



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU
SUCCESSION CASE NO. 7 OF 2018
IN THE MATTER OF THE ESTATE OF NAFTARY UIRU
KAGUARA alias NAFTARY UIRU (DECEASED)
R U L I N G

1. The undisputed facts of this case are that the deceased herein, **Naftary Uiru Kaguara alias Naftary Iuiru Kagara '1'** died on 24th May 1998, while possessed of a single asset, namely land parcel LR NO. KIAMBAA/RUAKA/113 which measures 6.9 acres. Although initially only five beneficiaries were involved in this cause, it became apparent through the parties' multiple filings in respect of the Summons for confirming grant dated 9th February 2018 that the deceased was monogamous and sired eight children during his lifetime.

These are:

- a) Peter Kaguara Uiru (deceased)
- b) Simon Mungai Uiru
- c) Alice Nyakio Uiru
- d) Rachel Moi Uiru
- e) Winnie Wairimu Uiru
- f) Lucy Wanjiku Uiru
- g) Janet Wanjiru Uiru alias Jane Wanjiru Kagunya – deceased
- h) Grace Wanjohi Uiru alias Grace Wanjohi Mbugua – deceased

2. It appears that the siblings in (a) to (f) above have occupied over time certain portions of the deceased's land which they also developed. The daughters in (g) and (h) above were married in Ruaka and Loitokitok respectively and they had children. They were buried in their respective marital homes. In this cause they are represented by Rahab Wandia Mbugua, one of several children of Grace Wanjuhi Mbugua. Following the death of **Peter Kaguara Uiru**, his wife, **Nancy Waithera Kaguara** was appointed, alongside **Rachel Moi Uiru**, **Alice Nyakio Uiru** and **Winnie Wairimu Uiru** as administrators of the estate.

3. The substance of the Protests filed by and on behalf of the six daughters of the deceased primarily challenged the mode of distribution proposed in the Summons for confirmation, and the number of beneficiaries entitled. The daughters are agreed that the asset should be distributed equally among the eight children in accordance with Section 38 of the Law of Succession.

4. They dispute that the deceased had distributed his property before death and assigned larger parcels (2 acres each) to sons of **Peter Kaguara Uiru**, asserting that the deceased died intestate. On the other hand, **Nancy Waithera Kaguara** and **Simon Mungai Uiru** have asserted that the deceased had prior to his death assigned 2 acres to each son and allowed that the daughters to share 3 acres. That he had identified the respective parcels which were well marked out.

5. The court, having considered the affidavit and oral evidence adduced as well as submissions filed, takes the following view of the matter. Section 107 of the Evidence Act provides that:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

The oral and documentary evidence by Simon Mungai, Nancy Waithera and their witness Peter Njoroge Munyui did not credibly establish their claim. The alleged distribution during life was described in vague terms and no particular date given. Moreover, not a single document to support the alleged distribution was produced. The report prepared by elders, including Peter Njoroge Munyui on 20th July 1999 merely contains the hearsay statement that the elders “proceeded to the disputed land and Discovered that their late father Naftary Uiru Kagwara had already subdivided the land into five portions before his demise.” sic

6. The elders proceeded to identify the said portions and the respective beneficiaries. No elder or other witness who actually witnessed the alleged distribution gave evidence. The document produced by Peter Njoroge Munyui was therefore of little probative value and moreover did not constitute, as severally claimed by Simon Mungai and Nancy Waithera an agreement by the beneficiaries to share the suit land in the portions stated therein. The elders clearly recognized their limited role in the resolution of the dispute by counselling the disputants to file a succession cause. The Protestors have asserted, and it is reasonable to believe in the circumstances, that the deceased died intestate. Whatever wishes the deceased may have had regarding the sharing of the land upon his demise cannot be established from the material placed before the court and I find that he died intestate, and hence, his estate ought to devolve in accordance with the provisions of the Laws of Succession Act. The definition of child under Section 3 of Laws of Succession Act does not distinguish between male and female children born to the intestate and his wife in marriage. Neither do any of the provisions of the Laws of Succession Act governing intestate succession. Besides, under Article 27 of the Constitution, both male and females are entitled to equal treatment and are protected from discrimination. Section 38 of the Laws of Succession Act 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 Section 41 and 42 devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

7. As earlier observed, there is no credible evidence that the deceased settled or appointed any propriety (gifts intervivos) to any of the beneficiaries during his lifetime. In the circumstances, the court is of the considered view that all the children of the deceased are entitled to an equal share of the sole asset of his estate. The shares due to his deceased children Peter Kagwara Uiru, Janet Wanjiru Uiru alias Janet Wanjiru Kangunya and Grace Wanjui Mbugua will go to their respective estates for distribution among the beneficiaries surviving them in accordance with the Law of Succession there being no evidence that they all predeceased their father. And secondly, because none of their representatives in this case have presented evidence of appointment as their legal representatives. Thus the land parcel LR NO. KIAMBAA/RUAKA/113 will be distributed as follows:

- | | | |
|---------------------------------------|---|--------------|
| 1) Simon Mungai Uiru | - | 0.8625 acres |
| 2) Alice Nyakio Uiru | - | 0.8625 acres |
| 3) Rachel Moi Uiru | - | 0.8625 acres |
| 4) Winnie Wairimu Uiru | - | 0.8625 acres |
| 5) Lucy Wanjiku Uiru | - | 0.8625 acres |
| 6) Estate of Peter Kagwara | - | 0.8625 acres |
| 7) Estate of Janet Wanjiru Uiru alias | - | 0.8625 acres |
| Jane Wanjiru Kagunya | | |
| 8) Estate of Grace Wanjui Mbugua | - | 0.8625 acres |

8. The grant herein is confirmed in terms of the foregoing distribution therefore. During her testimony, Nancy Waithera Kagwara admitted that the person named Patrick Kihiu Kamau purchased a portion of the suit land through a transaction entered into with her deceased husband prior to the confirmation of the grant. The said alleged purchaser is not a child of the deceased or a beneficiary to the estate of the deceased herein therefore and any claims he might have in that regard ought to be directed against the estate of Peter Kagwara Uiru.

9. In view of the contention that has characterized this long drawn dispute, it is reasonable to predict that the beneficiaries in this case by themselves may not agree on the manner of subdividing the suit property so that each party obtains its rightful share. In the interest of justice, and in order to bring the disputation to an end the court directs that the Kiambu District Surveyor visits the suit property in the presence of all beneficiaries and their advocates and to prepare at least three alternative proposals as to how the suit land may be subdivided in a manner that takes into account the developments thereon and that is economically viable and equitable, and as much as possible ensuring that all the beneficiaries end up holding roughly equal portions of land.

10. The surveyors report is to be filed into court on or before 25th July, 2019 when the matter will be mentioned.

11. Regarding the contempt application filed on 26th November 2018, the court upholds the preliminary objection raised by Mr. Kimani. The application is based on the contempt of Court Act, an act of parliament declared unconstitutional on 9th November, 2018 in **Constitutional Petition No.87 of 2017 Kenya Human Rights Commission v Attorney General and Another [2018] e KLR**. The invocation of Article 159 (2) (d) of the Constitution by Miss Kibebo cannot cure the defect. The application filed on 26th November 2018 is struck out therefore. While so doing the court notes that there are many pending applications filed by the parties, some of them similar. The practice of parties filing numerous applications in the same matter and for similar orders is frowned upon as it obfuscates issues while wasting previous judicial time. Now that the court has determined the respective shares due to the stated beneficiaries, the court hereby deems all pending applications filed prior to this ruling as spent. Nonetheless, in order to pre-empt actions by any parties aimed at defeating the execution of the final orders of this court, it is hereby ordered that the *status quo* in respect of the suit property as obtaining at the date of this ruling be maintained, and more particularly that with regard to the development captured in the Deputy Registrar's Report dated 9th December 2018, the court extends the *status quo* order given on 26th February 2019 as to installation of tenants therein.

Parties will bear own costs in view of the nature of these proceedings.

DELIVERED AND SIGNED AT KIAMBU THIS 30TH DAY OF APRIL 2019

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C. MEOLI

JUDGE

In the Presence of:-

Miss Kibebo for the Protestor

Mr. Kinuthia for the Petitioner

Court Assistant - Kevin