



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

SUCCESSION CAUSE NO. 174 OF 2015

IN THE MATTER OF THE ESTATE OF GRACE MUTHONI WAWERU (DECEASED)

JOSEPH NDIRANGU WAWERU.....PETITIONER

VERSUS

PENINA WANGUI WAWERU & 3 OTHERS.....PROTESTERS

RULING

Background

1. The dispute in this matter concerns the estate of Grace Muthoni Waweru who died on 7th October, 2011. Following the deceased's death, the Petitioner applied for letters of administration intestate of the estate. A grant of letters of administration was granted to him on 7th August, 2016.

2. In his petition filed on 27th October, 2015, the petitioner set out the following as the survivors of the deceased: Francis Muriithi Waweru, Bernard Kibanya Waweru, Patrick Mbugua Waweru, Joseph Ndirangu Waweru, Mary Wambui Waweru, Cecilia Wanjiku Waweru, Paulina Wanjiru Waweru and Penina Wangui Waweru (all children of deceased). The only asset recorded in the application with regard to the deceased's estate was **Title No. Nyandarua / Mkungi /3637** comprising 3.3 hectares (8.15 acres) according to a search availed with the petition filed on 27th October, 2015.

3. On 20th December, 2016, the petitioner applied for confirmation of the grant and indicated the above named persons as the survivors of the estate. In addition, he indicated the following persons as additional *dependents*: Lilian Muthoni (Deceased's daughter-in-law), Paul Waweru Kibanya, Paul Waweru Muriethi, Paul Waweru Ndirangu, Paul Waweru Mbugua (all deceased's grandsons) and Simon Mwangi Chuchu (a purchaser). The petitioner also proposed that the estate be distributed as follows:

Francis Muriithi Waweru – 1.6 acres

Bernard Kibanya Waweru – 1.6 acres

Patrick Mbugua Waweru – 0.25 acres

Joseph Ndirangu Waweru – 1.489 acres

Lilian Muthoni – 1.25 acres

Paul Waweru Kibanya – 0.25 acres

Paul Waweru Muriethi – 0.25 acres

Paul Waweru Ndirangu – 0.25 acres

Paul Waweru Mbugua – 0.25 acres

Simon Mwangi Chuchu – 0.111 acres

Total – 7.05 Acres

4. All the persons named as beneficiaries in the application for confirmation attended the hearing except for Peninah Wangui and her sisters Mary Wambui Waweru, Cecilia Wanjiku Waweru, Paulina Wanjiru Waweru, daughters of the deceased. The court (Meoli, J), ordered they be served and should file an affidavit granting consent or otherwise.
5. As directed by the court, Penina, complaining that her brothers did not want her and her sisters to inherit from the estate of their late mother, filed an affidavit on 20th September, 2017 on the mode of distribution. Her proposal for distribution was that: Francis Muriithi Waweru, Bernard Kibanya Waweru, Patrick Mbugua Waweru, Joseph Ndirangu Waweru, Mary Wambui Waweru, Cecilia Wanjiku Waweru, Paulina Wanjiru Waweru and Penina Wangui Waweru should all get one (1) acre each from the deceased's property.
6. The court heard the parties orally on their affidavits on the issue of distribution. Penina's case is that her father gave her and her sisters 1 acre each and the sons were given 17 acres. They now seek one acre each from their mother's estate. She exhibited a letter dated 8th July 2008 from the District Officer to the Chief North Kinangop in which he points out the sisters' complaint about not being given their one acre piece of land.
7. In cross-examination, Penina asserted that the one acre the sisters received was from their father and not from their mother. She admitted that she and her sisters each sold their one acre and went to live elsewhere.
8. The petitioner's case is that their father was the owner of Nyandarua/ Mkungi/ 2575 and 2763. The deceased was allocated the latter piece of land by their late father. That it was due to the sisters' pressure as shown in the letter by the District Officer that Nyandarua/ Mkungi/ 2763 was subdivided and distributed by the deceased. It must be pointed out that the estate of the late father has not been contested herein, nor is there any basis for it being contested as it is not the subject of the present proceedings.
9. The petitioner further asserts that his sisters were each given a piece of land by the deceased, but they failed to disclose that fact to the court. He exhibited photocopies of the Green card from the Lands office for Nyandarua / Mkungi /2763. It shows that the land was registered in the name of the deceased on 22nd July 2005, and was subsequently sub-divided into five parcels in 2008, namely: Nos 3637; 3638; 3639; 3640; 3641 and 3642. The parcels were originally in the names of the deceased, but were subsequently transferred, according to the petitioner to the sisters, who sold their parcels to third parties.

Analysis and Determination

10. At the hearing, all the protestors were present in court. I therefore take it that Penina was making representations on behalf of all the daughters of the deceased.
11. It is not disputed that the only immovable property which was owned by the deceased at the time of her death was Nyandarua/ Mkungi/ 3637. Whilst it may be true that the deceased's sisters also received land from their father, what is in issue here is the intestate estate of the deceased, that is the property of the deceased which was capable of being devolved upon her death. In law, any property that was demised to a person during the lifetime of the deceased person is regarded as a gift.
12. **Section 3 of the Law of Succession Act** aids in defining what property is the subject of inheritance. It has the following definitions of property:

“ ‘estate’ means the free property of a deceased person”

“ ‘free property’ in relation to a deceased person, means the property of which that person was legally competent to dispose during his lifetime and in respect of which his interest has not been terminated by his death”

13. The petitioner has shown from the mutation form and Green cards that the deceased's parcel No. 2763 was subdivided and all but subdivision parcel 3637 measuring 3.3 hectares or 8.15 acres were transferred during her lifetime. Upon such transfer, the parcels ceased to be free property of the deceased and she was legally incompetent to again dispose it, as her interest therein ceased. The actual transfers of the said sub-divisions do not reflect the names of the sisters as alleged by the petitioner except in the case of the sub-division for parcel 3642 in the name of Cecilia Wanjiku Makunu, one of the sisters. For the transfers of the sub-divisions to have taken effect from the name of the deceased, the deceased must have signed the same.
14. The law is clear that the net intestate estate of a deceased person is required to be shared equally amongst all the surviving children of the deceased. That is the general principle stated under **Section 38 of the Law of Succession Act** which provides that:

“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 shall be equally divided among the surviving children.”

15. In **Re Estate of John Musambayi Katumanga – deceased [2014] eKLR**. Musyoka J, held, and I concur, that:

“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is ‘equally’ as opposed to ‘equitably’. This is

the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”

16. There is an overriding concept that stands out within the principle of equal distribution of the deceased’s free property. It is the idea that any lifetime gifts granted to a child must be taken into account when determining equality of distribution. This is catered for in **section 42** of the **Law of Succession Act** which provides as follows:

“Where –

(a) An intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) Property has been appointed or awarded to any child or grandchild under the provisions of section 26 or 35,

that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.” (emphasis supplied)

17. Thus, in the present case, any gifts given by the deceased to her children during her lifetime must be included in the distribution. From the petitioner’s evidence, the only child shown to have received a gift is Cecilia Wanjiku Mukunu. There is however, nothing to confirm the assertion of the petitioner that the other sisters were all given a piece of land by the deceased. If they were it is critical that such evidence be availed, and that such gifts be taken into account.

18. In his application for confirmation, the petitioner has included dependants in the list of beneficiaries. Dependants are dealt with under **section 26** of the **Law of Succession Act**. They cannot receive unless dependency is proved, that is to say, there must be clear evidence that they were being maintained under and in pursuance of **section 29** of the Act.

19. Clearly therefore, the evidence availed in the present case is inadequate to allow, without resulting in some measure of injustice, for direct distribution at this point.

Disposition

20. In light of all the foregoing, the court is minded to make the following general declarations and give guidelines for the distribution of the deceased’s estate. First, that the deceased estate must be distributed equally to all her children, grandchildren being provided for under their parents’ portions. Secondly, that the children of the deceased must disclose or account for properties and gifts given to them by the deceased, so as to enable just distribution in accordance with the law.

Orders and Directions

21. The court hereby orders and directs as follows:

- a. That the deceased’s estate shall be distributed to all her children equally;
- b. That the petitioner and the protestors shall within thirty (30) days of the date of this ruling avail by way of affidavit clear, unambiguous and conclusive details of the properties they have received from the deceased during her life-time, including details and evidence of what transpired in respect of the parcels numbers Nyandarua/ Mkungu/ 3638-3842.
- c. That immediately after the filing of such affidavits as stated in (b) above, the parties shall meet to agree on the distribution of the estate.

22. Each party shall bear its own costs.

Orders accordingly.

Dated and Delivered at Naivasha this 28th Day of February, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mburu for the Petitioner
2. Penina Wangui Waweru in person - Protestors

