



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE NO. 640 OF 2013

IN THE MATTER OF THE ESTATE OF KATAMA NYAKI alias GATAMA NYAKI (DECEASED)

EMMANUEL NJIRU GATAMA.....ADMINISTRATOR

VERSUS

JOSEPH NJERU NJUE.....PROTESTOR

J U D G M E N T

A. Introduction

1. This is the protest sworn on the 27/04/2015 against the summons for confirmation of grant dated 9/06/2014.
2. It is the protestor's case that the administrator commenced the succession proceedings without the consent of the protestor who is his step-brother. The protestor further deposes that the administrator is not likely to distribute the deceased's estate equally amongst the deceased's beneficiary.
3. In rejoinder, the administrator swore his replying affidavit dated 8/06/2015 in which he deposed that the protest was overtaken by events as the protestor had all along been made aware of the succession proceedings having been served with the forms for confirmation of grant. The administrator further deposed that the protestor and his siblings were to get a bigger share in the proposed distribution.
4. The protest was partially heard through *viva voce* evidence. Later, the parties opted to rely on their affidavits and filed submissions. The protestor testified that his side of the family came to know about the succession proceedings in 2014, a year after the same was filed. He further testified that he was opposed to the mode of distribution as proposed by the administrator as it was not fair.

B. Protestor's Submission

5. The protestor submitted that the administrator had not consulted the second house of the deceased when he commenced the succession proceedings or informed them that he was granted letters of administration. The act of administrator was contrary to provisions of Rule 26 of the Probate and Administration Rules according to the protestor.
6. He further submitted that the distribution of the estate of the deceased was not equal contrary to provisions of Section 35 and 38 of the Law of Succession Act for the house of the 2nd wife was given less share compared to the house of the 1st wife to which the administrator belongs. He relied on the case of **Re Estate of John Musambayi Katumanga- (Deceased) [2014] eKLR** where the court held that the provisions of Sections 35 (5) and 38 were in mandatory terms regarding the equal distribution of the deceased's estate.

C. Petitioner's Submissions

7. He submitted that despite numerous summonses in connection to the succession cause herein, the protestor and his siblings had refused to attend the meetings at the chief's office in Kagaari North East and as such the protestor was aware and refused to co-operate.
8. The protestor further submitted that notice as provided for under the law was issued to the deceased's dependants and in the absence of the protestor's consent, the administrator filed a supporting affidavit as provided by law and that none of the other beneficiaries had come to corroborate the protestor's allegations.
9. He further submitted that the distribution of the deceased's estate should be done equally among the children of each house after dividing the said estate among the houses as provided for under Section 40 (1) of the Law of Succession Act. Finally, he submitted that even if the date of the deceased's death was wrong and the names of the dependants wrongly entered, the same could be altered and/or amended by the court and thus not fatal to the application.

D. Analysis & Determination

10. The protestor's states that the petitioner commenced the succession proceedings without his consent and that of his step siblings. The petitioner in response states that he had tried many times to get the protestor and other siblings to come discuss the succession matter to no avail. The petitioner further states that in the absence of the notice he had filed a supporting affidavit as allowed by law.

11. I have perused the court record and seen the affidavit of service sworn on the 24/11/2014 by Wilfred Njeru Kigoro who deposes that he had gone to serve the protestor and his siblings with Summons for Confirmation of Grant. I have also seen a letter from the Chief's office dated 3/9/2012 not addressed to anyone in particular but calling for attendance at the Chief's office in Kagaari North East.

12. To me the petition was filed contrary to Rule 26 of the Probate & Administration Rules which states: -

“26(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require”

13. The petition ought to have been accompanied by consent as provided under **Rule 26 of the Probate and Administration Rules** signed by all the beneficiaries or in the alternative a renunciation duly signed as required.

14. From the administrator's representation, he may have informally informed the protestor of the existence of these proceedings at the confirmation stage. However, it is not in dispute that no consent of the beneficiaries was filed in court in accordance with Rule 26.

15. The effect of failure to comply with Rule 26 of the Probate and Administration Rules was ably discussed by the court in **Al-Amin Abdulrehman Hatimy v Mohamed Abdulrehman Mohamed & another [2013] eKLR** where the court held that the law of succession by virtue of Rule 26 requires that any application for issue of a Grant must be accompanied by a consent duly signed by all persons entitled in the share in the same estate.

16. I have also considered the mode of distribution as proposed by the petitioner in the summons for confirmation of grant. The deceased in this cause was polygamous and **Section 40 of the Law of Succession Act** will guide distribution of his estate. It provides: -

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

17. The protestor proposes that the estate be divided equally between all the children of the deceased who are ten (10) in number. The two widows of the deceased are not alive as indicated in the protest. Section 38 and 40 are therefore applicable to the extent of their relevance herein.

18. I find that the protestor has proved his protest to the balance of probabilities while the petitioner did not explain the basis of his preferred mode of distribution.

19. It is my considered opinion that the estate of the deceased comprising of LR. Kagaari/Kanja/223 shall be distributed in accordance with Section 40 of the Act to the ratio of 7:3. In effect, the estate shall be shared equally among the ten(10) children of the deceased.

20. Each party to meet their own costs.

21. The protest stands allowed.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JULY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriithi for Lee Maina for petitioner

Protestor present