



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO.1984 OF 1997

IN THE MATTER OF THE ESTATE OF ROSE WAMUYU MUGUCHU (DECEASED)

JUDGMENT

1. Rose Wamuyu Muguchu whose proceedings this estate relate died intestate on 12th June 1996 leaving behind her parents Mugo Ngare and Beatrice Wanjiru father and mother respectively as the only survivors. The following assets were listed in Form P & A 5 as constituting her estate :

- a. $\frac{1}{4}$ an acre Plot at Maragwa Muranga
- b. 7 acres of agricultural land in Kirinyaga
- c. $\frac{1}{4}$ an acre at Kasarani Nairobi
- d. Shares in KCB, National Bank, Standard Chartered and Barclays Bank
- e. Debt owed by Harrison Gathuri
- f. Refrigerator, T.V, and other electrical gadgets
- g. Loans to different people

2. On 17th September 1997, Mugo Ngare petitioned for a grant of letters of administration intestate and the same was made and issued to him as the sole administrator on 4th November 1997. Unfortunately, before the grant could be confirmed, the petitioner/administrator died. Subsequently, Grace Muthoni Njambogo a sister to the deceased filed a notice of motion dated 4th June 2014 but filed on 13th June 2014 seeking to substitute the deceased administrator. She was consequently appointed as the administratrix vide a grant of letters of administration issued on 4th March 2015.

3. As fate would have it, Grace Muthoni Njambogo also died on 31st October 2013 before confirmation of the grant thus culminating to her substitution with Danson Kubai Muguchu her brother on 22nd 2016 as the next administrator. Upon his appointment, Danson Kubai lodged summons for confirmation dated 6th February 2017 but filed on 14th February 2017. In his application, Kubai proposed to distribute the estate to the beneficiaries as follows:

1. Danson Kubai (brother) – 300 shares NBK
2. Patrick Gachoki Muguchu (brother to deceased) – Ndigichu Housing Shares
3. Grace Muthoni Njambogo (sister) – Plot 22B Kutus Kirinyaga and Plot 25B Kasarani
4. Lydia Wanjira Muguchu (sister) – $\frac{1}{4}$ acre plot Maragua in Murang'a
- 5.(a) Margaret Thiguku Kariithi (sister-in-law) Each 2 acres

(b) Danson Kubai Muguchu out of

(c) Fredrick Gachoki Muguchu Baragwi/Guama/75

4. Dissatisfied with the mode of distribution proposed by the administrator, Margaret Thiguku Kariithi a sister-in-law to the deceased by virtue of being a wife to the late Simon Kariithi Muguchu a brother to the deceased challenged the application vide affidavit of protest sworn on 23rd February 2017 but filed on 4th April, 2017. She alleged that after Grace Muthoni Njambogo died, the administrator Danson Kubai secretly substituted her without the knowledge of the other beneficiaries.

5. She further stated that before the deceased died, she had transferred plot No. 129B Kanyata Kutus to Grace Muthoni Njambogo. That the plot listed as Plot No. 22B does not exist. She also stated that Plot listed as 25B Kasarani should read Plot No. 106 Block 122/19 jointly owned with five others with the deceased entitled to $\frac{1}{2}$ share which she proposed to go to Grace Muthoni

Njambogo's children namely:

1. Peris Wambura Njambogo

2. Heirs to Beatrice Wanjiru (Allan Njambogo and Grace Wanjiru Njambogo)

3. Esther Njeri Njambogo

4. Charles Muthoni Njambogo and

5. Stanley Muchiri Njambogo

She also agreed that $\frac{1}{4}$ acre plot in Maragua should go to Lydia Wanjiru Muguchu.

6. In a nutshell, she had no objection to the mode of distribution proposed by the administrator save for Baragwi/Guama/75 comprising of 7 acres. She claimed that, prior to the death of Symon Kariithi Muguchu her deceased husband, he had bought two acres out of the said land from the original owner Christopher Muchuna Mwaniki who also gifted the remaining portion of five acres to the deceased in whose name the entire title was transferred.

7. She alleged that since 1972, she has been cultivating on the two acres of land and that she has planted tea bushes in the entire portion. She also claimed that the deceased had allowed her to construct a house on her 5 acre land where she is staying to date. It was her proposal that the said land be shared out by giving her her two acres first and the balance be shared equally amongst the deceased's three brothers with her representing Symon Kariithi Muguchu thus taking 3.64 acres inclusive of her two acres, Danson Kubai Muguchu 1.64 acres and Fredrick Gachoki Muguchu 1.64 acres.

8. She averred that they have been cultivating the said land under that arrangement since 1972 and that the same position was confirmed during their family meeting held on 10th September 2011 (See minutes attached marked MJK 6).

9. In reply to the protest, the administrator averred that the land in question is measuring 3.64 ha translating to 6.4 acres and not 7 acres as alleged by the protestor. He denied the allegation that the protestor owned two acres out of the land in question and wondered why she did not process her title for all that time. He termed the sale agreement attached to the protest affidavit (MJK-5) as a forgery.

10. However, the administrator admitted that although his late brother the protestor's husband had planted tea bushes in the two acres; he too had planted his in two acres in the same land. He maintained that the land should be shared out equally between him, the protestor and Fredrick Gachoki Muguchu.

11. On 10th May 2017, the honourable court gave directions for the matter to proceed by way of viva voce evidence and parties to file witness statements and documentary exhibits if any. During the hearing, parties agreed to record consent on the uncontested property so as to proceed with the single asset that was contested. However, the consent was never recorded. In her testimony, PW1 Margaret Kariithi adopted her affidavit of protest and the annexures thereto plus her witness statement dated 15th November 2017 which is a replica of the contents contained in the affidavit of protest. Regarding the plot in dispute, she claimed that her husband bought two acres out of 7 acres from one Christopher an uncle who gave the remaining five acres to the deceased as a gift. She now claims her two acres plus 1.6 acres being the share of her late husband as one of the three brothers to the deceased.

12. On the other hand, DW1 – Danson Kubai also adopted as evidence his witness statement dated 24th November 2017 together with a replying affidavit in response to the affidavit of protest. On cross examination, he alleged that the sale agreement produced as evidence by the protestor was a forgery as the seller of the land was not even called as a witness. He disowned the minutes held by family members on 10th September 2011 maintaining that he did not sign the same. He admitted on cross examination that since 1972, the protestor's family has been cultivating on the two acres land. He further admitted on cross examination that the balance of 5 acres was being utilized by him, Fredrick Gachoki and Simon Kariithi who had built a house on $\frac{3}{4}$ an acre on the 5 acre land.

13. Upon close of the hearing, both parties agreed to file their written submissions within 14 days. On 15th May 2018, M/S Wangechi representing the protestor filed her submissions dated 14th May 2018. The respondent/ administrator appearing in person also filed his submissions on 2nd May 2018.

14. In her submissions, M/S Wangechi adopted the testimony of the protestor and averments contained in her affidavit of protest. She

however urged the court to recognize the protestor's husband as a dependant since they had not split the title into two. Equally, the administrator did adopt his witness statement in his submission. He claimed that in July 2014, the protestor engaged a private surveyor to sub divide the land in question and in the process destroyed his tea bushes thus occasioning him immense loss to the tune of Kshs.938, 765.00 a sum he was claiming from the protestor as compensation.

15. I have considered the application herein, affidavit of protest, evidence adduced by both parties and submissions thereof. Issues for determination are:

- a. Whether L.R. NoBaragwi/Guama/75 should be shared equally between the three brothers to the deceased;**
- b. Whether the protestor has a purchaser's interest on the said land;**
- c. Whether the protestor is a dependant to the deceased.**

According to the protestor, she has no objection to the mode of distribution proposed by the administrator in respect to the rest of the assets save for plot No. Baragwi/Guama/75. To that extent, except for L.R. Baragwi/Guama/75, the rest of the estate shall be distributed as proposed in the affidavit in support of the application for confirmation dated 6th February 2017.

16. The property in dispute Baragwi/Guama/75 is alleged to have been bought partly by the husband to the protestor (2 acres) and partly (5 acres) given as a gift to the deceased by their uncle. Parties are in agreement that they are beneficiaries to the deceased's estate pursuant to Section 39 (1) (c) of the Law of Succession which provides:

“where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority:

- a.**
- b.**
- c. Brothers and sisters, any child or children of the deceased brothers and sisters, in equal shares.**

The deceased having left neither parent nor children, the brothers and sisters are the next in priority to inherit her property.

17. In the absence of any contestation, the land ought to be shared equally amongst the siblings (**See in the matter of the estate of Joseph Muchiri Komu (deceased) Nakuru HC Succession 441/1998**). However, in the instant case, the protestor has claimed that her husband bought two acres out of the 7 acres and that the remainder being five acres was transferred into the deceased's name including her husband's two acres. She produced a purported one sentence sale agreement dated 14th July 1972 written in Kikuyu but translated in English. Unfortunately, there was no witness called to corroborate her testimony to prove the authenticity of the sale agreement.

18. The protestor was not a witness hence not in a position to confirm whether those signatures in the said agreement are authentic. The seller was neither called nor was any witness who purportedly witnessed the agreement. For sure, the evidence with regard to the purchase of two acres from the said Christopher their uncle is scanty and not corroborated by anybody. The theory of buying the land does not meet the threshold of the burden of proof required in acivil suit. I do agree with the administrator that the allegation of buying land has not been proved to the required degree.

19. In any event, M/s. Wangechi submitted that since the land was not sub-divided, the protestor would still plead dependency to get her share. Having dismissed the theory of land purchase, I will now turn to the claim of dependency as alluded to by M/s. Wangechi who submitted on it as an alternative.

20. Who is a dependant in Succession Law? - Section 29 of the Law of Succession defines a dependant as follows:

“for purposes of this part “dependant” means –

- a. The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.**
- b. Such of the deceased's parents, step parents, grandparents, grand children, step children, children whom the deceased had taken into his family as his own, brothers and sisters, and half brothers and half sisters, as were being maintained by the deceased immediately prior to his death; and**
- c. Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.**

21. Was the protestor being maintained by the deceased immediately prior to her death? The protestor did not claim that she was a dependant to the deceased. The claim regarding dependency was advanced by her lawyer. There was no evidence that the protestor was a dependant of the deceased and being maintained as such immediately prior to her death.

22. Having ruled out the element of purchase of land and dependency, the only remaining option is that of land held in trust. It is admitted that the land in question was passed over to the deceased (5 acres) and the protestor (2 acres) by their uncle Christopher. That it was agreed between the deceased and the protestor that the land was to be transferred in the name of the deceased for her benefit and in trust for the protestor. Indeed the two took vacant possession on the ground since 1972 with the protestor cultivating her two acres where she has planted tea bushes and has been cultivating uninterrupted. Subsequently, the deceased gave her (protestor) a portion in her 5 acre land to build a house in which she did put up a permanent house where she is staying to date.

23. I am therefore sufficiently persuaded that there is implied trust that the deceased was registered as the absolute owner of the land in question for her benefit and that of the protestor being a gift from their uncle. The administrator does not deny that the protestor has been occupying the two acres since 1972 after being gifted by their uncle. It could not be a coincidence that she was occupying that land by sheer luck or at the mercy of the deceased. Indeed the family meeting held on 10th September 2011 recognized that fact except for the administrator. I am convinced that the deceased was the owner of the two acres of land held by the deceased in trust for her and upon the deceased's demise the protestor is entitled to her two acres share first before the remainder can be distributed amongst the beneficiaries in accordance with Section 39 (1) (c) of the Law of Succession. As to the distribution of T.V, Refrigerator, other electrical gadgets and debts from third parties, there was no evidence led to prove existence of those items. Nobody claimed the same hence I will not make any finding on them.

24. Accordingly, the application for confirmation dated 6th February 2017 is hereby allowed and the grant confirmed with orders as follows:

- a. That 300 shares at National Bank of Kenya shall be given to Danson Kubai Muguchu absolutely.
- b. That shares in Ndigichu Housing shall be given to Fredrick Gachoki Muguchu absolutely.
- c. That plot No.Kanjata/29B Kutus and ½ share in Plot No. 106 block 122/19 Kasarani be given to the heirs of Grace Muthoni Njambogo namely,Peris Wambura Njambogo, Esther Njeri Njambogo, Charles Muriuki Njambogo, Stanley Muchiri Njambogo and heirs to the late Beautrice Wanjiru(Allan Njambogo and Grace Njambogo) in equal share.
- d. That ¼ acre plot in Maragua Murang'a to be given to Lydia Wanjira Muguchu.
- e. That two acres to be excised from Baragwi/Guama/75 be given to Margaret Thiguku Kariithi and the remainder be shared out equally between Margaret Thiguku Kariithi, Danson Kubai Muguchu and Fredrick Gachoki Muguchu.
- f. That this being a family matter each party to bear his or her own costs.

SIGNED, DATED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF JULY, 2018.

J.N. ONYIEGO (JUDGE)

In the presence of:

Objector/ProtestorIn person

N/A.....Counsel for the Petitioner/respondent

Edwin..... Court Assistant