



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 385 OF 2011

IN THE MATTER OF THE ESTATE OF SILAS NJOROGE MWORIA ALIAS SILAS NJOROGE MWORIA ALIAS SILAS NG'ANG'A MWORIA (DECEASED)

JOSEPH MUNGAI NG'ANG'A.....ADMINISTRATOR/RESPONDENT

VERSUS

ESTHER WANJIKU NJOROGE.....1ST PROTESTOR

JOHN NJAU NG'ANG'A.....2ND PROTESTOR

J U D G M E N T

A. Introduction

1. The deceased in this case died intestate on 25/08/1992 whereas this cause was gazetted on 7th October 2011 with Mungai Ngang'a Mwororia having petitioned for the letters of administration intestate. He was issued with letters of administration interstate on 11th November 2011.
2. The protestors filed a joint affidavit of protest on 20/06/2014 in their capacity as widow and son of the deceased.
3. The parties were heard through *viva voce* evidence.

B. Protestors' Case

4. The 1st protestor testified that the petitioner did not inform her when he came to court and further that the petitioner had not asked her what the deceased had told her about his estate.
5. The 1st protestor further testified that the deceased had land at Murinduko measuring 15 acres out of which the 2nd Objector was to get 8 acres and the petitioner was to get 5 acres. She testified that Mary Wanjiku, a daughter to the deceased was to get 2 acres.
6. The 1st protestor further testified that the deceased had some land in Nanyuki at Muramati measuring 8 acres of which she had 4 shares and the petitioner's mother had 4 shares. She further urged the court to confirm that we stay the way they had been staying.
7. In cross-examination, she stated that the deceased had stated that she was to inherit his shares from Kandara Investment Limited whereas the petitioner's mother was to get the deceased's shares from K.F.A.
8. The 2nd protestor testified that when their late father sub-divided his estate there was no objection as to the distribution. He then produced a small book in which the deceased wrote on the issue of sub-division. The 2nd protestor further testified that the deceased in his will had stated that **Land Ref. 129 in Muramati** was to be shared among the children of the deceased.
9. The 2nd protestor further testified that there was a family meeting in late 1994 wherein the mother of the petitioner was to take charge of **Land Ref. No. 129 in Muramati** pending the filing of a succession suit. He further testified that the deceased did not transfer ownership of the parcels to his heirs as he feared the heirs would sell them.

C. Respondent's Case

10. In his replying affidavit, the respondent admitted the alleged relationships between him and the protestors. He said that the 1st protestor is his step-mother while the 2nd one is the step-brother. He denied that there was non-disclosure of facts material to the case stating that all the beneficiaries were duly informed of the succession proceedings.

11. It is further stated that the deceased had distributed all his properties during his lifetime among his family of three (3) wives and their children. It was further deposed that this application does not meet the threshold of objection proceedings.

12. DW1, the respondent testified that the deceased had 3 wives and had acquired **L.R. No. Gichugu settlement scheme/44** in 1959. He further testified that the deceased had land in Laikipia/Daiga respectively No. 124 where the deceased was buried. That land was given to his widow the 1st protestor. Laikipia/Daiga/129 is still in the deceased's name and Laikipia/Daiga/131 was given to Mary Wanjiku and Michael Mburu children of the deceased's eldest widow known as Wambaire.

13. It was the respondent's testimony that No. 129 was to go to his mother, Miriam Wanjiku. He further testified that Gichugu Settlement scheme measuring 15 acres should be shared equally between the three houses and similarly any shares or any other land belonging to the deceased should be divided equally between the 3 houses.

14. In cross examination, the respondent stated that the deceased never shared out his land between his wives or children during his lifetime and had not obtained consent to subdivide or transfer the portions.

15. DW2, the deceased's daughter testified that the deceased had 3 parcels of land in Laikipia/Daiga which she said should be shared to the three houses of the deceased. She supported the mode of distribution proposed by the respondent.

16. She further testified that she was not satisfied with 2 acres of land she uses in Gichugu/Settlement Scheme 44 and which the protestors had proposed be given to her. She said that the land should be shared equally between the three houses of the deceased.

D. Protestors' Submissions

17. The protestor submitted that the deceased had distributed his estate before his death and urged the court to follow the same as outlined in their affidavit of protest.

18. It was further submitted that the beacons on land parcel no. Gichugu/Settlement Scheme/44 should remain as had been placed by their father before his death in 1973.

19. It was further submitted that whereas the petitioner ought to remain in land parcel no. Laikipia/Daiga/Umande Block 111/129, the objectors were also entitled to a share of the same parcel for it measured eight (8) acres.

20. The protestors concluded by asking court to distribute the land parcels as per the wishes of the deceased before his death.

E. Respondent's Submissions

21. The petitioner submitted that the deceased recognised his three houses and subsequently purchased 3 shares forming the three land parcels in Laikipia for the three houses and that he allocated a share to each house. He further submitted that the only share still remaining namely **Laikipia/Daiga/ Umande Block 111/129** was to be distributed to their house as the other houses had each been allocated a share.

22. From the evidence of the parties, this court reaches a conclusion that the deceased died intestate.

23. The protestors failed to discharge the burden of proof that the deceased left a will. The exercise book produced by the 2nd protestor was of no probative value to this claim.

24. The petitioner submitted that contrary to allegations by the protestor's, land parcel No. Gichugu/Settlement/Scheme/44 had not been subdivided by the deceased. The petitioner urged court to distribute the land as proposed in their submissions therein that is equally between the three houses.

25. Regarding the shares in various companies that the deceased held, the petitioner submitted that the same should be divided equally among the houses.

26. It is not in dispute from the evidence of the parties that there are eight (8) beneficiaries in this case identified as follows: -

- | | | |
|-----------------------------|---|-------|
| 1) Esther Wanjiku Njoroge | - | widow |
| 2) Milliam Wanjiku Ng'ang'a | - | widow |
| 3) John Njau | - | son |
| 4) Mungai Ng'ang'a Mworia | - | son |

- 5) Teresiah Wamaita Ng'ang'a - daughter
- 6) Wanjira Maina - daughter
- 7) Naomi Muthoni Kiguru - daughter
- 8) Ruth Wairimu Njoroge - granddaughter

27. It is imperative that Ruth Wairimu Njoroge, a granddaughter is not directly entitled to inherit the deceased's estate. However, she becomes a beneficiary in place of her deceased mother Mary Wanjiku who was a daughter by his first wife Josephine Wambaire.

28. I rely in the Court of Appeal case of **CHRISTINE WANGARI GACHIGI VS ELIZABETH WANJIRA EVANS & 11 OTHERS [2014] eKLR** which dealt with the issue of grandchildren claiming in the estate of the deceased and where the court applied the provisions of **Section 38 of the Act**. The court affirmed that: -

The learned trial Judges decision that the beneficiaries of the estate of the deceased herein comprised all the deceased's children surviving as at the time of distribution and the grandchildren of the deceased children of the deceased who had either predeceased her or died shortly after presentation of the succession proceedings to court.

The principal of equality as enshrined in Section 38 of the Act is the key principle which ought to have guided the learned judge in the distribution exercise. We affirm that it is the same principle that will guide our redistribution exercise. In doing so, we find it fit not to treat the eligible grandchildren of the deceased as single units, but to reroute them back to benefit as such through their deceased parents' house hold units.

29. It is not in dispute in this case that Ruth Wairimu should take her late mother's share. Neither is it in dispute that Teresia Wamaita Ng'ang'a and Ruth Wairimu are the only surviving beneficiaries of the first house.

30. As for Wanjira Maina and Naomi Muthoni Kiguru, none of the two beneficiaries came forward to claim any share of the deceased's assets. Neither did the respondent or the protestors propose any share for them.

31. It is not in dispute either that the respondent is the only surviving beneficiary in the house of the 2nd widow Milliam Wanjiku Nga'ang'a while the 2nd protestor is the only surviving child in the house of the 1st protestor Esther Wanjiku who is alive but advanced in age.

32. The court was informed by the 2nd protestor and Mr. Nduku counsel for the respondent that the 1st protestor was aged over 90 years and unable to attend court. It had been agreed in principle by all the parties that since she had given her evidence, the 1st protestor be excused from attending court. In her evidence, the 1st protestor did not claim a share in the LR. Gichugu Settlement/Scheme/44. All she wanted is for her son the 2nd objector to get 8 acres out of the 15 acres parcel and to be allowed to continue staying where she has settled.

33. Having considered all the foregoing, the heirs in the deceased's estate who have claimed interest are identified as follows: -

- 1) Esther Wanjiku Njoroge - widow
- 2) Milliam Wanjiku Ng'ang'a - widow
- 3) John Njau Ng'ang'a - son
- 4) Mungai Ng'ang'a Mworio - son
- 5) Teresiah Wamaita Ng'ang'a - daughter
- 6) Ruth Wairimu Njoroge - granddaughter

34. Section 40 of the Law of Succession Act is applicable in the distribution of assets in this case. It provides: -

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

35. The protestors have not given any satisfactory reason why the 2nd objector should be given eight (8) acres out of Gichugu/Settlement/Scheme/44 while the first family which has two beneficiaries gets on two (2) acres jointly.

36. The 2nd objector said, he was the favourite son of the deceased and that he assisted the deceased in many ways. This is not a factor to be taken into consideration in distribution of the estate of a deceased person. The law applicable must be followed as much as possible to

achieve equitable distribution among the beneficiaries in accordance with the law.

37. It is not in dispute that the deceased had distributed some of his land parcels at Laikipia-Daiga to some of his wives and children during his lifetime as follows: -

- 1) LR. Laikipia/Daiga/Umande/111/124 (Muramati) Esther Wanjiku - widow
- 2) LR. Laikipia/Daiga/Umande/111/131 – Mary Wanjiku and Michael Mburu – daughter and son (1st house)
- 3) LR. Laikipia/Daiga/Umande/111/130 – John Njau Nganga – son - 3rd house (2nd protestor)

38. The only parcel at Laikipia/Daiga in the name of the deceased and available for distribution is LR. No. 129 measuring 3.290 ha. (approximately 8.1 acres). The petitioner testified that the land was to go to his mother Milliam Wanjiku to put her on equal footing with the other two widows who had already been allocated their parcels in Laikipia-Daiga area. There was no evidence that the 2nd house of which the respondent belongs had been given land at Laikipia.

39. The respondent further testified that he took over the parcel and started developing including cultivation and has made extensive developments.

40. The 2nd protestor did not oppose the proposal of the respondent in this regard. He even proposed it in his affidavit that the petitioner should be given that parcel on behalf of his deceased mother.

41. The deceased had several shares in various companies. The protestors have not opposed the mode of distribution by the respondent.

42. I have considered all the issues raised in this protest. I find the respondent's mode of distribution fair and capable of achieving equitability among the beneficiaries.

43. I now proceed to distribute the estate of the deceased in accordance with the law. The provisions of **Section 40 and Section 42 of the Act** will guide this court in the distribution.

1) Gichugu/Settlement/Scheme (16.00 acres)

- i. John Njau Nganga - 5.33 acres
- Esther Wanjiku Njoroge - to have life interest
- ii. Joseph Mungai Nganga - 5.33 acres
- iii. Teresia Wamaitha Nganga - 5.33 acres
- Ruth Wairimu in equal shares

2) Laikipia/Daiga/Umande/111/129

- i. Joseph Mungai Nganga - Whole

3) Share in the following companies: -

- a) Kandara Investment Limited
- b) Kwirimia Peredential Society
- c) Kandara (Narumoru) Company Limited

To be shared **equally** among **all** the beneficiaries.

44. A certificate of confirmation to issue.

45. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF DECEMBER, 2018.

F.N. MUCHEMI

JUDGE

In the presence of: -

Both petitioners and 2nd protestor