



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 606 2006

IN THE MATTER OF THE ESTATE OF ELIZABETH WANJIRU WAWERU - DECEASED

JUDGMENT

1. The deceased in this cause died intestate on 31st January, 2006 at Nyahururu. A grant of letters of administration of her estate was issued to Lucy Njoki Njeru (the 1st administrator) and the Late Joseph Benson Karanja (the protestor) who has since been substituted by his wife Wanjiru Karanja. The identity of the beneficiaries and the properties constituting the estate of the deceased are not in contention.

2. The dispute concerns the mode of distribution of estate of the deceased. In her summons for confirmation of the grant dated 17th September, 2008 the administrator proposed that the estate be divided as per the agreement of the beneficiaries, including the protestor, which has been captured in the minutes attached to the affidavit in support of the summons.

3. The protestor objected to the mode of distribution as proposed by the administrator. He swore a replying affidavit in protest on 30th October, 2008 and a further affidavit in protest on 5th February, 2010. His objection was only in regard to some of the properties which he proposed that they be divided as follows:

- a. Plot No. L.R. 6585/21/VI (family home) near Nyahururu sports house to be given to Moses Kuria absolutely
- b. Plot No. L.R. 6585/111 (posho mill plot) to the protestor absolutely
- c. Plot No. Laikipia/Lairak/277 in Ngarua to the protestor
- d. That the shares in British American Insurance Company, British American Life Insurance Policy, Kenya Breweries Limited, Kenya Commercial Bank and Housing Finance Company be sold and distributed to all the beneficiaries equally,
- e. Plot Title No. 3855/Nyandarua/OlJOROROK Salient be given to Anne Waithera
- f. Plot L.R. No. Nyandarua/OlJOROROK Salient/4360 near Ngarenoro River be given to Grace Gakenia Waweru
- g. Plot No. 6585/46/6 be sold and the proceeds be given to the beneficiaries equally
- h. The money in Kenya Commercial Bank Account No. 166200776 be used to pay the debts and liabilities of the estate and the balance be divided to all the beneficiaries equally

4. The protestor argued that the property should be distributed in accordance with the Kikuyu Customary Law which requires that the family property, Plot No. L.R. 6585/21/VI near Nyahururu sports house, be given to their youngest brother Moses Kuria absolutely. He also argued that he should be given Plot No. L.R. 6585/III and Plot No. Laikipia/Lairak/277 in Ngarua absolutely because he did not receive a full plot or a "shamba" plot out of his late father's estate. He also denied the contention in the agreement that he had renounced his right to inherit any part of the deceased's estate and in particular, his claim to the shares of the deceased in the various companies and the money in the bank. He asked that the proceeds from the sale of the shares and the balance of the money in the bank, after payment of the estate's liabilities and debts, be divided between all the beneficiaries equally.

5. He admitted that he attended the meeting whose minutes were annexed to the summons for confirmation of the grant. He however maintained that the purpose of the meeting was for the beneficiaries to air their views and make proposals on how the property should be divided. However, there was no agreement made on that day and the proposals therein are therefore not binding on him. He further asked the court to note that not all the beneficiaries were represented in the meeting. In addition, he asked for an order directed at the administrator compelling her to render an account of the rents collected from commercial Plots No. 6585/III and L.R. No. 6585/46/VI. Counsel for the protestor urged the court to allow the equitable distribution of the estate of the deceased as proposed by the protestor. He further asked the

court to direct that the deceased protestor's shares will be given to his two children Waweru Karanja and Wanjiku Karanja.

6. The 1st administrator's case is as contained in her affidavits sworn on 13th December, 2007, 23rd September, 2009, 8th February, 2010 and 29th June, 2010, and the affidavit of John Kimani Waweru sworn on 7th April 2009. The crux of her case was that the proposal in the minutes constitutes the agreement of the beneficiaries with regard to how the property should be distributed. She contended that after the death of their mother, they held a meeting which was attended by the administrator, protestor, Moses Kuria and John Kimani Waweru who also represented the interests of the beneficiaries who were absent.

7. It was her case that home Plot L.R. No. 6585/21/VI is the family home and should remain as such particularly for the benefit of the beneficiaries who reside outside the country so that they can have a place to reside in whenever they visit. It is for this reason they agreed that the same should remain in the name of their deceased father Peter Waweru Gathirimu. As regards the Posho Mill Plot L.R. No. 6585/III, it was agreed should be sold and the proceeds divided equally among all the beneficiaries except the protestor who refused a share of the same. This property is also still registered in the name of their deceased father, Peter Waweru Gathirimu. Both properties are the subject of his pending succession cause, Nairobi HCSC No. 23 of 1989 and accordingly any issues pertaining to the same should be ventilated in that cause.

8. With regard to Nyandarua/OljoroOrok Salient/3855 and Nyandarua/OljoroOrok Salient/4366 the administrator argued that the same should be distributed as per the agreement because the persons to whom the protestor argued that the same should be given did not support his sentiments. The administrator further contended that the protestor voluntarily renounced his claim to Plot Title No. Laikipia/Lariak/277, the companies' shares and the money in the bank. She further argued that the Macharia Plot No. 6585/46/VI was completely dilapidated at the time and the initial intention of the parties was to sell the same and share the proceeds. However they agreed that the same be given to the daughters of the deceased who would renovate it at their own costs. They have since made substantive renovations on the property. It would therefore be unjust to order that the same be shared with the rest of the beneficiaries.

Analysis and determination

9. The parties filed written submissions in support of their arguments which I have duly considered together with the authorities cited. There were two issues raised for determination in this cause namely:

- a. How should the estate of Elizabeth Wanjiru Waweru be distributed; and
- b. Should the 1st administrator render a full and accurate account of the rent proceeds from the commercial properties?

10. The law relating to the distribution of the estate of an intestate was stated by the Court of Appeal sitting in Meru in **Justus Thiora Kiugu & 4 others V. Joyce Nkatha Kiugu & another**, [2015] eKLR. Reinforcing the duty of the court to promote alternative forms of dispute resolution under Article 159 (c) of the constitution, the court held that if the parties agree on a mode of distribution of the estate of an intestate, then the court must adopt that consent and make it an order of the court. If the parties are unable to agree, then the court has no discretion but to distribute the property as per the provisions of the **Law of Succession Act, Cap 160 Laws of Kenya**.

11. The Law does not allow any person to distribute asset of a deceased person other than through the process of succession. The deceased in this matter died post the commencement of the **Law of Succession Act (Cap 160 Laws of Kenya)**. That is the applicable Law in the distribution herein.

12. Beneficiaries can and do often agree on the mode of distribution of a deceased's estate. Where, however, there is disagreement on the mode of distribution, the court must step in and invoke the law.

13. In **Eunice Wairimu Rukwaro & Another V. Dorcas Wangui Rukwaro and Others** [2005] eKLR, the deceased's clan elders met after his death and distributed his property without undergoing the process of succession. During the hearing, the petitioners argued that the property should be distributed the way the clan elders had done. In dismissing that argument, the court found out that the so called clan elders had intermeddled with the deceased's estate contrary to **Section 45(1)** of the **Law of Succession Act**. The court stated:

“The clan elders had no authority to distribute the properties of the deceased under any written law, nor did they have any grant of representation. Their purported distribution of the estate was of no legal effect.”

14. In the same vein, in our instant case the beneficiaries who purported to distribute the estate herein in a meeting had no authority so to do under any written law, nor did they have a grant of representation. The best that meeting could have achieved would have been to strike an agreement on distribution which would if all parties consented be adopted by the court in the confirmation stage. That meeting and the outcome was not binding.

15. The protestor has indicated that Customary Law should apply in the distribution of property plot 6585/26/V1 and that the same should go to Moses Kuria being the last born. The deceased having died after the commencement of the Law of Succession Act (Cap 160 Laws of Kenya), the applicable Law in the distribution of his estates is the Law of Succession Act (Cap 160 Laws of Kenya).

16. The 1st administrator has made heavy weather of an alleged indication by the protestor that he was not interested in various assets in the estate. There is no tangible evidence that the protestor renounced rights to his inheritance. That claim thus fails.

17. In regard to the property, Macharia plot No.6585/46/6, the 1st administrator states that initially the same was to be sold and proceeds

shared. It was however agreed that the same be given to the daughters of the deceased who would renovate it at their own costs. They have since made substantive renovations to the property. This entire action is tantamount to intermeddling with the property of the deceased. Those involved must consider themselves lucky that **Section 45 of the Law of Succession Act** has not caught up with them otherwise they would most probably be in jail!

18. The protestor has stated that he should inherit plot No.Laikipia/Lairak/277 (Ngarua farm) entirety and absolutely for the reason that he never got a full plot (shamba) in his late father's estate. This contention is fallacious and not supported by Law. Any grounds the protestor would have in respect of the distribution of his father's estate ought to be raised in the Succession Cause related thereto. That proposal must fail.

19. So, which way the distribution of the estate herein? The deceased died intestate and was only survived by her children. Section 38 of the Act provides that in the circumstances, her property should be divided equally among the surviving children. The court however retains discretion when distributing the property to ensure that there is equitable distribution all the time alive to the fact that equitable is not synonymous with equal ((See **In Re Estate of John Musambayi Katumanga – (Deceased)**, [2014] eKLR and **Rono V. Rono & Another**, [2005] eKLR)

20. I have had regard to the proposals on distribution by the 1st administrator and the protestor. I note that the protestor was completely left out in the distribution and as found above, he had not renounced his inheritance. I also note the apparent consensus among the beneficiaries including the protestor on some of the properties. My task now is to make reasonable provision for the protestor all the while maintaining fairness and equity to all beneficiaries.

21. With that in mind, the estate herein shall be distributed as follows:

a) **L.R. No.6585/21(VI)(Home plot)**

The 1st administrator has annexed title documents and valuation reports indicating that this property is registered in the names of Waweru Gathirimu, (deceased) the deceased's late husband. It has not been shown that this property transmitted to the deceased and therefore constituted part of her free property which she could dispose of in her lifetime as defined by Section 3(1) of the Law of Succession Act. There is material on record to show that the said property was (and could still be) subject of a separate succession cause being Nairobi H.C.SUC. C. No.23 of 1989 (**In the matter of the Estate of Peter Waweru Gathirimu, Deceased**)

This property therefore is not one that is available for distribution to the beneficiaries in this cause

b) **L.R. No.6585/III (Posho Mill plot)**

Similarly on the material before court, this property is also excluded for distribution to the beneficiaries in this cause for the same reasons articulated in (a) above. The title documents on record show the said property is registered in the names of Peter Waweru Gathirimu.

c) **Maina Estate**

To Moses Kuria Waweru absolutely.

d) **Mutitu Shamba**

i) Mary W. Waweru

ii) Grace G. Waweru

iii) Anne W. Waweru

iv) Jane W. Waweru

v) Lucy Njoki Njeru – in equal shares

e) **Title No.LaikipiaLariak/227 (Ngarua Farm) B**

i) One (1) acre inclusive of the house and burial site to John Kimani Waweru to hold in trust for all beneficiaries.

ii) Four (4) acres to the children of Joseph Benson Karanja (Deceased), Waweru Karanja and Wanjiku Karanja in equal shares absolutely.

iii) Mary W. Waweru, Grace G. Waweru, Anne W. Waweru, Jane W. Waweru and John Kimani Waweru – one (1) acre each absolutely.

f) Title No.Nyandarua Ol Joro orok Salient 3855 (Bombay plot)

To Jane W. Waweru absolutely

g) Plot No.6585/46/6 (Macharia plot) to:

i) Mary W. Waweru

ii) Grace G. Waweru

iii) Anne W. Waweru

iv) Jane W. Waweru

v) Lucy Njoki Njeru – in equal shares

h) Plot No.Nyandarua/Ol joro-orok Salient/4366 (near Ngarenaroi river)

To Lucy Njoki Njeru absolutely

i) Marmanet Saw Mill

To John Kimani Waweru and Moses Kuria Waweru in equal shares.

j) Range Rover KSS 909

To John K. Waweru

k) Pick up KZZ 189

To Moses Kuria Waweru

l) Money in deceased's accounts in Kenya Commercial Bank and Barclays Bank of Kenya

i) To be utilised to pay any debts and liabilities of the estate.

ii) Remainder to be divided equally among all beneficiaries (with the share of Joseph Benson Karanja (deceased) going to his children Waweru Karanja and Wanjiku Karanja in equal shares).

22. In answer to the issue of accounts, the administrator has in her further affidavit sworn on 23rd September, 2009 stated that rent from plot No.6585/46/VI (Macharia plot) has always been collected by Nyakech Commercial Agencies who have an obligation to account to the court.

23. That statement, with profound respect, must be arising from extreme ignorance of the law and the succession process generally.

24. Once appointed an administrator, **Section 83** of the **Law of Succession Act** requires an administrator to among other things get in all free property of the deceased including debts owing to him and moneys payable to his personal representative by reason of his death.

25. The administrator becomes the manager of the affairs of the estate which would include collection of rent. Where rent is collected by an agent, the person accountable to the estate and the court is the administrator. The administrator cannot shirk this responsibility.

26. It follows therefore that it is the duty of the administrator to given an account of all rent collected since the demise of the deceased. She must therefore liase with the said Nyakach Commercial Agencies to ensure that a full and accurate account of the rent collected since the demise of the deceased is filed in court within three (3) months of this ruling.

27. With the result that the grant herein is confirmed within the terms of the distribution hereinabove.

28. This being a family matter, each party to bear its sown costs.

Dated. Signed and Delivered at Nakuru this 23rd day of February, 2017.

A. K. NDUNG'U

JUDGE