



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSES NO. 35 OF 2013

CONSOLIDATED WITH 330 OF 2009

In the matter of the Estate of MBOGO NJERU (Deceased)

NJERU M'CHINI.....PROTESTER

V E R S U S

JANE KANYIRI KANYI.....PETITIONER

J U D G E M E N T

1. The above files were consolidated for purpose of determination of the two cases in respect of the same deceased person and the same asset being LR. No. Ngandori/Kiriari/1269.
2. The protestor filed Succession Cause No. 330 of 2009 seeking for letters of administration intestate in the estate of Mbogo Njeru in his capacity as son. He was issued with letters of administration on 15/09/2009. The grant was confirmed on 3/03/2011 with the protestor being the sole beneficiary.
3. In Succession Case No. 35 of 2015, the petitioner named the protestor who is her brother and herself as having survived the deceased. The letters of administration were issued in her favour on 23/05/2013. She then filed summons for confirmation of grant in which she proposed distribution of L.R. Ngandori/Kiriari/1269 in equal shares between her and the protestor. Each beneficiary was to get 1½ acres. The protestor then filed a protest against confirmation which is now the subject for determination herein.
4. The court on 4/12/2012 revoked the grant in Succession Cause No. 330 of 2009 and ordered that the whole process starts afresh. The grant in Succession Cause No. 35 of 2013 is still in force thus making Jane Kanyiri Kanyi the petitioner in these consolidated cases.
5. The parties by consent agreed to have the protest disposed of by way of written submissions. Mr. Momanyi represents the protestor while Ms. Ndorongo appears for the petitioner.
6. The protestor deposes that he acquired the land on which he resides Ngandori/Kiriari/1269 through an understanding between him and the deceased. The two agreed that the protestor sells his plot No. 396 Karau in exchange of the deceased's land L.R. Ngandori/Kirigi/1269 to raise funds for medical treatment of the deceased. The petitioner was fully aware of this arrangement. The deceased subsequently died before transferring the land to the protestor. Plot No. 396 Karau was sold to one Salesio and there is an agreement to that effect.
7. The petitioner recognizes that Daiwan Church of Kenya was given a plot by the deceased during his lifetime which they took occupation immediately. It was hived off from the deceased's land.
8. It was the protestor's case that the petitioner did not contribute any funds for medical expenses of the deceased.
9. The protestor filed evidence statements from the following:-

(a) Salesio Njue Njeru who said he bought Plot No. 396 Karau from the protestor and that he was aware that the proceeds of sale were to be used in treatment of the deceased. He was also told that the deceased had agreed to exchange his land with the plot in favour of the protestor. The protestor then took possession of the deceased's land.

(b) Francis Nyaga Kathumbu who said that the deceased was his uncle and that he called him and informed him that he needed to raise funds for treatment. He further stated that he had agreed with the protestor to sell his plot to raise the funds. In return, the protestor was to be given the land of the deceased LR. Ngandori/Kiriari/1269.

(c) Joseph Mbogo Njage the pastor of Daiwan Church of Kenya who said the deceased gave his church a plot during his lifetime and which they occupy.

10. The petitioner's evidence is that the deceased was her father and that he is survived by two children being the protester and the petitioner. The protester secretly filed succession cause NO. 330 of 2009 and got the grant confirmed in his favour on 3/03/2011. He disinherited the petitioner as he bequeathed himself the only asset of the deceased LR. Ngandori/Kirigi/1269 measuring 3.00 acres.

11. The petitioner stated that she later filed succession cause No. 35 of 2013 and was appointed administrator. She filed summons for revocation of grant in succession cause No. 330 of 2009. The grant was found to have been obtained fraudulently by the protester and was revoked.

12. The petitioner has proposed that the only asset of the deceased be shared equally between herself and the protester for they are the only heirs. Each of them will get 1½ acres.

13. The petitioner describes the protester as a liar for he has given false evidence that he paid medical bills for the deceased which was untrue since the deceased died of sudden illness. The protester also deponed that he does not have another parcel of land while he owns LR. Ngandori/Ngovio/4404.

14. The protester in his submissions argued that his sister the petitioner is married and has land owned by her husband and that for this reason, she ought not to inherit from the deceased.

15. From the evidence of the parties, I find that the petitioner and the protester are the only heirs of the deceased's estate. This is a fact that is not in dispute.

16. The petitioner may be married but this does not affect her rights of inheritance. The law treats all the children of the deceased equally whether married or not. The protester is also married and for some reason he believes he should inherit and be the only heir of the deceased's estate. The Constitution does not allow discrimination on grounds of sex among others.

17. The relevant law is Section 38 of the Law of Succession Act and Article 127 of the Constitution.

Article 27 (1)

Every person is equal before the law and has the right to equal protection and equal benefit of the law.

Section 38

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 be equally divided among the surviving children.

18. The pastor of the Daiwan Church did not testify to say who sold or gave the church plot one year after the death of the deceased. The affidavit he filed seems to be in support of the protester's case. The affidavit evidence remained untested in the absence of cross-examination. At the time the plot was sold or given there existed no administrator of the estate and the succession proceedings were to be filed about 16 years later. The transaction was therefore null and void. However, the church may sort out the issue with the person they dealt with out of court.

19. In view of the provisions of the law, the protester and the petitioner have been identified as the only heirs of the estate. The law provides for equal shares for each one of them.

20. It is my considered view that the protest is unsuccessful and is hereby dismissed.

21. The grant issued to the petitioner is hereby confirmed in the following terms:-

LR. Ngandori/Kirigi/1269

(a) Njeru M'Chini - 1½ acres

(b) Jane Kanyiri Kanyi - 1½ acres

22. Each party to meet their own costs.

23. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF MAY, 2018.

F. MUCHEMI

J U D G E

In the presence of:-

Ms. Mutegi for Ndorongo for Petitioner