



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO. 129 OF 2016

IN THE MATTER OF THE ESTATE OF THOMAS MUCHIRI (DECEASED)

J U D G M E N T

1. A grant of Letters of Administration Intestate was issued to **Priscilla Wanjiku Muchiri and Thomas Kariuki Muchiri (Petitioners)** in respect of the estate of **Thomas Muchiri** (the deceased herein) who died on 18th November 1980. At the time of the issuance of the grant the matter was a succession cause in Kiambu Magistrate's Court, being **PM's Succession Cause No. 22 of 2008**. On 10th June 2010, the Petitioners filed a summons to confirm grant, which met resistance in the form of protests from one of the beneficiaries, **Edwin Kihara Muchiri** a son to the deceased and his own wife **Grace Njeri Kihara**, the latter only allegedly seeking to safeguard her interest and the interest of her children with **Edwin Kihara Muchiri** but otherwise supporting the distribution proposed.

2. On 22/6/15 the lower court cause was transferred to the High Court owing to the limits in the pecuniary jurisdiction of the lower court. The protestor **Edwin Kihara Muchiri** did file a reply to the protest by his wife **Grace Njeri Kihara** on 2nd December 2015. The initial summons was subsequently abandoned by the Petitioner and pursuant to the order by **Ngugi J** on 7.12.17, a new summons for confirmation of grant was filed on 8th February 2018. The Petitioners swore the supporting affidavit and on 26th March 2018 the Petitioner **Thomas Kariuki Muchiri** filed a Further Affidavit which delineated the proposed distribution of the sole asset of the estate, namely **Kabete/Kanyariri/143**.

3. In responding to the new summons, **Grace Njeri Kihara**, once more swore an affidavit in support of the mode of distribution in principle (both in the support affidavit and apparently the subsequent distribution proposal filed on 25th September 2018) but subject to a request to the court to issue an order to preserve the share due to **Edwin Kihara Muchiri**, allegedly the subject matter of a dispute between the couple in what is referred to as **Matrimonial Cause No.5 of 2017**. Her spouse and Protestor, **Edwin Kihara Muchiri** also swore an affidavit to the following effect.

4. That a son of the deceased, and the Protestor's brother, one **Thomas Kariuki Muchiri** had not been included in the distribution proposed in the new summons; that **Hottensia Gathoni Waweru** being a wife to his late brother **George Waweru Muchiri** is not entitled to a share of the estate as the said brother had already received a gift *intervivos* in the form of a land parcel at Gitaru where he had set up his matrimonial home with **Hottensia Gathoni Waweru**; that **Teresia Nduta Mwaura**, widow of the Protestor's late brother **Edward Mwaura** is not entitled to any share of the asset of the estate as the deceased had helped the deceased husband to purchase a piece of land in Eldoret, where he and **Teresia Nduta Mwaura** settled; that **Samuel Njoroge Gichuki** and **Peter Kimani Nyakuru** listed as beneficiaries in the summons are strangers not entitled to inherit from the estate herein.

5. As regards **Grace Njeri Muchiri**, he complains that in essence, she is proposing to distribute his share without consulting him. **Priscilla Wanjiku Muchiri, Hottensia Gathoni Waweru, Rose Wangui Muchiri, John Muchiri Mwaura, Samuel Njoroge Gichuki, Peter Kimani Nyakuru** and **Thomas Muchiri Wairimu** who describe themselves as beneficiaries have also filed a proposed mode of distribution dated 5th December 2017 and filed on 25th September 2018. A consent was recorded on 25th September 2018 that the summons for confirmation of grant be determined on the basis of the respective parties' proposed distribution.

6. The court has considered the summons for confirmation of grant, the relevant affidavits and filings by the parties as well as perusing the entire file respecting the instant estate. The sole asset falling for distribution is the land parcel No. **KABETE/KANYARIRI/143** which measures approximately 3.9 acres and is still registered in the name of the deceased as per the search dated 6th December 2001 attached to the Petition.

7. According to the letter dated 1st September 2006 authored by the chief Kanyariri sub location, also attached to the Petition, and the affidavit of the Petitioners in support of the Petition (P & A 5), the deceased was survived by the following persons:

- a) Priscilla Wanjiku Muchiri - daughter
- b) Thomas Kariuki Muchiri - son
- c) Hottensia Gathoni Waweru - (daughter-in-law)

- d) Margaret Muthoni Muchiri - (daughter-in-law)
- e) Edwin Kihara Muchiri - son
- f) Thomas Muchiri Wairimu - grandson
- g) Teresiah Nduta Mwaura - (daughter-in-law)

8. Evidently the daughters-in-law are widows of the sons of the deceased who apparently predeceased him, while the grandson appears to be a son of the deceased's daughter who predeceased the deceased. The two Protectors herein are man and wife and their dispute is essentially between them as to whether the Protector **Edwin Kihara Muchiri** ought to become the absolute proprietor of his share of the estate of his deceased father, or to hold the share subject to the claims by his wife **Grace Njeri Muchiri**.

9. The affidavit sworn by the Petitioners in support of the summons replicates the names of the beneficiaries in the chief's letter and Petition affidavit referred to earlier. However in the distribution proposed at paragraph 4 of the said affidavit, the widows of the intestate's deceased sons namely, **Hottensia Gathoni Waweru** and **Teresia Nduta Mwaura** are excluded. It is proposed that the remaining six beneficiaries (except **Thomas Kariuki Muchiri**) get 0.20 ha. of the land parcel while **Thomas Kariuki Muchiri** receives two portions, the first, being 0.50 ha. and the second portion measuring 0.20ha. This mode of distribution is repeated in the Further affidavit of the Petitioner **Thomas Kariuki Muchiri**.

10. This exclusion of the daughters-in-law to the deceased appears to resonate with the depositions at paragraph 4 and 5 of the protest affidavit of **Edwin Kihara Muchiri** to the effect that the said widows' husbands had already had property settled in their favour by the deceased in his lifetime, and therefore ought not to inherit any portion of the Kanyariri property. No evidence was led to support these assertions, nor justification for the two portions designated in favour of **Thomas Kariuki Muchiri**, who on all accounts is the same person.

11. The proposed mode of distribution filed on 25th September 2018 which the 1st Petitioner **Priscilla Wanjiku Muchiri** appears to endorse is contrary to her affidavit in support of the summons and to the affidavit of her Co-Petitioner **Thomas Kariuki Muchiri**. The said schedule of proposed distribution includes the following beneficiaries:

- a) Priscilla Wanjiku Muchiri
- b) Hottensia Gathoni Waweru
- c) Margaret Muthoni Muchiri
- d) Edwin Kihara Muchiri
- e) Teresia Nduta Mwaura
- f) Samuel Njoroge Gichuki
- g) Peter Kimani Nyakuru
- h) Thomas Muchiri Wairimu

12. It is proposed therein that each of the beneficiaries (a) – (e) and (h) receive 0.23 ha each, while the purported beneficiaries listed at item (f) and (g) are to jointly receive in equal shares a portion measuring 0.23 ha. **Grace Njeri Muchiri** the second Protector supports this mode of distribution. This document is executed by all the persons listed (except **Edwin Kihara Muchiri**).

13. Who are the beneficiaries listed at item (f) and (g) above? No explanation was made in that regard. On all accounts these persons are indeed strangers as **Edwin Kihara Muchiri** has asserted, there being no demonstrated relationship between them and the deceased. Nor is it clear why the Co-Petitioner **Thomas Karikuki Muchiri** has been omitted in the said schedule. Hence the complaint by the Protector **Edwin Kihara Muchiri**.

14. In light of the foregoing, it is imperative for the court to state for the avoidance of doubt, that the beneficiaries of the deceased are as stated in the Petition and the chief's letter earlier referred to. The Protector **Edwin Kihara Muchiri** having failed to tender evidence that the intestate's sons whose widows were named therein had property settled in their favour in the lifetime of the deceased, there can be no justification for excluding the said widows from benefitting from the estate.

15. The deceased in this case died intestate and was survived by his children or their children/widows listed as such in the Petition. Section 38 of the Law 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 sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

16. The children who survived the deceased or the children's widows are entitled to equal shares of the net estate. Equally, by dint of

Section 41 of the Law of Succession Act, the children of an intestate's child who predeceased the intestate are entitled to the share of their deceased parent in the estate of their grandparents, if the parent has predeceased the said intestate grand-parent. In the circumstances of this case the beneficiaries listed in the Petition and Chief's letter are entitled to share equally the net intestate estate herein.

17. Therefore, this court determines that the land parcel No. **Kabete/Kanyariri/143** is to be shared in equally among the following beneficiaries:

- a) Priscilla Wanjiku Muchiri - daughter
- b) Thomas Kariuki Muchiri - son
- c) Hottensia Gathoni Waweru - (daughter-in-law)
- d) Margaret Gathoni Muchiri - (daughter-in-law)
- e) Edwin Kihara Muchiri - son
- f) Thomas Muchiri Wairimu - grandson
- g) Teresiah Nduta Mwaura - daughter-in-law

18. In the event that any of these beneficiaries are deceased since the filing of this petition, their shares are to devolve upon their respective estates. The grant issued to the Petitioners is confirmed in these terms.

19. In view of the age of this dispute and the possibility that some of the beneficiaries may have developed their homes on certain portions of the land in question, or are settled thereon, the subdivision of the land will take such development/occupation into account in order to prevent disruption and financial difficulties to the beneficiaries.

20. The court directs that the land parcel No. **KABETE/KANYARIRI/143** is to be subdivided into seven equal parts. In the event that after 6 months of today's date the beneficiaries are unable to agree on the manner of subdivision, the court further directs that the District Land Surveyor, Kiambu does visit the land and prepare two proposals as to how best, the land can be subdivided, bearing in mind equity, the topology of the land, the developments, if any made by any beneficiary and proper access. In that event, such proposals are to be filed into court not later than end of March 2020 and a mention date taken so that further directions may be given.

21. Regarding the contest between the two protestors, it seems that the protest by **Grace Njeri Muchiri alias Grace Njeri Kihara** was motivated by the apprehension that her estranged husband and Protestor **Edwin Kihara Muchiri** might, upon receiving his net share of the estate, dispose of it, to the detriment of her interests and of her children with the said protestor.

22. Having called for and perused **Kiambu High Court Family Miscellaneous Case No. 5 of 2017**, the court has confirmed that the said **Grace Njeri Kihara (Muchiri)** had indeed filed an Originating Summons on 19th September 2017, seeking to have the share of the estate due under the succession cause to **Edwin Kihara Muchiri** the Respondent therein, declared as matrimonial property *inter alia*. An application for an injunction, to restrain the Respondent in respect to dealings in the said share filed simultaneously with the Originating Summons, was adjourned on 20.11.18 as none of the parties attended court.

23. There are no orders in that matter to restrain the Respondent in any way. In my considered view, the Applicant therein cannot expect to use the present succession cause to obtain preservative orders while her motion in the Family Miscellaneous cause lies unprosecuted. Besides, this cause is ill-suited for entertaining a dispute relating to matrimonial property. Nevertheless, in the interest of justice, and to avoid precipitating a situation that may lead to the defeat of the motion in the Family Miscellaneous Cause, I will order in relation to the share due to **Edwin Kihara Muchiri** under the present cause that, upon receiving the same, he ought to maintain the *status quo*, that is, to hold the property intact pending the hearing and determination of the motion in **Family Miscellaneous No. 5 of 2017**.

24. For the foregoing purpose, I direct that the said application be listed before me for hearing on 25/9/19 and that the registry does serve early notices on all the advocates in that cause. This order in no way affects the distribution of the estate of the deceased as ordered herein and the administrators shall proceed with dispatch to execute the orders of the court in that regard.

DELIVERED AND SIGNED AT KIAMBU THIS 25TH DAY OF JULY 2019

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C. MEOLI

JUDGE

In the presence of:

Grace Njeri Kihara (Muchiri)

Hottensia Gathoni

Court Assistant - Kevin