



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

SUCCESSION CAUSE NO.414 OF 2015

IN THE MATTER OF THE ESTATE OF MUGO NJAGI....DECEASED

GRACE WARUGURU NJAGI.....PETITIONER

J U D G E M E N T

This matter relates to the estate of **MUGO NJAGI** deceased who died on 2.5.1989. Temporary letters of administration intestate were issued to Alice Muthoni Mugo and Grace Wanja Mburia, the Petitioners. Later on 29.10.2015 they filed a summons for confirmation of the grant. They listed the following as the beneficiaries.

1. Beth Warui Muchira
2. Kithinji Mugo (deceased) – survived by Virginia Kamori Kithinji
3. Alice Muthoni Mugo
4. Grace Wanja Mburia
5. Nelson Njagu (deceased) - survived by Grace Waruguru

They stated that both Beth Warui Muchira and Kithinji Mugo (deceased) have their own land and the whole family is in agreement that they do not get any land. They therefore proposed that **Land Parcel No. Kabare/Njiku/119** (the suit land) be subdivided equally as hereunder;

1. Alice Muthoni Mugo
2. Grace Wanja Mburia
3. Grace Waruguru Njagi as trustee of beneficiaries of Nelson Njagu (deceased).

The protestor Grace Waruguru proceeded to file an affidavit of protest sworn on 14.1.2016. She confirmed that both Beth Warui Muchira and Kithinji Mugo (deceased) have their own land and should not get a share in the suit land. That both the petitioners are married and have parcel of land and were also not to get anything. That no one apart from their family has ever occupied or utilized the suit land as the intentions of the deceased was well known to them. She proposed that the whole share of the suit land be inherited by herself.

Undisputed facts

Mugo Njagi (deceased) estate comprises of **Land Parcel No. Kabare/Njiku/119** and he left behind the following dependants;

1. Beth Warui Muchira
2. Kithinji Mugo (deceased) – survived by Virginia Kamori Kithinji
3. Alice Muthoni Mugo
4. Grace Wanja Mburia

5. Nelson Njagu (deceased) - survived by Grace Waruguru

Both Beth Warui Muchira and Kithinji Mugo (deceased) have their own land and should not get any share of the deceased's land.

Issues arising;

Whether the petitioners as daughters of the deceased are entitled to inherit the deceased's estate.

The Protestor is stating that since the Petitioners are married and have land where they are married, they should not inherit the land of their deceased father. The Court of Appeal has dealt with this issue of inheritance at length and has held that there could be no discrimination on the girl child. They hold the view that daughters are equally entitled to a share of inheritance of their father's estate. A leading authority is the case of **MARY RONO VS. JANE RONO & ANOTHER [2005] eKLR** where the Court of Appeal set aside the distribution of the estate of the deceased and substituted it with an order that the estate be shared out equally between the sons and the daughters of the deceased. The Court stated as follows:

The Constitution, which takes hierarchical primacy in the mode of exercise of jurisdiction, outlaws any law that is discriminatory in itself or in effect. That is section 82(1).....

The superior court was of the view that section 27 of the Act donates unfettered discretion to the court in the sharing of the estate considering the definition of "dependant" in section 29 to include the "wife and the children of the deceased".....

I think the discretion, like all discretions exercised by courts, must be made judicially or to put it another way, on sound legal and factual basis. The possibility that girls in any particular family may be married is only one factor among others that may be considered in exercising the court's discretion. It is not a determining factor.....

More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the "houses according to the number of children in each house,..."

There is no discrimination of such children on account of their sex.

The averments by the Protestor that the Protestors are married and were not entitled to get anything out of the estate is archaic and cannot and cannot see the light of day in the present age. All children are equal irrespective of sex and whether they are married or not. Where the daughters are married and of their own free will decide not to get a share of the estate, that would be a different situation.

The above decision was determined with finality that all daughters of the deceased entitled to inherit the estate equally with their brothers. As such all the children of the deceased are irrespective of gender are required to be given an equal share. Section 38 of the Law of Succession Act provides;

Where an intestate has left a surviving child or children but no spouse, the net estate shall subject to the provisions section 41 and 42 devolve upon the surviving child, of there be only one or equally divided among the surviving children.

The estate is governed by the Law of Succession Act by didn't of Section 2 (1) which provides;

"Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of and shall have universal application to, all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act, and to the administration of estates of those persons"

The Law of Succession Act enshrines the principle of equal distribution of the estate of the deceased to all the children irrespective of gender and whether they are married or not. **Article 27 of the Constitution** outlaws discrimination on account of sex amongst others.

The protestor submits that since the petitioners were married before 1981 when the **Law of Succession Act** came into force and that since 1991 when the Nelson Njagi Mugo was registered as owner in 1991 the Petitioners did not seek to be given a portion. This issue was addressed in a ruling by my brother Justice Limo in a ruling dated 7.7.2015 in an application of revocation of grant. The Judge found that Nelson Njagi Mugo had concealed material facts, inadvertent mistake or wrong, marked with irregularities, fraud and concealment. There was no appeal against this ruling and the protestor cannot challenge it at this stage. It is the protestor's husband who obtained the grant through fraud and other irregularities.

The issue which arises is whether it would be equitable to distribute the estate to the Petitioners and the protestors. According to the testimony of the protestor the eldest son of the deceased Jeremiah Githinji Mugo was given land by the deceased measuring 14 acres that is why he is not claiming any land from the estate of the deceased. The petitioners are not claiming land from Githinji Mugo. Strikingly this land measures fourteen acres. The land was given to him during the lifetime of the deceased. That is therefore land which belonged to the deceased. It would seem that the husband of the protestor was given the land in dispute as the protestor has stated that herself and her family have been residing on the land exclusively and it is her husband who developed the land. The protestor stated that when she moved to the land after being married she did not find the petitioners at home as they had been married. None of the siblings claimed land in the life time of her deceased husband. I am of the opinion that distributing the net estate comprised in the land parcel **No. KABARE/NJIKU/119** between the Petitioners and protestor would not be equitable as it would fail to consider the property which the deceased had transferred to the other son during his lifetime. The protestor testified that the petitioners were not supposed to get a share of the land. The Petitioners have been married for over 40 years. From the time they got married they have not cultivated or lived on the suit land. The protestors have land where they are married and they are not destitute. It would be opening a Pandora's box to order that they can go back to their roots and

inherit land they have not occupied for over forty years and have not developed. The petitioners are women who were long married and settled with their families. To revisit the distribution of the only estate of the deceased simply because it is the only one in his name without regard to what was given out in his life time would be unfair and not in the interest of justice.

The Petitioner's other sister Beth Wanjiru said she did not want land, the same with Githinji. This tends to confirm the testimony by the protestor that the land in dispute was to be inherited by the husband of the protestor. Section 42 of the Law of Succession Act provides;

Previous benefits to be brought into account

“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”.

One child of the deceased is said to have been given 14 acres during the lifetime of the deceased and transferred it to his name. What remained is 14 acres which went to the protestors husband. It would not be equitable to distribute this land to the petitioners who were married long before the Law of Succession came into force.

I am persuaded by the decision of Wanjiru Karanja, Judge, as she then was in the case of Susan Wakera Karimi & 3 others Vs. Peter Miano Itugi and Another Vs. Peter Miano Itugi and Another where when faced with a similar situation had this to say;

The applicants herein are just driven by greed and want to come home they left decades ago to claim what is not rightfully their. This would amount to travesty of justice. this court will not allow it.

I am in agreement with this finding. The petitioners are elderly women who as I earlier stated were married over 40 years ago (one married in 1964=54 years). It would be a travesty of justice to go back to the home and disrupt the protestors' occupation. It is an abuse of the court process. This the court trust prevent at all costs. I find that the protest has merits. I order that the net estate in land Parcel No. KABARE/NJIKU/119 will go to the protestor Grace Waruguru Njagi – whole share.

Costs to the Protestor.

Dated and delivered at Kerugoya this 13th day of April, 2018

L.W. GITARI

JUDGE

13.4.2018