



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 826 OF 2012

IN THE MATTER OF THE ESTATE OF SILAS NJUKI WERU alias

CYRUS NJUKI WERU alias NJUKI WERU (DECEASED)

DANIEL WANG'OMBE NJUKI.....PROTESTOR

VERSUS

MARY WANJUGU KINYUA.....RESPONDENT/PETITIONER

RULING

1. The estate relates to the late **SILAS NJUKI WERU alias CYRUS NJUKI WERU alias NJUKI WERU (DECEASED)** who died on the 24th October, 2011 at Provincial General Hospital in Nyeri County. There are three (3) identifiable parcels of land comprising the estate of the deceased which are; **Kirimukuyu/Gachuiro/139; Mutara/Thome Block 1/3374 (Mathira)** and **Nyeri Municipality/Block 5/Thigu/87**.

2. The Deceased died intestate and left the following surviving him namely;

- (i) Daniel Wang'ombe Njuki – who shall be referred as **'the protestor'** herein; is the deceased's son;
- (ii) Mary Wanjugu Kinyua – who shall be referred to as **'the respondent'** herein; is the Petitioner and a daughter-in-law of the deceased;
- (iii) Peterson Ndereba Njuki – a son to the deceased;
- (iv) Consolata Nyachomba Njuki – a daughter of the deceased;
- (v) Mary Mugure Njuki – a daughter of the deceased

3. The Grant was issued on the 25/02/2013 and on the 24/09/2013 the Respondent filed a Summons for Confirmation of Grant in which she proposed the distribution of the properties comprising the estate of the deceased which distribution was not opposed for two of the parcels namely **Kirimukuyu/Gachuiro/139 and Mutara/Thome Block 1/3374 (Mathira)**;

4. The only contentious property is **Nyeri Municipality/Block 5/Thigu/87** (which shall hereinafter be referred to as **"the contentious parcel of land"**) which the petitioner had proposed that it be sub-divided equally between the following persons;

- (i) Joseph Kamau Njuki - son
- (ii) Peterson Ndereba Njuki – son
- (iii) Teresa Nyaruai Nyachomba – grand-daughter
- (iv) Daniel Wang'ombe Njuki – the protestor
- (v) Mary Mugure Njuki – daughter

(v) Mary Wanjugu Kinyua – the respondent/petitioner

5. The Protestor filed his Affidavit of Protest on the 20th February, 2014 against the Summons for Confirmation of Grant and gave his reasons for protesting and included his proposed mode of distribution of this contentious parcel;

6. Directions were taken on the 27/06/2014 that the matter proceed for hearing and that ‘**viva voce**’ evidence be tendered; all the parties gave oral evidence and hereunder is a summary of the protestor’s case and the petitioners response;

PROTESTORS CASE

7. The protestor together with his two other brothers opposed the mode of distribution proposed by the respondent; and proposed that this contentious parcel of land be shared equally amongst the other beneficiaries and that the petitioner who was the wife of his deceased elder brother be excluded; reason being that this deceased brother had benefitted from a gift inter vivos; this brother had passed on the 23rd of September, 2007 and during his lifetime his late father had gifted him with parcel number **NYERI/MUNICIPALITY BLOCK V/THIGU/104**;

8. The protestor testified that his father had on the 20th April, 1984 subdivided the contentious parcel of land into four equal parts and had identified the beneficiaries and distributed the sub divisions to them; the following were the beneficiaries; that is himself his brothers Peterson and Joseph and a grand-daughter of the deceased namely Teresa Nyachomba; the three brothers each live on their sub-divisions whereas the portion left to the grandchild Teresa was utilized for cultivation.

9. Under cross-examination the protestor confirmed that his father had left no will whether oral or written; he also concurred that no surveyor had been engaged by his late father to demarcate the land; nor had consent been obtained from the Land Control Board to sub-divide the contentious parcel; the protestor did not dispute the fact that the parcel number **NYERI/MUNICIPALITY BLOCK V/THIGU/104** had been jointly registered in the joint names of his late father and late brother as they had jointly purchased the land;

10. After the close of the hearing Counsel for the protestor put in written submissions and made reference to Section 31 of the Law of Succession Act which provides that a gift made by a deceased person in contemplation of death is valid notwithstanding that there has been no complete transfer of legal title; in this instance there was delivery of possession to the intended beneficiary and therefore the court was enjoined to uphold the will and wish of the deceased;

11. Counsel relied on the following authorities **Paul Kiruhi Nyingi & Anor vs Francis Wanjohi Nyingi (2009) eKLR**; **Peter Chira & Anor vs Nelson Gathogo (2002) eKLR** and **artha Wanjiku Waweru vs Mary Wambui Waweru (2007) eKLR**.

12. The protestor prayed that the contentious parcel number be distributed as he had proposed and that the other two parcels be distributed as proposed by the petitioner.

PETITIONERS CASE

13. The Grant was issued to the petitioner on the 25/02/2013 and she thereafter filed Summons for Confirmation on the 24/09/2013 and therein proposed the mode of distribution for the three properties that constituted the estate of the deceased; she had proposed that the properties be divided in equal proportions between herself, the three (3) surviving children of the deceased and two (2) grand-children of the deceased; who are the children of two (2) deceased children of the deceased;

14. That the protestor opposed her proposed mode of distribution and filed a protest only against the distribution of the contentious parcel of land; which he proposed that it be distributed to himself, his two other surviving brothers and Teresa Nyaruai Nyachomba; and that she, the petitioner, be excluded from getting any share in this property;

15. It was the petitioner’s contention that she was entitled to her husband’s share in this contentious property; that before the deceased passed on a meeting had been held but only the male siblings were allowed to attend and all the female beneficiaries were barred from attending; her male children represented her at this meeting;

16. It was at this meeting that it was agreed that the contentious parcel be divided into four (4) and her husband’s name was on that list; the meeting and the agreement was made when the deceased was still alive; she also annexed a map (**DExh.9**) for this parcel which shows that a portion was earmarked for her late husband to inherit;

17. That she used to live on a small house situate on the portion marked on the map that had been bequeathed to her late husband; but she now utilized this portion for cultivating; that there existed no boundaries and there was need to engage the services of a surveyor; Teresa who was a child of a deceased sister had not been given any land even on behalf of her late mother; the deceased was adamant on male inheritance and gave this parcel of land only to the male members of his family.

18. With regard to the property known as **Nyeri Municipality/Block 5/Thigu/104** her evidence was the abovementioned property never belonged to the deceased; that her husband had bought it from a land buying company where he was a member; he bought it together with his son-in-law and a friend; she produced the Green Card (**DExh.1**) and a Certificate of Official Search (**DExh.8**) to prove that this parcel of land belonged to her late husband together with two (2) other persons;

19. Written submissions were also filed and exchanged; the case law relied on was the case of **Rono v Rono & Anor [2005] eKLR**;

20. The petitioner prayed that the protest be dismissed with costs to the petitioner.

ISSUES FOR DETERMINATION

21. After hearing the evidence of the parties and upon reading their respective written submissions this court has framed the following issues for determination;

- (i) Whether the petitioner's deceased husband had benefitted from the estate *inter vivos*.
- (ii) Whether Mary Mugure Njuki and Teresa Nyaruai Nyachomba are beneficiaries;
- (iii) Distribution of the contentious parcel of land;

ANALYSIS

22. There is no dispute over the sharing of the parcels of land known as **Kirimukuyu/Gachuiri/139 and Mutara/Thome Block 1/3374 (Mathira)** and the protestor agreed that the parcels be distributed as proposed by the petitioner.

23. The dispute arises as to the sharing of the contentious parcel of land; the protestor stated that the petitioner should be excluded from benefitting from this parcel of land as her late husband had already benefitted from the estate of the deceased as he had already been gifted *inter vivos* by the deceased in his lifetime with parcel number ;

24. The protestors evidence was that the deceased had expressed his wish as to how he wanted his property sub-divided; and had actually sub-divided the land as per the plan drawn in accordance with these wishes; and three of the beneficiaries were already in possession of their respective portions; that this was as per the deceased's wishes which ought to be respected;

Whether the petitioner's deceased husband had benefitted from the estate *inter vivos*.

25. The first issue to be addressed is whether parcel number **Nyeri Municipality/Block 5/Thigu/104** was gifted *inter vivos* to the petitioners late husband; if it was then this would make the property part and parcel of the estate of the deceased and thus bring in the issue of equality under the provisions of Section 42 of the Law of Succession Act; the section provides that a previous benefit must be taken into account; this would then mean that if this property were to be distributed as proposed by the petitioner this would make her more advantaged than the other beneficiaries as she would get a larger share of the estate which would be wrong as there would be inequality;

26. Under cross-examination the protestor controverted his own evidence on the gifting *inter vivos* of this property; he indeed conceded that from the documentation provided by the petitioner that the petitioners late husband had a hand in the purchasing of this property; that he had contributed monies towards its purchase and further the first registration was in the joint names of the petitioners husband and others;

27. From the evidence adduced by the petitioner which this court finds to be credible and truthful when contrasted with that of the protestor and together with the exhibits she produced this court is satisfied that this property was jointly registered in the names of the petitioners late husband, his son in law and a friend; that upon sub-division of this property the portion he had gotten was as of right as a joint owner and not as a gift *inter vivos* from the deceased.

28. The upshot is that the deceased does not feature anywhere in the ownership of parcel no. **Nyeri Municipality/Block 5/Thigu/104** and therefore could not have gifted the parcel to the petitioners late husband; therefore when determining distribution this court is not duty bound to consider the provisions of Section 42 of the Law of Succession Act.

Whether Mary Mugure Njuki and Teresa Nyaruai Nyachomba are beneficiaries:

29. It is not in dispute that Mary Mugure Njuki is a daughter of the deceased; when it comes to sharing an inheritance the Law of Succession does not discriminate on the basis of gender; in this instance sons and particularly daughters regardless of their marital status are entitled to a share in the estate of the deceased;

30. As for Teresa Nyaruai Nyachomba she is a grandchild of the deceased and lays claim to the portion that would have devolved to her late mother; Section 38 makes reference to the surviving children of the deceased; Section 29 provides for those grandchildren who have been taken in by the deceased and maintained by the deceased; no evidence was adduced on this latter aspect; but her saving grace is that there is consensus between the protestor and the petitioner in that both are agreeable to her inclusion as set out in their respective affidavits.

31. This court is satisfied that both can benefit from the estate of the deceased.

Distribution

32. It is reiterated that there is no dispute over the sharing of the parcels of land known as **Kirimukuyu/Gachuiri/139 and Mutara/Thome Block 1/3374 (Mathira)** and the protestor agreed that the parcels be distributed as proposed by the petitioner.

33. This court is satisfied that the petitioners late husband had not received a gift *inter vivos* of **Nyeri Municipality/Block 5/Thigu/104** from the deceased; and that this property was never a part of the estate of the deceased;

34. The protestor cited Section 31 of the Law of Succession and urged the court to uphold the wishes of the deceased as to his distribution of this contentious property; the evidence adduced was that this distribution was agreed upon at a meeting in which the female members of the family were excluded; they were also excluded from the list of beneficiaries; the protestor relied on the case law **Paul Kiruhi Nyiongi & Anor vs Francis Wanjohi Nyingi (2009) eKLR** which gives instances when the court ought to uphold the wishes of a deceased; but the proviso therein is that the deceased's wishes can only be upheld if found to be fair and not discriminatory;

35. In this instance the act of excluding the female members from the meeting and thereafter excluding them as beneficiaries is found to be unfair and discriminatory to the female members of the family; and therefore this court cannot uphold the deceased's wishes;

36. The other angle is that the agreement cannot be categorized as a written will as it does not conform to the requirements set out at Section 11(a)(b) and (c) of the Law of Succession Act; further if the wishes of the deceased were to be described as an oral will then in accordance with Section 9(b) of the Law of Succession Act it becomes invalid by virtue of timelines set by law relating to the time when it was made and the date of the demise of the deceased; the deceased died a year from when the oral will was made;

37. Therefore in this instance there being no surviving spouse Section 38 of the Law of Succession Act is found to be the applicable law; the section provides for the distribution of the property equally amongst the surviving children of the deceased; the emphasis being on the surviving children;

38. Therefore the contentious property shall be divided equally between the petitioner, the four (4) surviving children and the grand-child Teresa Nyaruai Nyachomba of the deceased namely;

- (i) Joseph Kamau Njuki - son
- (ii) Peterson Ndereba Njuki – son
- (iii) Daniel Wang'ombe Njuki – the protestor
- (iv) Mary Mugure Njuki – daughter
- (v) Mary Wanjugu Kinyua – the respondent/petitioner
- (vi) Teresa Nyaruai Nyachomba – grand-child

FINDINGS

39. The petitioner's deceased husband had not been gifted *inter vivos* and had not benefitted from any property forming part of the estate of the deceased.

40. Mary Mugure Njuki and Teresa Nyaruai Nyachomba are both found to be eligible to inherit a portion of the contentious property;

41. The protestors proposed mode of distribution of the contentious property is found to be unfair and discriminatory

42. The petitioners proposed mode of distribution of the deceased's estate is found to be fair.

DETERMINATION

43. The protest is found lacking in merit and is hereby dismissed;

44. The petitioners mode of distribution of the deceased's estate is found to be fair; the application for confirmation is hereby confirmed as set out in paragraph 38 hereinabove;

45. Each party shall bear their own costs.

It is so ordered accordingly.

Dated, Signed and Delivered at Nyeri this 11th day of January, 2018.

HON. A. MSHILA

JUDGE.