



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2322 OF 2015

**IN THE MATTER OF THE ESTATE OF NGANGA KAHEMBE ALIAS ONESMUS NG'ANG'A
KAHEMBE ALIAS ONESMUS NG'ANG'A KAHEMBA ALIAS ONESMUS NG'ANG'A S/O
KAHEMBE (DECEASED)**

JUDGMENT

1. The deceased herein Onesmus Nganga Kahembe died intestate on the 27th January, 2002. Upon his demise, he was survived by a widow and eight adult children namely

- Hannah Wanjiru Nganga (widow)
- Peter Njenga Nganga (son)
- Ruth Nyambura Nganga (daughter)
- Samuel Wagura Nganga (son)
- Esther Wanjiku Nganga (daughter)
- Naomi Muthoni Nganga (daughter)
- Edith Wangui Nganga (daughter)

2. By consent dated 4th October, 2013 and filed in court on 10th October, 2013 duly signed by all dependants, Peter Njenga Nganga one of the siblings was mandated to petition the court for grant of letters of administration as a sole administrator.

3. The said Peter Njenga Nganga petitioned Kikuyu Principal Magistrate's court for a grant of letters of administration on 10th October, 2013. He listed his mother and siblings aforementioned as survivors and beneficiaries of the estate of the late Onesumus Nganga Kahemba.

4. A full inventory of all the assets and liabilities left by the deceased at the time of his death were enumerated as follows:-

- L.R. No. Karai/Gikambura/T.641
- L.R. No. Gilgil/Gilgil Block 1/897 (Kikopey)
- L.R. No. Kabazi/Munanda Block 2/791 (Maombi ona)
- 10 shares with Brooke Bond Kenya Ltd.
- 410 shares with British American Tobacco Ltd.
- 1782 shares with East African Breweries Ltd.
- A/C No. [...] at KCB

5. Subsequently, the estate was gazetted on 8th November, 2013 vide gazette notice No. 14566 and a grant of letters of administration intestate issued on 4th March, 2014. Upon receipt of the said grant and a period of six months having lapsed, the petitioner/administrator filed summons dated 10th September, 2014 seeking for confirmation of grant.

6. In support of the application for confirmation, the applicant Peter Njenga Nganga swore an affidavit in support deponed on 10th September, 2014. He also annexed a consent dated 9th September, 2014 in support of the proposed mode of distribution of the estate. The said consent was signed by all beneficiaries save for Samuel Wagura Nganga and Josphat Ngugi Nganga.

7. The applicant therefore proposed to have the estate shared out amongst the beneficiaries as hereunder:

(i) Karai/Gikambura/T.641 – to be registered in the name of Peter Njenga Nganga and Hannah Wanjiru Nganga jointly in trust for the beneficiaries.

(ii) Gilgil/Gilgil Block 1/897 (Kikopey) – to be registered in the name of Peter Njenga Nganga and Hannah Wanjiru Nganga jointly in trust for the beneficiaries.

(iii) Kabazi/Munanda Block 2/791 (Maombi ona) – to be registered jointly in the name of Josphat Ngugi Nganga and Edith Wangui Nganga.

(iv) Shares with ICDC Investment Co. Ltd, British American Tobacco Ltd., East African Breweries Ltd. and Brooke Bond Kenya Ltd. – to be registered in the names of Peter Njenga Nganga and Hannah Wanjiru Nganga jointly in trust for the beneficiaries.

(v) Account No. [...] at KCB to be registered in the name of Hannah Wanjiru Nganga wholly.

8. Aggrieved by the proposed mode of distribution, Samuel Wagura Nganga one of the beneficiaries (dependants) lodged a protest dated 4th November, 2014 terming the proposal vague and unfair. The protestor argued that L.R. No. Karai/Gikambura/T.641 is a gift intervivos given to him absolutely by his late father hence nobody should claim a share of it as he has fully developed the same as his matrimonial home with a permanent structure in place. Further, he averred that the proposed distribution did not specifically state what each beneficiary was entitled to out of which property.

9. When the file was placed before the presiding Magistrate on 13th May, 2011, the court directed for the file to be placed before the High Court for hearing and determination based on the ground that the value of the estate exceeded the Kshs.100,000 maximum pecuniary jurisdiction then applicable for a Magistrate's court.

10. Vide summons for transfer dated 11th December, 2014 filed before the High Court by the administrator/applicant seeking for transfer of the file herein from Kikuyu Law Courts to Milimani High Court Family Division, the same was heard and granted on 28/4/2015. After the matter was transferred by consent, the same was listed for hearing by way of viva voce evidence.

EVIDENCE

(i) Protestor's Case

11. During the hearing, the protestor (PW1) told the court that, he is a son to the deceased and therefore entitled to a share of the estate. He contended that his brother the administrator did not consult with him before sharing out the estate. He singled out L.R. No. Karai/Gikambura/T.641 as the property in dispute.

12. Protestor opined that the said property was bequeathed to him by his father during his lifetime and that he has been cultivating and staying in that property since 1987 wherein he has built a permanent house.

13. He however admitted that sometime in October, 2013 all beneficiaries met and signed an agreement to the effect that, L.R. No. Karai/Gikambura/T.641 and Gilgil/Gilgil/Block 1/897 were to be sold and part of the proceeds used to buy a much bigger land which was to be shared amongst Peter Njenga, Samuel Wagura (protestor) and Esther Wanjiku. A balance of some unspecified sum of money was to be given to

Margaret Muthoni, Naomi Mukami, Josphat Ngugi and Edith Wangui.

14. He further claimed that, whereas his siblings residences are not affected in their respective areas of occupation within their father's estate by the proposed distribution, his residence will be affected if L.R. No. Karai/ Gikambura/T.641 is to be sold a fact he is vehemently opposed to. In the alternative, he proposed to have the said land subdivided into two equal portions of 50 x 100 feet so as to leave him with one half and the rest be sold and proceeds shared out amongst the other beneficiaries. He suggested that save for Edith who is not married, the rest of the sisters should not get a share except money in the account.

(ii) Petitioner's Case

15. The petitioner told the court that the issue of distribution of the estate was deliberated at length by the entire family before their area Chief on 18/10/2013 eight days after petitioning the court for a grant of representation. He produced the said agreement as an exhibit (petitioner's Exh. No. 1).

16. In the said agreement reached by both siblings, the protestor and petitioner included, it was agreed that L.R. Gilgil/Gilgil Block 1/897 and Karai/Gikambura/T.641 were to be sold and proceeds used to buy another parcel of land which was to be shared out between Peter Njenga, Samuel Wagura and Esther Wanjiku. Part of the sale proceeds which was not specified was to be shared out between Edith Wangui, Naomi Mukami, Josphat Ngugi and Ruth Nyambura. L.R. parcel No. Kabazi/Mwanda Block 2/79 was given to Josephat Ngugi, Edith Wangui and their mother Hannah Wanjiru.

17. The rationale behind the sale of the two portions was that Karai/Gikambura/T.641 is too small ($\frac{1}{4}$ an acre) for the nine beneficiaries to fit and that, Gilgil/Gilgil Block 1/897 is dry, rocky and unproductive hence unsuitable for cultivation.

18. The petitioner averred that, the commercial viability of Karai/ Gikambura/ T.641 is worth 14,000,000/= hence an individual (protestor) cannot be a sole beneficiary. He denied that the protestor was given the said land by their father as a gift as claimed.

19. In her testimony, Hannah Wanjiru (2nd petitioner witness), told the court that all portions of land be shared equally amongst all her children and shares be given to her absolutely.

Protestor's Submissions

20. In submission, C.M. Kinyanjui urged the court to find that the petitioner's proposed mode of distribution of the estate is not only vague but unfair and discriminatory on grounds that the petitioner did not provide for specific shares to specific and identifiable beneficiaries pursuant to Section 71 of the Law of Succession and Rule 40 (4) of the Probate and Administration rules.

21. Counsel submitted that the protestor having been given Karai/ Gikambura/T.641 by his late father as a gift *inter vivos* and the same having built a permanent structure, he (protestor) should be given 0.056ha (half share) and the remainder be registered in the names of Peter Njenga Nganga (administrator) and Hannah Wanjiru Nganga in trust for the other beneficiaries.

22. The learned counsel further submitted that, shares at ICDC Investment Company be shared out equally amongst all beneficiaries.

Petitioner's Submissions

23. Counsel for the petitioner defended the mode of distribution proposed by the petitioner arguing that Section 34, 35 and 40 of the Law of Succession confers upon the widow personal and household effects and life interest of the residue net intestate. M/S Muhuhu urged the court to apply Section 34 and 35 to distribute the estate equally amongst the beneficiaries.

24. Learned counsel submitted further that, the protestor was not given any land as a gift by his late father and that one beneficiary cannot inherit a property worth 14,000,000/= at the current market price to the exclusion of the rest of the beneficiaries. In the alternative, counsel submitted that, L.R. Nos Gilgil/Gilgil Block 1/897 and Karai/Gikambura /T641 should be registered in joint names of Peter Njenga and Hannah Wanjiru in trust for other beneficiaries or be sold as agreed in a family meeting so as to acquire a bigger portion for equal distribution. She cited the case of **Nairobi H.C. Succession Cause No. 218/2007 in the estate of Habiba Wanjela Kalamdin (deceased) 2015 eKLR** where the court ordered for sale of L.R. No. Ruiru West Block 1/1956 and the proceeds shared amongst the beneficiaries.

Determination

25. I have considered the petition/application herein, proposed estate distribution, protest, testimony by both parties and submissions by both counsels. There is no dispute that the deceased herein died intestate leaving behind nine survivors among them a widow. There is no dispute either that the deceased left three pieces of land and a number of shares in various institutions. The only issues for determination are

- Was there a gift given to the protestor intervivos in respect of L.R. Karai/Gikambura/T.641;
- Are the beneficiaries entitled to equal share in respect of all the properties;
- Is the widow entitled to any share absolutely out of the estate.

26. According to the petitioner, the proposed mode of distribution was agreed upon in writing on 18/10/2013 by all family members before their area Chief. This fact is admitted by both parties in their evidence in court although the protestor changed his mind later.

27. The deceased herein died intestate and left one surviving spouse and eight children. Section 35 of the Law of Succession Cap 160 comes to play to the extent that surviving spouse is entitled to personal and household effects of the deceased absolutely and a life interest in the whole residue of the net intestate estate. Section 35 (5) goes further to provide that:-

“subject to the provisions of Sections 41 and 42 and subject to any apportionment or award made under this section, the whole residue of the net intestate shall on the death, or in the case of a widow, re-marriage, of the surviving spouse devolve upon the surviving child if there be only one, or be equally divided among the surviving children”.

28. Section 35 is therefore clear that in the absence of any other provision or any benefits by the deceased to any beneficiary, the net intestate estate in a monogamous marriage shall be shared out equally amongst the surviving children irrespective of gender.

29. It is therefore inaccurate and improper for the protestor to argue that the female beneficiaries who are married daughters do not deserve a share of their late father’s estate. Section 34, 35 and 40 of the Law of Succession Cap 160 Laws of Kenya does not discriminate on inheritance on the basis of gender. Whether married or not, a child is a child for purposes of inheritance hence no special gender nor marital status would encumber the right of any child male or female from getting his or her rightful share in an estate whether testate or intestate. Therefore, there was nothing wrong in giving Edith and Esther a share.

30. In the **case of Rono vs Rono and another Civil Appeal No. 66/02 Eldoret (2008)eKLR (G & F) Pg 83** the court held

“the fact that girls would one day get married was not a determining factor when it comes to the distribution of the net estate of the deceased. The court had a duty to exercise its discretion judiciously when it came to distributing the estate”.

Similar position was echoed in the matter of **Regina Waitathu v Tarcision Waitathu & 3 Others (2016)eKLR** in which Justice Mativo held.....

“.....it matters not that a child is a man or a woman, a boy or a girl. All are equal in the eyes

of the law and distribution must be in conformity with the law”.

31. Was the protestor given L.R. Karai/Gikambura/T.641 as a gift Intervivos. It is trite law and a basic principle of evidence law that he who alleges must prove. The protestor claimed the said land as having been given by the father as a gift. The rest of the family denied and challenged that allegation. To fortify their position the petitioner produced an agreement signed by all family members on 18/10/2013 before their area Chief in which they agreed to sell the said property together with Gilgil/Gilgil Block 1/897 and have the proceeds used in buying a bigger portion which they would then share between three beneficiaries. The protestor claimed that he changed his mind later. Why would he sign an agreement on how to share their late father's estate voluntarily and only to change midstream.

32. I am alive to the provision in Section 28 (a) of the law of succession which provides that:

“in considering whether any order should be made under this part, if so, what order, the court shall have regard to----- (d) whether the deceased had made any apportionment or either a gift to the respondent during his lifetime”.

33. It is not enough for one to state that he was given some property as a gift during the lifetime of the deceased. He must go further and prove that there was actual grant by deed, an instrument in writing, by way of declaration of trust by the owner or by way or resulting trust or presumption. Gifts of land must be by way of transfer or if the land is not registered, it must be in writing or by declaration of trust in writing. Gifts intervivos must be complete for the same to be complete **(see remarks by J.P. Nyamweya in the estate of the late Gideon Manthi Nzioka (2015) eKLR.**

34. In the instant case, the protestor is not claiming a gift given in contemplation of death but rather a gift intervivos (during the lifetime of the deceased). The onus is upon the protestor to prove that such gift ever existed and that during advancement the deceased was in his sound mental status and that there was no element of influence or manipulation, coercion, fraud or misrepresentation of facts.

35. The fact that the protestor has built a temporary house made of iron sheets on the wall and roof on the original family land before the other family members moved to Kabazi where their father acquired extra property does not give him exclusive right over that particular property.

36. Secondly, the protestor is claiming a more valuable and lucrative property which the petitioner estimated to be worth 14,000,000 at the current market rate. It is no wonder that the protestor did not want to comment on the estimated value of that property. It is within the same land that there are four semi permanent family rental houses built by their late father each earning 500 per month. Obviously, one person cannot benefit from this property alone.

37. In a nutshell, the protestor has not proved the allegation of a gift intervivos given by his father in respect of LR No. Karai/Gikambura/T.641. Having held as such, the property is therefore subject to distribution in accordance with Section 35 of the Law of Succession Cap 160.

38. According to the protestor, the proposed mode of distribution is quite general. The schedule attached to the application for confirmation merely states that Peter Njenga Nganga and Hannah Wanjiru are to hold the property in trust for the beneficiaries. The beneficiaries in reference have not been specified or identified. However, during the hearing, the administrator/petitioner stated that the beneficiaries are as per the agreement they signed before the Chief on 18/10/2013. He again went further to state that all beneficiaries are entitled to a share referring to all children.

39. It is clear from the agreement signed before the Chief with regard to distribution of the estate that the daughters have interest in the estate. Their mother equally supported that position while claiming all shares absolutely. Daughters have not raised any concern nor opposition challenging the proposed sub-division.

40. Since both parties had earlier on agreed in writing on how to share the estate, and considering that

Karai/Gikambura/T.641 is a prime property and too small to be sub-divided and further considering that Gilgil/ Gilgil Block 1/897 is a dry land to which no single beneficiary can be allocated, it is reasonable that the two be sold so that the proceeds can be used to purchase a bigger portion of land to which the respective beneficiaries (Peter Njenga Nganga, Samuel Wagura Nganga and Esther Wanjiku Nganga) will share equally. A similar approach was adopted in the **estate of Habiba Wanjela Kalamdin (deceased) herein above quoted.**

41. While sharing out Karai/Gikambura/T.641, the developments done by the protestor shall be taken into account, valued and compensation made to him to the extent of that value and the balance shared out equally amongst the respective beneficiaries or in the alternative buy a piece of land which shall be shared out equally. The same principle shall apply in respect of Gilgil/Gilgil Block 1/897.

42. As to Kabazi/Munanda Block 2/791 (Maombi ona), there is no dispute and the same shall be shared equally between Josephat Ngugi and Edith Wangui and Hannah Wanjiru Nganga shall have life interest on the same.

43. Considering that the protestor is already in occupation of Karai/ Gikambura/T.641, he shall have priority to purchase the said property at the prevailing market price before it can be offered for sale to any other 3rd party.

44. As regards shares with Brooke Bond, ICDC, BAT and East African Breweries, they shall be shared equally amongst all the nine beneficiaries (widow plus children). Cash in KCB Kencom Account No. [...] shall be given to the widow absolutely. This is because the widow has not benefited from any land save for having life interest on the same.

45. Accordingly, the protest herein is dismissed, the grant made on 4/3/2016 confirmed and the estate shared out as follows:-

(i) Gilgil/Gilgil Block 1/897 to be shared out equally or be sold and proceeds be shared out equally between Peter Njenga Nganga, Samuel Wagura Nganga and Esther Wanjiku Nganga.

(ii) Karai/Gikambura/T.641 to be sold and proceeds used to purchase a bigger portion which shall be shared equally amongst Peter Njenga Nganga, Samuel Wagura Nganga and Esther Wanjiku Nganga. Alternatively, the sale proceeds less the value of developments done by the protestor (Samuel Wagura) be shared out equally amongst Peter Njenga, Samuel Wagura and Esther Wanjiku.

(iii) That the protestor shall be given priority in the purchase of Karai/Gikambura/T.641 after undertaking a joint valuation exercise by all interested beneficiaries.

(iv) L.R. No. Kabazi/Munanda Block 2/791 be shared equally between Josephat Ngugi Nganga and Edith Wangui Nganga with their mother Hannah Wanjiru Nganga having life interest thereon.

(v) Shares at Brooke Bond Kenya Ltd, ICDC Investment Co. Ltd., British American Tobacco Ltd and East African Breweries to be shared equally amongst all nine beneficiaries: Hannah Wanjiru Nganga, Peter Njenga Nganga, Ruth Nyambura Nganga, Samuel Wagura Nganga, Josephat Ngugi Nganga, Esther Wanjiku Nganga, Naomi Mukami Nganga, Margaret Muthoni and Edit Wangui Nganga.

(vi) Cash at KCB Kencom Branch account No. [...] be given to the widow Hannah Wanjiku Nganga absolutely.

This being a family matter I will order that each party bear his costs.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF APRIL, 2017.

J. N. ONYIEGO (JUDGE)

In the presence of

.....Counsel for the Protestor

..... Counsel for the Petitioner