



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 243 OF 1993

IN THE MATTER OF THE ESTATE OF KARIUKI GACHENGA

(DECEASED)

JUDGEMENT

1. The deceased herein died on 2nd February 1982. Representation to his estate was sought in this cause by the Public Trustee. The deceased was expressed to have been survived by three (3) widows – Sarah Gathoni, Mary Mwhaki and Hannah Njoki, and fifteen (15) children. He was said to have died possessed of landed assets and money in the bank. A grant of letters of administration intestate was made to the Public Trustee on 8th June 1993; the said grant was confirmed on 22nd February 1994, the estate devolved upon the three widows during their lifetime and thereafter to the children absolutely and in equal shares. A certificate of confirmation of grant to that effect was duly issued.
2. The grant to the Public Trustee was revoked by consent on 14th March 2016, on an application dated 10th December 2015. The surviving widow of the deceased, Mary Mwhaki Kariuki, was appointed the sole administrator of the estate, and a grant in those terms was made to her on 14th March 2016. .
3. The new administrator moved the court, by her application dated 6th June 2016, for confirmation of her grant. She proposes equal distribution of the estate to all the beneficiaries, whom she has listed in the affidavit in support.
4. A protest was raised to the application by Lucy Ruguru; vide her affidavit sworn on 8th September 2016. Her objection is that the grant to the applicant was obtained without all the members of the family of the deceased being consulted. The deceased had died a polygamist, and the protestor feels that all the houses of the deceased ought to be represented in the administration of the estate. She further says that there was another succession cause that had been filed at the High Court at Nakuru, being Nakuru HCSC No. 468 of 1993, over the same estate which was abandoned after the instant one was filed. A grant had been made in that cause to all the widows of the deceased. The protestor further states that the deceased intended for his estate to be distributed equally between the widows who were to thereafter distribute the property amongst their children. She complains that the Public Trustee never consulted them at all during her tenure. She mentions that the land on the ground has been subdivided into three portions, a fact not disclosed to the court. She says that there has been no disclosure of some assets that have been distributed to family members, such as Ndeiya/Ndeiya/2443.
5. The administrator has responded to the protest through her affidavit sworn on 5th October 2016. She denies that she did not consult the other family members, saying that she did but they wanted the *status quo* so that the property remains undistributed prevailed as it favoured them. She acknowledges the existence of the cause at Nakuru, but says it was not brought at the instance of all the family members, and the family agreed to have that cause abandoned. On equal distribution of the assets as between the three widows, she states that the deceased died intestate and had made no will, and therefore there was nothing to that effect. She asserts that the estate ought to be distributed as per the provisions of the Law of Succession Act, Cap 160, Laws of Kenya. On Ndeiya/Ndeiya/2443, she states that the same was inheritance from the deceased's father and when it devolved upon his estate it was registered in her name jointly with representatives of the other houses to hold in trust. She denies discriminating against children from the other houses saying that she proposes equal distribution of the entire estate to all. She avers that the estate is not income generating and that was why she wanted the assets distributed so that each can develop their own portions and derive income therefrom.
6. The application was heard orally following directions given on 20th February 2017. The hearing happened on 30th May 2017 and 18th July 2017. The applicant testified and called one witness, while the protestor testified and called one witness.
7. The applicant testified that Ndeiya/Ndeiya/2443 was devolved to the estate of the deceased from the estate of his father during the currency of the instant cause; hence it was not listed as an asset in the estate. She stated that the property was registered in the names of three individuals from the three houses that make up the household of the deceased. She stated her intention to be that each child of the deceased be allocated their individual share, and that was why she proposed equal distribution. She pleaded ignorance of the Nakuru succession cause. She mentioned that two of the children from the third house had since died, and were buried on estate land. Her witness was her son William Gachegechi Kariuki. His testimony was on all fours with that of the applicant.
8. The protestor testified that the deceased had distributed his movable assets before he died, and had said that the land be shared out equally

between the three houses. She cited the title deed for Ndeiya/Ndeiya/2443 as an indication of how that should happen, the division equal to all the three houses. She asserted that the Ndeiya property had been distributed equally, although she conceded that the title deed thereon did not indicate whether the three proprietors held the property in trust. She also stated that a family meeting, not attended by all, had agreed on distribution of the deceased's land, and a letter was duly signed on 6th December 1993 to that effect. She called the Chief who had drafted the letter of 6th December 1993 to confirm the same and that the family was in total agreement at the time.

9. At the conclusion of the proceedings, I directed the parties to file written submissions. There has been compliance. The parties have filed detailed written submissions, complete with the authorities that they rely on. I have perused through both the submissions and the authorities and noted the arguments made therein.

10. These protest proceedings are really a storm in a tea cup. The distribution that the Public Trustee had obtained before she was removed represented the correct position in law. The deceased had been survived by widows and children. Under Part V of the Law of Succession Act the property of an intestate, who is survived by spouse and children, is shared out between them in such a manner that the spouse holds life interest and upon its determination the property reverts to the children in equal shares. The argument that the Public Trustee had failed to distribute the estate therefore did not hold any water. There was nothing for her to distribute. Life interest by the surviving spouse had not determined and therefore the time had not yet come for distribution of the property amongst the children. The Public Trustee had acted according to the law, and there was no failure or omission or default on her part.

11. It should be emphasized that what Part V envisages is that the surviving spouse does not take the estate property absolutely and neither do the children. The surviving spouse acquires a right to utilize the property during lifetime, while the children have a suspended right over the same property which ought to crystalize at an uncertain future date upon the demise of the surviving spouse. The property devolves upon the surviving spouse, but not absolutely. She holds it in trust for the children, who are the persons to whom it ought to pass ultimately absolutely. The trust held by the surviving spouse continues up to the date of her death. That is what the law provides, and that was the nature of the distribution that the Public Trustee proposed to the court and that was what the court accepted.

12. During life interest the children have no control over the property, for their rights over it are in abeyance. They cannot deal with it at all by way of sale or gift or exchange or otherwise. The point is that the property does not devolve to them, but to the surviving spouse. The property held by the surviving spouse during life interest is held in trust as aforesaid. The surviving spouse can only deal with in accordance with the law that governs trusts. He or she cannot deal with it as if it belongs absolutely to them.

13. There are additional provisions in Part V of the Act on how the surviving spouse may deal with the property during that time. Under section 35(2), the surviving spouse may exercise what is described as the power of appointment. This amounts to distributing the property amongst the children by way of gift taking effect immediately without having any recourse to the court process. That would mean that it was not necessary to have had the Public Trustee removed as administrator. What the surviving spouse should have done was to approach the Public Trustee with the proposal to distribute of the property amongst the children through exercise of the power granted to her by section 35(2) of the Act.

14. The other provision is in section 37 of the Act. The law is alive to the fact that the surviving spouse may have needs that require funds, yet her hands are tied in the sense of her not having absolute right to the property as the same is held in trust and cannot be disposed of at will. Should there be need for funds for her maintenance or medical needs, among others, section 37 empowers the surviving spouse to sell any property the subject of life interest, if the same is necessary for such maintenance, subject of course to leave of court or consent of the adult children of the deceased.

15. In the instant case, the surviving spouse claimed that she was sickly and needed funds for healthcare. She felt that the life interest hindered her quest to raise such funds, hence the move to have the grant to the Public Trustee revoked. That step was needless; the surviving spouse should instead have moved the court under section 37 of the Law of Succession Act for leave to dispose of a portion of the estate to raise funds to cater for her medical needs. The removal of the Public Trustee was a setback that was unnecessary, as it now requires the court to go through the same motions that it had to go through with the Public Trustee.

16. The family herein appears to me to be agreed that the assets be distributed so that each member of the family has control of their share thereof. In other words, they would like the court not to subject the estate to life interest as required by the law, but to distribute the assets to all including the surviving spouse. The only dispute between them is on how the distribution should be done. The applicant proposes equal distribution amongst all the members of the family, including herself, of the entire estate. The protestor on her part proposes distribution equally amongst the houses. The two concepts of distribution are applicable in Kenya. One of them is statutory, while the other is a concept in customary law. The Law of Succession Act, through Part V, embraces the concept of equality in distribution amongst members of the family, while customary law, including Kikuyu customary law, knows of distribution of an intestate's estate, where the latter dies a polygamist, amongst the houses equally regardless of the number of children in each house. The customary law position leads to unequal distribution often as some of the houses may have fewer children compared with the others.

17. The deceased herein died in 1982. The Law of Succession Act came into force on 1st July 1981. His estate therefore falls for distribution in accordance with the provisions of the Law of Succession Act and not African customary which had governed the area prior to 1st July 1981. The deceased died intestate, and therefore his estate should be distributed in accord with the principles enunciated in or the spirit of Part V of the Act, equal distribution amongst all the members of his household.

18. The protestor alleges that the family had agreed to have the estate shared out in accordance with customary law. She refers to documents that were allegedly prepared by a Chief stating that position. The provisions of the law on distribution can be overridden by the consent of the parties on distribution. In this case, it is unclear as to whether the meeting of 1993 was attended by all the members of the family of the deceased. It is clear though that not all members of the family signed the document that the protestor relies on. It cannot therefore be said that such persons were party to a consent to which they did not append their signatures. It also transpires that at the time quite a large number of the children of the deceased were minors. It is not clear whether they were at the alleged meetings. Even if they were, they could not possibly be bound by any agreement entered into at the said meeting.

19. An issue was raised as to whether Ndeiya/Ndeiya/2443 was estate property. The applicant concedes that the said property was estate property as it was the deceased's inheritance from his father's estate. She does not object to the same being distributed amongst the family members. The protestor says that the said property has already been distributed to the three houses represented by the persons whose names appear in the title deed. Distribution can only be through confirmation of the grant herein. The grant has not been confirmed, so the issue of Ndeiya/Ndeiya/2443 having been distributed does not arise. The same is estate property and it shall be among the assets in respect of which I shall be making orders shortly on its distribution.

20. On whether the applicant herein should be the sole administrator given that the deceased died a polygamist, I find that although the law allows there to be more than one administrator, there is usually no need to have many administrators where administration is generally going on smoothly. From the documents lodged herein and the testimonies that I recorded from the witnesses who gave evidence, there is nothing to suggest that the applicant has been unable to or is having difficulties administering the estate to require that additional administrators be appointed. Of course where the deceased was a polygamist, democracy would favour that the other houses be represented.

21. On the question of the Nakuru cause, it is common ground that the same was abandoned. Neither of the family members pursued it after the Public Trustee took charge of the estate upon being granted representation herein. It would be academic to pursue that cause. The best thing would be to call up the file and have it consolidated with the instant cause or to have it closed altogether to obviate the possibility of mischief.

22. In the end the orders that I shall make on the application dated 6th June 2016 are as follows –

(a) That Nyandarua/Njabini/157 and Ndeiya/Ndeiya/2443 shall be distributed to the surviving widow of the deceased, the applicant herein, and to all the children of the deceased equally;

(b) That for any child of the deceased who died after 2nd February 1982 their share shall devolve upon their estate;

(c) That the applicant is confirmed as the sole administrator of the estate;

(d) That a certificate of confirmation of grant to issue accordingly;

(e) That the Deputy Registrar shall call for the court file in Nakuru HCSC No. 468 of 1993 for the purposes of that cause either being consolidated with the instant cause or otherwise being marked as closed;

(f) That any party aggrieved by the orders made in this judgment shall have twenty-eight (28) days to lodge an appeal against the same at the Court of Appeal; and

(g) That each party shall bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 14TH DAY OF JUNE, 2018.

W. MUSYOKA

JUDGE