



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSIN CAUSE NO. 336 OF 2008

(IN THE MATTER OF THE ESTATE OF LYDIA WANJIRU THAGANA(DECEASED))

MARY GATHONI THAGANA.....1ST APPLICANT

PHILIP MUTAHI THAGANA.....2ND APPLICANT

-VERSUS-

JANE WAIRIMU THAGANA.....1ST PROTESTOR

PETER KARIUKI THAGANA.....2ND PROTESTOR

JUDGMENT

The grant of letters of administration intestate for the estate of Lydia Wanjiru Thagana (deceased) was made in the joint names of the applicants on 2nd February, 2006. By a summons for confirmation of grant dated 8th September 2006, they sought to have the grant confirmed and proposed to have the deceased's net intestate estate comprising land Title No. Kabarú Block 1/Mureri/218, measuring approximately 1.253 hectares, devolve upon the following people:

1. Thomas Kiretai Wachira
2. Margaret Muthoni Wachira and;
3. Jackson Muturi Wachira.

According to the applicants, these people, in whose favour the estate would be registered are to hold it in trust for themselves and on behalf of their siblings whom they named as:

1. David Mutahi Wachira
2. Mary Gathoni Wachira
3. Edward Waithaka Wachira
4. Joseph Wachira
5. Veronica Njeri Wachira
6. Lucy Karure Wachira

The named beneficiaries are the deceased's grandchildren born of her elder son, Samuel Wachira Thagana, but who predeceased his parents, that is, the deceased and one Thagana Kiretai.

Apart from these grandchildren, the deceased was also survived by her own children whom the applicants named as:

1. Philip Mutahi Thagana, the second applicant
2. Stephen Gachanja Thagana
3. Stanley Ndirangu Thagana
4. Jerioth Muthoni Thagana

The first protestor is also the deceased's child; her other children are named as Nancy Nyambura Thagana, the mother to the second protestor but who is also deceased and Gachengo Thagana.

The rationale behind the applicants' proposal to have the deceased's entire estate devolve upon the children of Samuel Wachira Thagana was explained to be that prior to the deceased's husband's death, he had made *inter vivos* transfer of all his properties to his children except Samuel Wachira Thagana who, as noted, had predeceased him; his late son's share, according to the applicants, was Title No. Kabaru Block 1/Mureri/218 but which was registered in the deceased's name to hold in trust for Samuel Wachira Thagana's children.

It was their case that since the rest of the deceased's children had been catered for by their father, they have no basis to lay any claim on the present estate which, in actual sense, belongs to Samuel Wachira Thagana and for this reason it is only his children who are entitled to it.

As a matter of fact, except for the 1st protestor, the rest of the deceased's children have no problem with the estate devolving upon Samuel Wachira's children exclusively. As far as the second protestor is concerned, he would be entitled to the property which his mother, Nancy Nyambura Thagana was given by the deceased's late husband.

The protestors are of a different view; according to them, the deceased bequeathed the estate to them together with Julia Wanjiru Thagana and Muthoni Thagana, whom I understand to be also the deceased's grandchildren. As far as they are concerned, each of the protestors together with Julia Wanjiru Thagana should get one acre of the land.

At the hearing of the protest the protestors conceded that the deceased's late husband had transferred his properties to his children in his lifetime and that in the absence of Samuel Wachira, his eldest son, his (Wachira's) children were entitled to his share. Since his children were away, his share was registered in the deceased's name. As far as Jane Wairimu is concerned, his son Michael Ndugo was given a share of the land.

Mary Gathoni reiterated that her father's share of the property which her grandfather transferred *inter vivos* was registered in her grandmother's (the deceased's name). As a matter of fact, her parents had been buried in the land which now comprises the deceased's estate. Ephraim Wahome an assistant chief from the area in which the land is located emphasised the same point that the deceased's husband distributed all his land properties to his children and that his elder son's share was registered in the deceased's name.

The devolution of an intestate estate where the intestate is survived only by children without a spouse is governed by **section 38 of the Law of Succession Act, cap. 160**; it reads as follows:

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.

There is no dispute as to the number and identity of the children who survived the deceased. Everything else being equal, her estate should be shared equally amongst all these children. Sections 41 and 42 of the Act would not apply because the former provision only comes into play if the beneficiaries are minors in which event their share of the estate is held in trust until they reach the age of 18; none of the surviving children falls into this category of beneficiaries. The latter provision, on the other hand, is only relevant if the deceased had settled or advanced any property to any beneficiary; in this regard, the property will be taken into account in the distribution of the remainder of the estate. There is no evidence that the deceased transferred any part of her estate for the benefit of any of the beneficiaries in her lifetime.

Except for the first protestor, none of the deceased's children is interested in her estate. They are all in agreement their late father distributed all his properties to them in his lifetime including what is now considered as the deceased's estate; this particular property was for the benefit of his elder son's children, so they have contended.

As matter of fact, the protestor's own witness agreed with the applicants in unequivocal terms that the deceased's husband shared out and transferred his properties to not only his surviving children, in his lifetime, but he also catered for his son Samuel Wachira who predeceased him; this he did by having his share registered in the name of the deceased in trust for Wachira's children. To quote Jerioth Muthoni Thagana who testified as one of the protestor's witnesses, this is what she said:

The estate of our father was distributed according to children. He had a will. I know Samuel Wachira Gathara. The will provided that he gets a share. His family was to take his share but it never came. His parcel was given to our mother. My father shared out the property before he died. I am not claiming any share of the estate of my mother.

It is apparent from Jerioth Muthoni Gathana's testimony that the protestors acknowledged that Samuel Wachira was not only one of the deceased's sons but also that he had children on whose behalf the deceased held the property meant for him.

From the evidence proffered by both the applicants and the protestors, it is obvious that the intention of the deceased's husband was to cater for each of his children. That intention, noble as it might appear, was scuttled by the registration of the piece of land meant for Samuel Wachira (or his children) in the name of the deceased as its absolute proprietor. The effect of such registration, no doubt, defeats any claim

based on trust unless a declaration of the trust is made by a court of competent jurisdiction. The point is, had the applicants sought the appropriate remedy in the Environment and Land Court, the debate whether the estate was held in trust on behalf of Samuel Wachira's children would now be moot.

As things stand at the moment, the cause before this honourable court is the deceased's estate and not her husband's; how it was acquired is not a question open for interrogation and determination in these proceedings. Rather, the court's primary concern at the moment is how the estate should devolve in the wake of the demise of its registered proprietor. As noted, since the deceased died intestate, the intestacy provisions of the Act to which I have already made reference would apply.

Ordinarily, each of the deceased's children would have been entitled to an equal share of her estate; however, except for the first protestor, they have all ceded their claim to Samuel Wachira's children in honour of what they have stated to be their late father's wish. They have in effect renounced their inheritance. I suppose if their wish is granted and their share of the deceased's estate given to Samuel Wachira's house, subject to the first protestor getting her share, the letter and the spirit behind section 38 of the Act will still have been given effect.

The deceased had eight children in total; for avoidance of doubt, they are named as follows:

1. Samuel Wachira Thagana (deceased)
2. Philip Mutahi Thagana
3. Stephen Gachanja Thagana
4. Jerioth Muthoni Thagana
5. Stanley Ndirangu Thagana
6. Nancy Nyambura Thagana (deceased)
7. Gachengo Thagana
8. Jane Wairimu Thagana

The survivors of the deceased children would have been entitled to their respective deceased parents' share and it is for this reason they are named despite the fact that they are deceased.

It follows that the deceased's estate would have been divided into eight equal parts, with each child getting an equal share. Considering that the rest of the children have ceded their shares to Samuel Wachira's house, his children are now entitled to seven parts of the estate while Jane Wairimu Thagana can only get one part. Translated into acreages, Samuel Wachira's children will have approximately 2.625 acres while Jane Wairimu Thagana will have 0.375 acres or thereabouts which shall be registered in her name absolutely.

If I have to heed part of the applicants' prayers in the summons for confirmation of grant, I would direct the share due to Samuel Wachira's children to be registered in the joint names of Thomas Kiretai Wachira, Margaret Muthoni Wachira and Jackson Muturi Wachira to hold in trust for themselves and for the benefit of:

1. David Mutahi Wachira
2. Edward Waithaka wachira
3. Joseph Wachira
4. Veronica Njeri wachira
5. Lucy Karure Wachira

The grant made to the applicants on 2nd February, 2006 is confirmed in the forgoing terms. In the same vein, the protestor's protest is dismissed. Parties will bear their respective costs.

Dated, signed and delivered in open court this 22nd February, 2019

Ngaah Jairus

JUDGE