



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 103 OF 2018**

**IN THE MATTER OF THE ESTATE OF NGANGA GAIATHO (DECEASED)**

**BETWEEN**

**JOHN NGANGA GAIATHO.....APPELLANT**

**AND**

**WANJIRU NGANGA.....1<sup>ST</sup> RESPONDENT**

**GAIATHO NGANGA.....2<sup>ND</sup> RESPONDENT**

*(An appeal from the judgment and decree in Thika Succession Cause no. 435 of 2007 by Hon. C.A. Otieno Omondi (PM) on 23<sup>rd</sup> July, 2018)*

**JUDGMENT**

**Introduction**

1. **NGANGA GAIATHO (DECEASED)** died sometimes on 09<sup>th</sup> October, 1991. His estate comprised of **NGENDA/MANGU/1400**(*hereinafter referred to as the suit property*).

2. The deceased's family comprised of the following:

**Wife**

Wambui Nganga (deceased)

**Children**

1) Wanjiru Nganga

2) Gaitho Nganga

3) John Gichinga

4) Wairimu Nganga (deceased)

5) Waithira Nganga (deceased)

6) Kariuki Nganga(deceased)

7) Gatuguta Nganga (deceased)

8) Mutumwa Nganga (deceased)

3. John Gichinga and Wanjiru Nganga were appointed joint administrators of the deceased's estate.

4. By an application for confirmation of grant dated 29<sup>th</sup> September, 2010 filed on 06<sup>th</sup> October, 2010, John Gichinga Nganga (*hereinafter referred to as the 1<sup>st</sup> Administrator*) proposed to distribute the estate as follows:

1) Gaitho Nganga 1 acre

2) John Gichinga 3 acres

3) Wanjiru Nganga 1 acre

5. Wanjiru Nganga the co-administrator filed a protest and proposed to distribute the estate as follows:

1) John Gichinga 1acre

2) Wanjiru Nganga 1 acre

3) Gaitho Nganga 1 acre

4) Martin Itugi Ndungu (purchaser) 1 acre

5) Waithira Nganga's children ¼ acre

6) Mutumwa Nganga's children ¼ acre

#### **Evidence**

6. The protest was heard by way of viva voce evidence. The 1<sup>st</sup> Administrator testified that the deceased made an oral will in the presence of Wahogo, Karai and Mathias Kariuki Wakahia and bequeathed him 3 acres of *the suit property*, 1 acre to Gaitho Nganga, and ½ acre to any of his daughters who left her matrimonial home. He stated that his deceased siblings Waithira and Mutumwa were survived by their children.

7. **PW2 MATHIAS KARIUKI WAKAHIA** stated that the deceased made a written will in which he bequeathed his land equally by his sons Gichinga, Gaitho, Kariuki and Gatuguta who'd get 1 acre each whereas his daughters who left their matrimonial homes would be given only a small portion to put up houses.

8. **DW1 HANNA WANJIRU NGANGA** (*hereinafter referred to as the 2<sup>nd</sup> Administrator*) stated that deceased had 8 children. She denied that deceased made a will but stated that the family had sold one acre of land to Martin Itugi Ndungu. **DW2 GAITHO NGANGA** stated that what was remaining of deceased's land was 3 acres which he had shared with his siblings Gichinga Nganga and Wanjiru Nganga with each getting one acre since 1 acre had been sold to Martin Itugi Ndungu. **DW3 JENIFER WAMBUI MUTUMWA** stated that she was the eldest child of 7 children of Mutumwa Nganga (deceased's daughter). She stated that she was aware that Gichinga Nganga, Wanjiru Nganga and Gaitho Nganga had sold 1 acre of deceased's land to Martin Itugi Ndungu for shs. 300,000/- and had already received Kshs. 100,000/- which was used to file this succession cause but that Gichinga Nganga had changed his mind concerning the sale.

9. By a judgment dated 23<sup>rd</sup> July, 2018, the trial court ordered that the estate of **NGANGA GAITHO (DECEASED)** be distributed as follows:

1) John Gichinga 1acre

2) Wanjiru Nganga 1 acre

3) Gaitho Nganga 1 acre

4) Waithira Nganga's children ½ acre

5) Mutumwa Nganga's children ½ acre

10. Aggrieved by the lower court's decision, the 1<sup>st</sup> Administrator preferred this appeal and on 24<sup>th</sup> August, 2018 filed the Memorandum of Appeal of even date which set out 3 grounds which I have summarized into 2 grounds to wit:

**1. The deceased died testate**

**2. Deceased's daughters were married**

#### **ANALYSIS AND DETERMINATION**

11. I have carefully considered the appeal in the light of the evidence on record and submissions for both parties and authorities in support thereof.

12. The Law of Succession Act cap 160 of the Laws of Kenya (*the Act*) at Section 8 and 9 which provides:

**8. A will may be made either orally or in writing.**

**9. (1) No oral will shall be valid unless:**

**(a) It is made before two or more competent witnesses and**

**(b) The testator dies within a period of three months from the date of making the will.**

13. The 1<sup>st</sup> Administrator claimed that the deceased made an oral will in the presence of Wahogo, Karai and Mathias Kariuki Wakahia and bequeathed him 3 acres of *the suit property*, 1 acre to Gaiitho Nganga, and ½ acre to any of his daughters who left her matrimonial home. He could not recall when the alleged oral will was made nor did he call any witness who was present when the alleged will was made. Mathias Kariuki Wakahia who was alleged to be present when the alleged oral will was made contradicted the 1<sup>st</sup> Administrator and stated that the deceased's will was in writing but the same was not tendered as an exhibit.

14. From the foregoing, I find that the trial court rightly found that the requirements of either a valid oral or written will had not been proved and that deceased died intestate.

15. Section 45 of the Law of Succession Act provide as follows:

**(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**

**(2) Any person who contravenes the provisions of this section shall—**

**(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and**

**(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.**

16. Section 82(b) (ii) of *the Act* on the other hand provides that no immovable property shall be sold before confirmation of the grant.

17. The alleged sale of 1 acre of deceased's land to Martin Itugi Ndungu amounts to intermeddling and the law takes a very serious view of intermeddling and makes it a criminal offence. (See [Veronica Njoki Wakagoto \(Deceased\) \[2013\] eKLR](#)). I therefore agree with the trial magistrate that the sale of 1 acre of deceased's land to Martin Itugi Ndungu offended the provisions of section 45 and 82(b) (ii) of *the Act* and was thus void.

18. Section 38 of *the 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.**

19. One thing that stands out prominently in this cause is that the 1<sup>st</sup> administrator has not made any provisions for his sister Wanjiru Nganga and the families of his two deceased sisters Waithira Nganga and Mutumwa Nganga. Now that Waithira Nganga and Mutumwa Nganga are dead, their children who are grandchildren of the deceased step into the shoes of their parents and take directly the share that ought to have gone to the said parents. (See [Estate of Veronica Njoki Wakagoto \(deceased\) \(supra\)](#)).

20. The proposal by the 1<sup>st</sup> administrator leaves no doubt in the mind of the court that he is acting under the fallacious patriarchal family tree which excluded daughters and any one claiming under them from inheriting from their fathers.

21. Today, it will be pretentious for any person to say or act ignorantly of the fact that discrimination of any person on the basis of gender or status is prohibited under the Constitution of Kenya, 2010, because; other than the existence of abundantly clear provisions of the Constitution, the chain of judicial decisions on discrimination on the basis of gender or status are equally clear. (See [Rono v Rono & Another, 2008 1 KLR \(G & F\) page 803](#); [Douglas Njuguna Muigai v John Bosco Maina Kariuki & another \[2014\] eKLR](#); [Mwongera Mugambi Rinturi & another v Josphine Kaarika & 2 others \[2015\] eKLR](#); [Stephen Gitonga M'murithi v Faith Ngira Murithi \[2015\] eKLR](#) and [Joyce Kabiti M' Turuchu v David M' Ntiritu Kiambi \[2016\] eKLR](#)).

22. The trial court found as a fact that the children of the deceased are entitled to equal share of the deceased's estate. Although the distribution by the court shows that the families of the deceased's children who are themselves deceased got ½ acre each, the totality of evidence discloses that the distribution by the trial court is reasonable and fair and I see no reasonable cause to interfere with it.

**Disposition**

23. For the foregoing reasons, the appeal is found to be unmeritorious and it is dismissed with costs to be borne by Gichinga Nganga, the 1<sup>st</sup> administrator/Appellant.

**DELIVERED AND SIGNED IN KIAMBU THIS 25<sup>th</sup> DAY OF *October* 2019**

**T.W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Nancy

Appellant - N/A

Respondent - N/A