



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 1139 OF 2011

(IN THE MATTER OF THE ESTATE OF KAGONIA CHUURA ALIAS KAGONIA S/O CHUURA ((DECEASED))

CHARLES PETER KAGONIA.....APPLICANT

VERSUS

FRANCIS NDUNGU KANYOGO.....1ST PROTESTOR

JAMES KARIAMBURI KANYOGO.....2ND PROTESTOR

JUDGMENT

The applicant is the son and administrator of the estate of Kagonia s/o Chuura (the deceased) who died intestate on 8th March, 1968 aged 100. He was domiciled in Kenya and he hailed from Thegenge sub-location, Karangia location in Nyeri County at the time of his demise.

Title No. Thegenge/Karia/618 measuring approximately 4.3 acres is indicated in the applicant's affidavit in support of the petition for letters of administration intestate as the only asset comprising the deceased's estate. It is this asset that the applicant has sought to distribute amongst the deceased's survivors in his summons for confirmation of grant dated 24th October, 2012. These survivors have been named as Mary Wamahiga Ndegwa, Jane Muthoni Kanyogo and Eunice Wambui Kanyogo all of whom have been described as the deceased's daughters-in-law. The rest of the survivors are the two protestors who are described as the deceased's grandsons.

The applicant has proposed that the two protestors should be given 0.575 acres of the estate while he himself and Jane Muthoni Kanyogo should have 2 acres thereof. Francis Ndungu Ndegwa, Peter wachira Ndegwa and Eunice Wambui Kanyogo should be given 0.575 acres each.

In a further affidavit sworn jointly by Mary Wangui Muriuki and Margaret Wanjiru Kanyogo in support of the summons for confirmation of grant, the deponents have proposed to have the share allocated to Eunice Wambui Kanyogo registered in the name of Margaret Wanjiru Kanyogo since Eunice has since passed on, more particularly on 31st December, 2012. The joint deponents have deposed that they are the daughters and the only survivors of the said Eunice Wambui Kanyogo.

The protestors were not satisfied with the proposed scheme for distribution of the estate and so they filed an affidavit of protest sworn by the 1st protestor on his own behalf and on behalf of the 2nd protestor. Their major bone of contention, as far as I can gather, is that Eunice Wambui Kanyogo is not entitled to any share of the estate because she was a beneficiary of Title No. Thegenga/Karia/614 and Mwireri Estates Limited/228 given to her by her deceased husband during his lifetime.

In the protestors' view, the estate ought to be shared out as follows:

- (i) Charles Peter Warui Kagonya and James Muthoni Kanyogo to get 2 acres each;
- (ii) Francis Ndungu Ndegwa to get 0.575 acres
- (iii) Peter Wachira Ndegwa to get 0.575 acres
- (iv) Francis Ndungu Kanyogo and James Kariamburi Kanyogo to get 1.15 acres.

At the hearing, the 1st protestor testified that he was the deceased's grandson in the sense that his father Josphat Kanyogo Kagonia, who is also deceased, was one of the deceased's children. He named one Isaac Kanyogo Kagonia as his father's other brother but who, like his father, was deceased as well. He also testified that his father had two wives whom he named as Miriam Gachago Kanyogo and Eunice Wambui Kanyogo; the former was his mother while the latter was his step mother. It was his evidence that his late father was entitled to 1.15

acres out of his grandfather's estate and it is this share that he proposed should be given to him and his brother, the 2nd protestor. His step-mother, according to his evidence had benefited from Title No. Thegenga/Karia/614 measuring 1 acre and Mwireri Estates Limited/228 measuring 2 acres on which she and her family were living at the time of the deceased's demise. The two parcels of land had been given to her by his father in 1997. As a matter of fact, an agreement reduced into writing had been made at the District Officer's office according to which it had been agreed that his step-mother would retain the two parcels while the protestors' house would have their father's share in the deceased's estate. He confirmed that he had no issue with the applicant's proposed share.

The protestor produced a copy of the green card showing that Title No. Thegenga/Karia/614 was once registered in his father's name before it was transferred to Eunice Wambui Kanyogo.

The applicant admitted that that protestors' late father was his step brother and he was entitled to an acre of the deceased land. Now that he was deceased, his children from his two houses were entitled to his share. He testified that each of his late step-brother's two houses had two children. He named those from the 1st house as Francis Ndungu and James Karuimburi while those from the 2nd house were Mary Wambui Muriuki and Margaret Wanjiru Kanyogo. It was the applicant's evidence that Eunice Kanyogo purchased the parcel referred to as Title No. Thegenga/Karia/614 except that it was initially registered in her husband's name because she did not have an identification card at the time she bought it.

The petitioner named the deceased's sons as Ndegwa Kagonia, Josephat Kanyogo, Joseph Kagonia and himself. Of the four sons, he was the only one surviving the deceased. His brothers are, however, survived by their children whom he named as follows:

1. Ndegwa Kagonia
 - (i) Francis Ndungu Ndegwa
 - (ii) Peter wachira Ndegwa
2. Josphat Kanyogo
 - (i) Francis Ndungu Kanyogo
 - (ii) Lucy Wambui Kariamburi
 - (iii) Margaret Wanjiru
 - (iv) Mary Wambui
3. Joseph Kagonia
 - (i) Wangechi
 - (ii) Wanjiku
 - (iii) Wanjiru
 - (iv) Nyakere
 - (v) Wairimu
 - (vi) Ann Kagonia
 - (vii) Kinyua
 - (viii) Mwangi

He testified that he could not remember the names of four other children in Joseph Kagonia's house. According to him, all these children should share one acre of land out of the entire estate. Similarly, Josephat Kanyogo's children should also get an acre of land from the deceased's estate.

Mary Wambui testified in support of the summons for confirmation of grant. She testified that she was the daughter to Josephat Kanyogo. She named Margaret Wanjiku as her sister. She, however, agreed that her late father had another wife, Miriam Gachagi, besides her mother and that she had three children whom she named as James Kariamburi, Francis Kagonia and Nyairia who is deceased. She also testified that her mother, Eunice Wambui, purchased Title No. Thegenga/Karia/614 though she was buried on Title No. Title No. Thegenga/Karia/618. She lives on the former parcel together with her sister.

As noted, the deceased in this cause died in 1968 before the enactment and commencement of the Law of Succession Act, cap. 160. Ordinarily, this Act would have limited application in such circumstances if there is proof of written laws and customs applicable to the administration of estates at the time of the deceased's death. Section 2 of the Act puts it better; it states:

2. Application of Act

(1) 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 estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.

Of particular relevance is subsection 2 that stipulates that the administration of the estates such as the one in issue is subject to written laws and customs applicable at the time of the deceased's death. But even with such laws and customs, the application of the Law of Succession Act is not completely ruled out because this provision reiterates that despite the laws and customs applicable at the time of the deceased's demise, the administration of his estate must commence or proceed in accordance with the provisions of the Act as far as it is practicable.

In the present cause, there is no evidence, and none was suggested, of any law or custom that may have been applicable at the time of the deceased's death; this being the case, it should not be difficult to apply the intestacy provisions of the Law of Succession Act to the extent that they are applicable. In this regard, the immediate provision that immediately lends itself to the present situation is section 38 of the Act. It states as follows:

38. Where intestate has left a surviving child or children but no spouse

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 shall be equally divided among the surviving children.

As far as I understand both the applicant's and the protestors' evidence, the deceased was polygamous; he was married to two wives. One of the wives named Gachambi Kanyugo is named in the petition as having survived the deceased though she apparently died before the petition for letters of administration was filed. It is not clear when the second widow died.

However, the application of section 38 presupposes the devolution of the deceased's estate amongst his or her children in the absence of a spouse or spouses. It is therefore sufficient that none of the deceased's wives existed at the time material to this cause.

There was evidence that the deceased was survived by four children but only one of them, the applicant, is still alive. The rest died apparently before this succession cause was instituted; however, they were survived by either their respective spouses or children who have, in those capacities, laid claim on the deceased's estate on behalf of their deceased's husbands or fathers, as the case may be. In particular, the two protestors together with Mary Wangui Muriuki and Margaret Wanjiru Kanyogo are claiming the share due to their late father, Josephat Kanyogo. As a matter of fact, the present dispute is essentially between them with the protestors claiming the entire share due to their father while Mary Wangui and Margaret Wanjiru who are their step sisters, also want a portion of what their late father would have been entitled to.

My assessment of the evidence is that the scheme of distribution the deceased's estate as proposed by the applicant is generally acceptable by all the parties and fairly consistent with the provisions of section 38 of the Act. If anything, the protestor who presented the protestors' case testified that he had no qualms with the proposed scheme except that his step-mother Eunice Wambui should not have been considered in the distribution of the share due to Josephat Kanyogo. Eunice Wambui herself died while this cause was pending and her daughters stepped in on her behalf to lay claim on their father's share.

I understood the protestors' case to be that Eunice Wambui's house which, as noted, is one of the two houses of Josephat Kanyogo, benefited from him by way of a gift inter vivos. In particular, they have alleged that the late Josephat Kanyogo transferred properties known as Title No. Thegenga/Karia/614 measuring and Mwireri Estates Limited/228 to Eunice wambui during his lifetime and therefore they are not entitled to his estate.

The protestors appear to have misapprehended a very basic fact that the estate in issue is not that of Josephat Kanyogo but that of his father. Looking at the copy of the extract of the register in respect of Title No. Thegenga/Karia/614 they appear to have a valid point to extent that this parcel of land was at one point owned by the late Josephat Kanyogo but was subsequently transferred to Eunice Wambui; however, they have raised the issue at the wrong forum. I say so because it is only in the succession cause in respect of the late Josephat Kanyogo that the questions of distribution of his estate and whether he had made any inter vivos gifts which should be taken into account in the distribution of the remainder of his estate can be considered. I need not add anything more on this save to say that to the extent that these questions have been raised in this cause, the protestors' protest has no sound basis.

In the ultimate, I do not find any merit in the protestors' protest and it is hereby dismissed. In the same breath, the grant made to the applicant on 7th May, 2012 is hereby confirmed. The deceased's estate shall be distributed in terms of Paragraph 6 of the affidavit sworn in support of

the summons for confirmation of grant sworn on 29th October, 2012 except that the share due to Eunice Wambui Kanyogo shall be registered in the names of Mary Wangui Muriuki and Margaret Wanjiru Kanyogo as owners in common. Parties shall bear their respective costs. It is so ordered.

Signed, dated and delivered in open court on 21st September, 2018

Ngaah Jairus

JUDGE