



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT SUCCESSION CAUSE NO.48 OF 2013

IN THE MATTER OF ESTATE OF JAMES KARIMI

KAMAU alias KARIMI S/O KAMAU (DECEASED)

DAMARIS MUTHONI KARIMI.....PETITIONER

-VERSUS-

OWEN KAMAU KARIMI.....PROTESTOR

JUDGMENT

On 30th September 2011 James Karimi Kamau alias Karimi s/o Kamau died. The chief Tumutumu Location in his letter to the Deputy Registrar dated 14th January 2013 reported that he was survived by his widow, five children and a grandson.

1. Damaris Muthoni Karimi- widow
2. Wandia Murugi Karimi-daughter
3. Owen Kamau Karimi-son
4. Laban Njeri Karimi- son
5. Lily Mukami Karimi-daughter
6. Lydia Wangari Karimi-married daughter
7. Stephen Maina Wamaitha-Grandson

And that his estate composed of Kirimukunyu/Mbogoini/61 and 791, Mwerua/Mukurwe/2124, plot 9 Tumutumu Shopping Centre and motor vehicle KND 234.

Grant of letters of administration intestate was made to the widow on 18th March 2013 and by summons for confirmation of grant dated 19th September 2013 she applied for confirmation of the grant. In the supporting affidavit it was indicated that she would be the sole heir to the entire estate.

This application provoked an affidavit of protest from her son one Owen Kamau Karimi sworn on 30th January 2014 in which he proposed that the estate be distributed as follows:-

- a) LR KIRIMUKUYU/MBOGOINI/61- DAMARIS MUTHONI KARIMI
- b) LR.KIRIMIKUYU/MBOGOINI/791-DAMARIS MUTHONI KARIMI-0.43 HA

-OWEN KAMAU KARIMI- 0.40 HA

- c) LR.MWERUA/MUKURE/2124 -DAMARIS MUTHONI KARIMI- 1.53 HA
-OWEN KAMAU KARIMI -0.80 HA
- d) PLOT NO.9 - DAMARIS MUTHONI KARIMI
- e) PLOT NO.14 KAROGOTO(omitted) -DAMARIS MUTHONI KARIMI) **jointly**
-OWEN KAMAU KARIMI) **equal shares**
- f) M/V KND 234 TOYOTA P/UP -DAMARIS MUTHONI KARIMI

It is noteworthy from his proposed mode of distribution he made an addition to the estate plot No.14 Karogoto which he deponed had been omitted by the Petitioner but was part of the Estate, distributing it in equal shares between him and the Petitioner. He also deponed that it would be up to the Petitioner, his mother to decide how to share her share of the estate amongst his siblings.

By a replying affidavit sworn on 3rd February 2014 his mother deponed that Plot No.14 Karogoto was not part of deceased estate. That the protester could not by himself decide how to share the estate without consent of his siblings. She expressed concern that the protester having been a teacher, had neglected his duties, leading to the termination of his services, and she suspected that he was a drug addict because he exhibited what she described as queer behavior. She opposed his mode of distribution saying that as the widow she was the sole beneficiary of her husband's property.

The matter went dead, until 5th November 2018 when it came up for revocation of grant under s.76 (d) (i).

When the petitioner was served with the notice of revocation she filed an affidavit sworn on 31st October 2018 to explain why she had not been able to pursue the matter in the intervening period and to request the court not to revoke the grant.

In the affidavit she explained how the protester had given her so much trouble, resulting in three Criminal cases against him, that she could not think about the cause but about her safety first. On 14th October 2014 he had attacked her at her home Mwerua/Mukure/2124 and forcefully occupied the land, restrained her workers from accessing the land. He was arrested and charged at Karatina and Baricho Law courts where he was imprisoned for 1 year in each of the cases I 2016. Prior to that he had been before the Karatina Court in Cr 413 of 2015 but the Petitioner had forgiven him on the promise that he would stop insulting and threatening her. She was even forced to file Kerugoya ELC no 119 of 2017 against him.

That it was due to all these issues that she had been unable to pursue the cause because at 81 years old and suffering from Arthritis and diabetes it was too much for her.

Upon considering her explanations, the court gave directions that both the Protest and the summons for confirmation of grant be heard on 29th January 2019.

On 29th January 2019 all the beneficiaries and the Petitioner and the protester were present. The protester told the court that his objections were based on the fact that Plot 2124 was in the joint names of both his mother and father and did not belong his mother alone and he suspected it had been transferred to her fraudulently. That plot 14 Karogoto had always been in his father's names since the 1960's. that he had documentary proof t that effect which given time he would provide. That he objected to the rest of the distribution because he was not consulted, and that 4 acres had been disposed of out of Mwerua/Mukure/2124 without his knowledge. He did not file any response to the Petitioner's affidavit

Wandia Murugi his sister told the court that the four acres were sold when their father was alive in 2010 to take care of hospital expenses. Their father was ailing for 20 years with diabetes and kidney failure and one time was hospitalized at MP Shah hospital for three weeks. That their sister one Sylvia, now deceased had cancer and money was needed to take care of these issues. That the money raised was not enough and they still had to conduct a harambee to clear the bills. She reiterated the Petitioner's affidavit confirming that their elderly mother was living in fear from threats by the Protester.

The matter was fixed for mention on 21st February 2019 for the Protester to provide the supporting documents for his protest.

On 21st February he filed a copy of the green card for Mwerua/Mukure/2124. He reiterated that he was not aware of the transfers made to his mother.

Upon considering the Affidavits by the Petitioner and the Protester the Issues arising for determination are:

1. Whether the property Mwerua/Mukure/2124 is part of the deceased's estate.
2. Whether plot No.14 Karogoto trading center is part of the deceased's estate.
3. What is the estate of the deceased?

4. Who and How should the estate be distributed?

Whether the property Mwerua/Mukure/2124 and Plot No. 14 Karogoto is part of the deceased's estate

The green card produced by the protestor clearly shows that the title was registered in name of James Karimi Kamau the deceased on 9th June and on 25th January 2011 the same was registered in the names of the deceased and Damaris Muthoni Karimi as joint proprietors and a title deed issued to that effect on 26th January 2011.

Surely the protestor did not expect his parents to consult him on this issue? It was their property and they could do with it what they pleased. He does not lay a basis as to why his parents should have consulted him in the first place.

On 30th September 2011, James Karimi died. On 23rd January 2015, the Registrar was presented with the certificate of death. The green card entry shows that the title was transmitted to Damaris Muthoni Karimi under s.60 Land Registration Act, upon the death of the joint proprietor and a title deed issued to her.

The section reads: **Transmission on death of joint proprietor**

If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate.

Granted this was done when this cause was pending before this court. However, at the death of the deceased herein all that the Petitioner was required to do was to present proof of his death, and his name would be deleted from the title, leaving her as the sole proprietor. On this one the Protester's consent or approval was nor required or expected.

There is also a letter dated 12th July 2010 showing that the transfer of the plot No.14 Karogoto Trading Centre to Damaris Muthoni Karimi was approved and minute by the full Nyeri County Council. At the time of the transfer the deceased was alive.

What is available for distribution to the heirs of a deceased person is his estate as defined by the law "*estate*" means the free property of a deceased person; Free property is defined as well:

*"free property", in relation to a deceased person, means the property of which that person was **legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death;***

The Karogoto Plot was transferred in the life time of the deceased. His interests in Mwerua/Mukure/2124 was terminated by his death. Hence, the 2 properties cannot be described to be part of the estate of the deceased as at 30th September 2011 when he died.

What is the deceased's estate?

The properties available for distribution are:

1. Kirimukuyu/Mbogoini/61
2. Kirimukuyu/Mbogoini/ 791
3. Plot No 9 Tumutumu
4. M/v Reg no. KND 234 Toyota Pick Up

Who and how should the Estate be distributed?

In the affidavit sworn on 28th January 2019, the Petitioner had changed her position the distribution proposed in the Summons for confirmation of the grant. This appears to have been informed by the developments after the filing of the protest and where she was now the registered proprietor of Mwerua/Mukure/2124 and Plot 14 Karogoto, removing the two from distribution.

She proposed that she only hold a life interest in the estate and in trust for all the beneficiaries in Kirimukuyu/Mbogoini/791 and Plot No. 9 Tumutumu "absolutely"; and a life interest in Kirimukuyu/Mbogoini/61 to hold in trust for Laban Njeru Karimi; and the motor vehicle to be inherited by herself absolutely.

Section 66 of the Law of Succession Act gives the court the guideline as to the persons to administer the estate of a deceased intestate. It states: **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; (all emphasis added)

The Petitioner herein has the legal priority rank in the administration of the estate with without the association of others including her children. The Protester does not occupy the same rank as his mother. He still remains her child and holds the same rank as his siblings. Hence the position he arrogates himself reducing his mother to the same rank as his siblings is not only legally untenable but a sign of misguided narcissistic arrogance on his part. It is no wonder that the Petitioner describes him as having queer behavior. That extreme sense of entitlement is dangerous and he may require help to deal with it.

S.35 of the Law of Succession Act provides for where an intestate has left one surviving spouse and child/children: It states;

Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Hence the Petitioner is entitled to the life interest in the estate, and should it be distributed, she is entitled a portion of the same as she cannot simply be disinherited.

She can distribute the estate in exercise of her life interest as provided for under section 35(2) which states:

A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

The Petitioner here appears to have intended to exercise her powers of appointment with regard to Kirimukuyu/Mbogoini/61 for Laban Njeru Karimi, however s.35 (2) clearly provides that such an appointment has to take effect with immediate effect and not in the future. By providing that she will hold the property in trust for one of the children to devolve to him in the future, the Petitioner acted in violation of this provision of the law. That mode of distribution is not allowable under s.35 (2) though nothing stops her from doing so later in the proper manner.

With regard to the motor vehicle both the Protester and the Petitioner are in agreement that it should be transferred to her absolutely.

Having stated the above I find that the Protest is not merited and it is dismissed.

The summons for confirmation of grant is confirmed on the following terms: -

1. The M/v Reg No. KND 234 Toyota Pick Up to Damaris Muthoni Karimi absolutely.
2. Damaris Muthoni Karimi to have life interest in, and to hold in trust for the beneficiaries herein, the estate of the deceased comprising of: *Kirimukuyu/Mbogoini/61, Kirimukuyu/Mbogoini/ 791 and Plot No 9 Tumutumu, unless otherwise appointed by the widow, to devolve in equal shares* to Wandia Murugi Karimi, Owen Kamau Karimi, Laban Njeru Karimi, Lily Mukami Karimi, Lydia Wangari Karimi, Stephen Maina Wamaitha.
3. For the avoidance of doubt the same to be reflected in the transmission and title documents.
4. No orders as to costs

Dated, signed and delivered in open court at Nyeri this 30th April 2019.

Mumbua T. Matheka

Judge

In the presence of:-

Court Assistant: Juliet

The Protester

Lily Mukami

Wandia Murugi

Judge