John died in 2006 leaving no survivors. He wanted John's share to be distributed only to Daniel Muhuthu Ndirangu and Charles Wachira Ndirangu, claiming that they are the ones who took care of him when he was sick.

In response the Petitioner swore an affidavit on 12th October 2016 on his behalf and on behalf of three of other beneficiaries; Patrick Makaru, John Murage and Daniel Muhuthu. He affirmed that their mother indeed passed away and that their deceased brother, John Mugi Ndirangu, left no survivors to his estate. His position was that their deceased brother did not bequeath his share to anyone and that there was no valid

will to his share of the property. According to him it was Patrick Makaru Ndirangu who took care of the deceased brother and not Daniel and Charles yet he was not asking for a bigger portion.

At the hearing of the case, the Protestor was absent. His by counsel Mr. King'ori requested that his affidavit be adopted as his evidence, which request was granted. The Petitioner did not testify but the other two brothers PW1, Patrick Makaru Ndirangu and PW2, Daniel Muhuthu Ndirangu did. Their position was that the estate should be shared equally. PW1 stated that 3 of his brothers, Peter Ndiritu Ndirangu, Charles Wachira Ndirangu and Daniel Muhuthu Ndirangu were frustrating the sharing of their deceased father's land among the brothers. They had fabricated a lie that their deceased brother, John Mugi Ndirangu, had left his share of the inheritance yet there was no evidence of such bequeaths. His position was that the property should be shared equally among the surviving brothers. He stated that the protest was brought in bad faith.

On cross-examination he stated that the deceased herein died intestate in 1962 and had not distributed the property. He stated that each of the brothers was allocated a portion of the land to use sometime in 2000 when their deceased brother was alive.

PW2, Daniel Muhuthu Ndirangu stated that he agreed that the whole property be shared equally amongst all the brothers. He stated that they had not agreed on how their deceased brother's share should be distributed amongst them.

The issue then is whether the protest has any basis?

The following fact is not in contention; that all the deceased's property should be shared equally amongst all his children. The contention here is what should happen to John Mugi Ndirangu's (Deceased) share of be distributed since he left survivors.

It is important to state that the estate of the deceased herein is not governed by the Law of Succession Act Cap 160 and that the Act only applies with regard to issues of administration, as the procedural law. This is because the deceased died in 1960 before the commencement of the Act. The substantive law for this estate are written laws and customs at the time of the deceased's death as stated in Section 2(2) of the Act as follows: -

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

The holding in *Re Nduati Mbuthia (Deceased)(2015)eKLR* is sublime on this issue. Justice Hon. Musyoka aptly held:-

“Section 2(2) of the Law of Succession Act defines the application of the Law of Succession Act with respect to persons who died before the said Act commenced on 1st July 1981. The provision is categorical that the substantive provisions of the said Act are not applicable to the estates of persons who died before the said Act commenced. The substantive provisions of the Act are those governing devolution or distribution of the estate of the dead person, whether such person died testate or intestate. These provisions are to be found in Parts II, III, IV, V and VI of the Law of Succession Act. The substantive law of succession for estates of the persons who died before 1st July 1981 is not to be found in Parts II, III, IV, V and VI of the Law of Succession Act, but in the written laws and customs that applied at the date of the death of the person in question.”

It was therefore proper for the Petitioner to seek for letters of administration under the Law of Succession Act as it is the applicable procedural law.

The only issue is the share of the property of John Mugi Ndirangu who passed away in 2006. He had his equal share of the property of the deceased according to the Kikuyu customs. He died after the commencement of the Law of Succession Act hence the whole of his estate is governed both procedurally and substantively by the Law of Succession Act as provided by Section 2(1) of the Act. Commenting on this provision, the Court in *Re Nduati Mbuthia (Deceased)(2015)eKLR* held:-

“The effect of Section 2(1) of the Law of Succession Act is that the provisions of the said Act are to apply to the estates of all persons dying after the commencement of the Act on 1st July 1981, subject of course to the exceptions created by the Act. The Act applies both as the substantive law as well as the procedural law to the estates affected.”

The share of the deceased brother is therefore governed by Parts II, III, IV, V and VI of the Law of Succession Act dealing with distribution of the estate. The protestor alleges that the deceased had bequeathed his share to Daniel Muhuthu Ndirangu and Charles Wachira Ndirangu. Daniel Muhuthu Ndirangu testified and stated that the family has not yet agreed on the matter of sharing of their deceased brother's property. The Protestor has not given any evidence to convince this Court that John Mugi Ndirangu bequeathed his share of the property. Section 39(1) (c) of the Law of Succession Act is clear that where the deceased has left no surviving child or spouse his estate shall devolve to his brothers or sisters in equal shares. The Petitioner has reserved the deceased brother's equal share in the mode of distribution in the affidavit in support of the summons for confirmation of grant.

It is important to clarify here that what the brothers are fighting over is John's entitlement to his father's estate. His share was demarcated and is known. The strict application of the Law of Succession would require that succession proceedings be filed in the estate of John Mugi Ndirangu. He had no other survivors except his wrangling brothers. Such a route would only lead to further delay in this matter. The brothers are not growing younger as their ages now range between 60 and 76 years old.

I also noted that the protestor and one of persons on whose behalf the protest was filed, never showed up. The other person on whose behalf the protest was filed, Daniel Muhuthu was PW2 and clearly stated he was for equal sharing.

This protest had no life. It is possible it was brought to settle some scores. We will never know because the protester never showed up.

This matter must come to an end. The justice of the matter is that LR OTHAYA/GURA/461, and in particular the portion demarcated to John Mugi (Deceased) be shared equally among the six surviving sons of the deceased.

The protest fails with no orders as to costs.

Dated, Delivered and signed at Nyeri this 25th day of January 2019.

Mumbua T Matheka

Judge

In the presence of:

Kinuthia holding brief for Mr.King'ori for the citees

Citers in person

Mumbua T Matheka

Judge