



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 538 OF 2011

**IN THE MATTER OF THE ESTATE OF CHARLES NJONJO GITURO ALIAS CHARLES
NJONJO GITURU (DECEASED)**

MICHAEL WAIBOCHI NJONJO

JAMES MWATHI NJONJO.....PETITIONERS

VERSUS

PETER WAWERU NJONJO.....PROTESTER

JUDGMENT

According to the certificate of death dated 18th October 2010, on 22nd February 1991 Charles Njonjo Gituro died.

By a letter dated 29th April 2011, addressed to the Deputy Registrar, High Court Nyeri, the Chief Mweiga Location confirmed the death of the deceased, and that he had two wives in his life time namely Wairimu Njonjo also deceased and Mary Wangeci Njonjo. He listed his rightful heirs as follows;

1st Wife

1. Wairimu Njonjo – wife (deceased)
2. George Gituro Njonjo –son (deceased)
3. Mary Wanjiku King’ori- daughter, 76 years, married
4. Michael Waibochi Njonjo-son, 67 years
5. Teresa Wanjiru Njonjo- daughter ,65 years
6. Ester Ngendo Ndirangu-daughter, 62 years, married
7. John Ndegwa Njonjo- son, (deceased)
8. Pauline Nyamacohi Mwangi-daughter, 58 years, married

2nd Wife

1. Mary Wangechi Njonjo- wife, 65 years
2. Stephen Mwangi Njonjo- son (deceased)
3. Peter Waweru Njonjo-son, 45 years
4. James Mwathi Njonjo-son, 43 years
5. Jennifer Wanjiku Njonjo-daughter, 41 years, married
6. Grace Njeri Njonjo-daughter,39 years, married
7. Joseph Kimani Njonjo-son, 37 years
8. Margaret Ngendo Njonjo- daughter, 30 years

By a consent filed on the 9th June 2011 the following gave their consent to letters of administration to the estate of the deceased to be issued to Michael Waibochi and James Mwathi Njonjo.

1. Mary Wanjiku King'ori
2. Teresa Wanjiru Njonjo
3. Ester Ngendo Ndirangu
4. Pauline Nyamacohi Mwangi
5. Mary Wangechi Njonjo
6. Peter Waweru Njonjo
7. Jennifer Wanjiku Njonjo
8. Grace Njeri Njonjo
9. Joseph Kimani Njonjo
10. Margaret Ngendo Njonjo

The two filed the petition on the same date and in form P&A5 listed all the beneficiaries as per the Chief's letter and the deceased's estate as NYERI/MWEIGA/573 and CHANIA/KAIRI/T452

Grant of letters of administration was issued on the 6th September 2011 to the petitioners. Consequently, they filed summons for confirmation of the grant on 15th March 2012. In their joint affidavit in support of the summons at paragraph 5 they deponed that;

The identification and shares of all persons beneficially entitled to the said estate have been ascertained and determined as follows;

- a) Land Parcel no NYERI/MWEIGA/573 to be shared as follows;
 1. Mary Wangechi Njonjo – 1 Acre
 2. Peter Waweru Njonjo- 0.95 Acres

3. Joseph Kimani Njonjo- 0.95 Acres
4. Antony Muturi Maina- 0.95 Acres
5. Michael Waibochi Njonjo-0.95 Acres
6. Teresa Wanjiru Njonjo- 0.95 Acres

b) Land Parcel CHANIA KAIRI T452 –Archdiocese of Nairobi-Kairi Catholic Church absolutely.

On the 25th October 2013, Peter Waweru Njonjo from the 2nd house filed an affidavit of protest against the confirmation of the grant.

His contention was that the petitioners had filed the summons for confirmation of the grant without consulting the widow and her family. That there was some fraud as a certain Antony Muturi Maina, not a family member, and the Catholic church were scheduled as heirs. That it was alleged that one of the administrators James Mwathi had sold his share of the estate without the consent of the rest of the members of the family. In addition, the deceased in his lifetime owned several properties and had transferred some of them to the sons in the first house as follows;

- i. George Gituro Njonjo (deceased) Chania Kairi T450
- ii. Samwel Ndegwa Njonjo(Deceased) Land at '91' in Laikipia where his family is settled to date
- iii. Michael Waibochi Njonjo Nyeri/Mweiga/ within Muthu-ini in Kieni west

Thus the 1st house did not deserve a share in NYERI/MWEIGA/573 as it was the parcel of land where the deceased lived with his 2nd wife and her family, and it was his wish that that parcel of land be transferred to her. That it is only that he died before he could effect his wishes. It was his contention that NYERI/MWEIGA/573 could only be inherited by the second house.

In a further affidavit filed on the 26th March 2014, he provided further details to the effect that one property CHANIA KAIRI T452 had been left out. He deponed that neither the 1st petitioner/ applicant nor his sister Teresa Wanjiru Njonjo had ever lived on NYERI/MWEIGA/573. He provided a certificate of search showing it was registered in the name of Njonjo Karangi which he proposed to be shared by the family of George Gituro Njonjo. He also produced a certificate of search for parcel no MWEIGA/MUTHUINI/BLOCK V/1058 in the name of Michael Waibochi Njonjo.

He reiterated his prayer that the parcel NYERI/MWEIGA/573 be shared equally among Mary Wangechi, Peter Waweru, Joseph Kimani and James Mwathi.

On 13th June 2014 the petitioners filed what they called a supplementary affidavit.

They averred that the deceased had never transferred any of his properties to the 1st house during his life time. That Chania/Kairi/T452 was part of the estate of the deceased, that the 1st Petitioner had bought the alleged to have been given to him, that their father had even sold two acres out of 573 to educate the protester, that the protester also had land parcel no. Nyeri/Mweiga/1514. That the protester had not demonstrated where the first family was settled to warrant his proposal.

The protest and the summons for confirmation of the grant were heard together by way of viva voce evidence. The Applicants were represented by Mr. Mwaura, and the protester by Mr. Kiminda

In his testimony the protester told the court that his father the deceased had left an oral will. That in the month that he died, while admitted at the Nyeri PGH, he sent his step sister Teresa Nyathi to call all the family members and PW2 John Mwangi Kahindigi because there was something he wanted to talk about.

In the presence the protester, Teresa, George Gituro(Deceased) Samwel Ndegwa (deceased) and the said Kahindigi, the deceased now shared out his property.

- Chania /Kairi/ t 452 in Kiambu was given to George Gituro from the 1st house
- Land in Gatarakwa Euaso Nyiro/Suguroi to Samwel Ndegwa from the 1st house
- Muthuini Block 5/1058 to Michael Wabochi
- Nyeri/Mweiga/573 to Mary Njonjo the widow and her sons.

Further that none of the children from the 1st house had ever lived on 573 during the life time of the deceased. That the 2nd petitioner had not been given a share out of 573 in the distribution.

He said the land in his name he had bought from his SACCO savings after the death of his father.

On cross examination he said he did not have any documents to prove that the 1st Petitioner's parcel of land had belonged to the deceased. He denied having transferred some of the deceased's shares to himself to buy his land. He conceded that the deceased had sold two acres out of the parcel 573 but denied it was purposely for his education.

His witness PW2 John Mwangi Kahindigi's testimony was not different from his. He testified he was present at the Nyeri PGH on 11th February 1991 when the deceased allegedly shared out his property to his family.

On cross examination he said he knew the deceased in 1962 and by then the 1st wife was deceased. That he only knew the second wife but the deceased used to say he had two wives. He said that it the deceased who sent Teresa aka Nyathi to call him. He said the deceased died of stomach complications. He added that the 1st petitioner was given shares to buy the land in Muthuini but he was to top up. That the deceased gave his land in Gatarakwa to his son Ndegwa from the 1st house. That Peter Waweru was given the land that was given to the 2nd wife and her children.

The petitioner called Teresia Wanjiru Njonjo aka Nyathi. She denied there ever being a meeting at the hospital where her father distributed the estate. He testified as DW2. He reiterated his proposed mode of distribution, saying that the 2nd petitioner represented the second house.

That Chania Kairi T452 had been given to their brother Gituro Njonjo.

He denied the existence of any will. He said that they attended a family meeting at the Chief's office in March 2011. That no one spoke about any will then.

He said his brother George was given land in Kiambu, his other brother Ndegwa was given land in Gatarakwa. That the shamba at Muthuini he bought himself. He confirmed that neither himself nor his siblings had ever stayed on the land 573 even during their father's life time.

He said the land in Kiambu was sold a long time ago to the Catholic Church, and that the 2nd Petitioner is the one who had brought Antony Muturi into the succession.

At the close of the petitioner's case each party through their respective counsel filed written submissions.

The protester set out two issues for determination

1. Whether there was a valid oral will made by the deceased distributing his estate
2. In the absence of the oral will, what would be the mode of distribution.

It was submitted that the oral will satisfied the provisions of section 9(1) (a) and (b) of Cap 160 Laws of

Kenya. That it was witnessed by an independent witness.

It was also submitted that if the court found that there was no oral will then the applicable provisions of the law of Succession would be 35 and 40. It was argued that it was evident from the record that it was only the 1st petitioner and his sister Teresa who were interested in no. 573 yet they had confirmed that during the life of the deceased they never lived on that land, they never used it and it was only the 2nd wife and her children who had lived there with the deceased. That this was clearly because the deceased had settled them in the Gatarakwa land and the Chania Kairi T452 land.

In their submissions counsel for the petitioner posed only one question? What was the applicable law in the instance case?

Their argument is that the deceased died intestate. He was a Kikuyu man. He was polygamous. At his death he was survived by the 2nd wife and children from both houses hence the applicable law would be s. 40.

They relied on the following authorities;

i. In the matter of the Estate of JOHN GICHERU WAMBUGU (DECEASED) [2016] eKLR

ii. In the matter of the estate of SAMUEL MIRITI (DECEASED)

MMM'M vs. AIM [2014] eKLR

iii. In the matter of the estate of GACHOKI NJURU(DECEASED)

LUCY NYARUAI GACHOKI vs. LOISE WAMBUI GACHOKI

iv. In the matter of the estate of JEREMIAH MUCHOGO MACHARIA alias NGUCHUGA MACHARIA (DECEASED) NYERI HCSC NO. 176 OF 2011

v. In the matter of the estate of RUTH NYAKANINI RUKWARO(DECEASED)

MARY WANJIRU MWAI&ANOTHER vs. JOSEPH RUKWARO NDIUNI NYERI HCSC NO. 52 OF 2010

I have considered all the evidence on record, the affidavits and annextures. I have also considered the submissions and authorities cited.

Two issues stand out for determination;

1. Whether there was an oral will
2. What law is applicable in this case.

Oral wills are governed by section 9 and 10 of the Law of Succession Act.

9. Oral wills

(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:

10. Proof of oral wills

If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.

Section 3 defines “competent witness” to mean a person of sound mind and full age;

From the testimony on record the deceased was admitted in hospital when he allegedly made the oral will. That already is problematic as one may want to question whether he was himself in the proper state of mind to do so. More importantly is the requirement of section 9(1) (a) – That no oral will shall be valid unless made in the presence of two or more competent witnesses. The beneficiaries of a will cannot also be the witnesses. Hence there can only have been one witness, PW2. Section 10 would only fall into place if the oral will has complied with section 9. The corroborating evidence on the circumstances surrounding the making of the will were also in dispute as some of the family members said to have participated in it denied any involvement. The protester was among the persons who gave his consent for the filing of this petition. Surely the existence of the alleged oral will would have been at the top of every one’s mind had that been the case. It would have featured somewhere. His brother the 2nd Petitioner or his mother would have raised it up, as there was no doubt that the matter was for the sharing of the deceased’s estate. I must find that the evidence falls short of the requirements of the law and conclude that there was no oral will.

On the second issue as to what law may be applicable.

Both parties are in agreement that section 40 ought to apply.

It is conceded that in the 1st house two sons were given properties during the life time of the deceased.

Section 42 of the Law of Succession Act clearly comes into play. It provides for the taking into account of previous benefits to beneficiaries;

Where—

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

See **In Re Estate of Ruth Nyakanini RuKwaro (Deceased) [2016] eKLR** where the Judge was dealing with a similar situation.

Of importance is that in this case it is not contested that the deceased during his life time gave out some of his properties to his two sons from the 1st house. There is no similar ‘giving’ in the second house.

With regard to the land held by the 1st petitioner and the protester, there was no evidence placed before me that it came from the deceased’s estate.

Section 40 provides for where intestate was polygamous

(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.

The deceased was survived by 6 children in each house and the widow in the second house. Only two of the children of the 1st house are interested in the estate. That leaves 9 units to which the estate ought to be shared equally.

S. 45 of the Law of succession act prohibits any dealings with the estate of a deceased person before succession has been done.

45. No intermeddling with property of deceased person

(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.

Antony Muturi Maina is a stranger to the estate of the deceased. It has not been established how he became beneficially entitled and he cannot inherit from this estate.

Both parties are in agreement that Chania Kairi T452 belongs to George Gituro Njonjo and is not part of the deceased's estate.

The only estate available for distribution is LR no. NYERI/MWEIGA/573 will therefore be shared as follows;

In the 1st House

Michael Waibochi Njonjo 1st Petitioner 0.638 acres

Teresa Wanjiru Njonjo 0.638 acres

In the 2nd house

Subject to section 35 of the Law of Succession Act, life interest in 4.466 acres to the widow, to devolve to the children of that house in equal shares.

The grant issued on the 6th September 2011 to the petitioners is confirmed accordingly.

No orders as to costs

Dated, delivered and signed this 17th day of January 2018 at Nyeri

Teresia M. Matheka

Judge

In the presence of;