



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 739 OF 2009

(IN THE MATTER OF THE ESTATE OF NJARI KARONJI
ALIAS ESHTON NJARI KARONJI (DECEASED)

ELISHIBA NJOKI NJARI.....1ST PETITIONER

DUNCAN WANDERI NJARI.....2ND PETITIONER

VERSUS

PURITY GATHONI NJARI.....1ST PROTESTOR

JOYCE MURUGI NJARI.....2ND PROTESTOR

ESTHER WANJIRU NJARI.....3RD PROTESTOR

CAROLINE WAKARAYA NJARI.....4TH PROTESTOR

JUDGMENT

The deceased, Njari Karonji, died intestate on 13th August, 2006 at the age of 86. He was domiciled in Kenya and his last known place of residence was Mbogoini in Nyeri County. According to affidavit sworn by the petitioners in support of the petition for letters of administration of his estate, which they filed in this court on 16th October, 2009, the deceased was survived by his wife, the 1st petitioner herein and ten children; some of these children are the 2nd petitioner and the protesters herein. In this same affidavit, a land parcel known as **Title No. Kirimukuyu/Mbogoini/837** measuring approximately 0.88 hectares and shares in Equity Bank Limited are listed as the only assets comprising the deceased's estate. A copy of the share certificate filed alongside the petition shows that the deceased held 50 shares in this financial institution. He had no liabilities.

The record shows that the grant of letters of administration intestate was made to the petitioners on 13th April, 2010. Subsequently, and in particular on 15th October, 2010, the administratrix and the administrator filed the summons for confirmation of grant according to which they proposed to have the landed property of the estate transferred to the second administrator absolutely while the administratrix was to get the shares in Equity Bank Ltd.

The protesters were not satisfied with this proposal and so they swore and filed a joint affidavit of protest against the proposed distribution. From what I gather in this relatively short affidavit, the protesters' proposal is that, contrary to the administrator and administratrix's position, each of the deceased's children

should get an equal share of his estate.

In response to the protestor's protest, the administrator, Duncan Wanderi Njari, swore that his deceased father had distributed part of his property by way of *inter vivos* transfer to his sons and retained the land that now comprises his estate for his own use and occupation. Later, and in particular, in the year 2004 he gifted the land to the administrator except that he was not able to transfer it into his own name in his father's lifetime. As far as he is concerned, this particular property is his particularly so when all along he took care of his deceased father and continues to take care of his mother. It is his case that the protesters forfeited their right to claim any share of the deceased estate since they are alleged to have disobeyed the deceased and were, in a way, alienated from him.

The protest proceeded to full hearing by way of oral evidence in the course of which the parties largely reiterated their depositions in their respective affidavits. One of the protesters, Purity Gathoni, added and agreed with the administrator that indeed their late father had provided for his sons, including the administrator during his lifetime. She particularised the parcels of land as **Title No. Konyu/Gichugu/1578** which was given to Dickson Kihara Njari; **Title No. Konyu/Gichugu/1579** given to Stephen Karonji Njari; **Title No. Konyu/Gichugu/1580** given to Duncan Wanderi Njari. The other parcels were **Title No. Kirimukuyu/Mbogoini/836** given to David Muhindi and **Title No. Kirimukuyu/Mbogoini/835** which was given to Patrick Njeru. She produced certificates of official search showing that these parcels of land were registered in the names of her brothers apparently after the deceased made the advancements. As far as she is concerned, **Title No. Kirimukuyu/Mbogoini/837** which the deceased retained in his name was to be inherited and jointly owned by his surviving widow and his daughters.

On his part, Duncan Wanderi Njari, the 2nd administrator, agreed that **Title No. Konyu/Gichugu/1580** was indeed registered in his name but he had all along been living on **Title No. Kirimukuyu/Mbogoini/837** because he had taken upon himself the responsibility to care for his parents who obviously included the deceased. It was his case that his late father's intention was to transfer the parcel that was initially registered in his (administrator's) name to Stephen Karonji and Dickson Kihara; he was to get **Title No. Kirimukuyu/Mbogoini/837** in return. However, although he has been living on this latter parcel and even developed it, his father died before the transfers were effected. He offered **Title No. Konyu/Gichugu/1580** to his sisters, the protesters herein. One of the deceased's daughters, Mary Nyaguthi Njari, testified and concurred with the administrator that the deceased asked him to come back home and live on **Title No. Kirimukuyu/Mbogoini/837**. It was her evidence that though he did not bequeath any part of his land to his daughters, the deceased directed that if any of his daughters' marriage collapsed and was compelled to return to her parents' home, it was the administrator's responsibility to show her where to settle. She personally had no interest in the estate but she testified she should be allowed to visit her parents' home whenever she felt like.

Dickson Kihara Njari, another of the deceased's sons, also agreed with the administrator that he came back to live with his parents because the deceased wanted somebody to take care of him. According to him, the deceased's daughters were never given any portion of the deceased's land because they did not buy him "a suit" he had requested of them.

Having heard from the parties and considered their respective submissions, it is apparent that the deceased died intestate and therefore the law applicable to the administration and distribution of his estate is, no doubt, the intestacy provisions of the **Law of Succession Act, cap 160**. The primary provision in this regard would be **section 35** of the Act that caters for the kind of scenario that has played out in the dispute between the administrator and the administratrix of the deceased's estate on the one hand, and the protesters on the other. That section prescribes the distribution of a deceased person's estate where, as is in this case, he is survived by a spouse and children. Subsection (1) sheds sufficient light on whom the estate, irrespective of whether it comprises movable or immovable assets, devolves. It states as follows:

35. (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her remarriage to any person.

This provision is, by and large, self-explanatory. Its literal and plain meaning which, for all intents and purposes is the meaning that should be adopted, is that the surviving spouse is entitled to the entire estate of his or her deceased spouse. His or her interest in that part of the estate that constitutes movable property such as personal and household effects is absolute and the spouse is at liberty to deal with it in any manner he or she deems fit including alienating or disposing it.

The spouse's interest in immovable property which, more often than not comprise, the net intestate estate also devolves upon the surviving spouse but unlike the moveable property, his or her interest in the net intestate estate is restricted to life interest only. This simply means that the surviving spouse can only enjoy this part of the estate for as long as he or she is alive; such a spouse cannot, for instance, alienate or dispose of this property or deal with it in any manner that is beyond their limited right to life interest. Where the surviving spouse is a widow, her life interest in the property is further limited if she remarries; she loses this right the moment she remarries. The court may, of course, in exceptional cases authorise the surviving spouse to sell immoveable property (see the proviso to section 37 of the Act) but short of this authority, the surviving spouse's interest is limited to life interest only or upon remarriage (where the surviving spouse is, as noted, a widow).

Does this then suggest that where a deceased is survived by a spouse and a child or children, they are thereby effectively disinherited? The simple answer to this question is in the negative. To my understanding, one of the reasons, if it is not the primary one, why a surviving spouse's interest in the net intestate estate is subject to life interest is the assumption that in the natural scheme of things, the surviving spouse will predecease the children (or if the surviving spouse is a widow, she may as well remarry in their lifetime) and therefore deceased's estate will ultimately devolve upon them. I cannot find any other reason why **section 35 (5)** provides that:

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, remarriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

The implication of this is that the net intestate estate devolves upon the surviving spouse but subject to his life interest in contemplation that either spouse will most likely be survived by their children; in the case of a widow, she may remarry most probably in their lifetime. It is for this reason that I suppose a spouse's interest in the net intestate estate is restricted in the manner prescribed by the Act.

But the children need not sit back and wait, perhaps anxiously, for their surviving parent's death or remarriage for them to benefit from the estate of their deceased mother or father. Similarly, the surviving parent need not wait until he or she dies or remarries before the children get a share of the estate of the deceased parent. Subsection (2) and (3) of section 35 provides a window for either of them to have the estate distributed without necessarily upon the occurrence of death or remarriage of the surviving spouse. According to subsection (2), the surviving spouse is bestowed with the power of appointment and may gift any child or children out of the net intestate estate. If that power is unreasonably exercised or withheld, subsection (3) has empowered a child or children to apply to court for appointment of his or their share. For better understanding, it is necessary to reproduce these provisions here; they state as follows:

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be

exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

In considering whether or not to grant the application, or the appropriate order to be made on the application, the Act prescribes the factors that the court must take into account in subsection (4) of section 35. That particular subsection provides as follows:

(4) Where an application is made under subsection (3), the court may award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to -

(a) the nature and amount of the deceased's property;

(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;

(c) the existing and future means and needs of the applicant and the surviving spouse;

(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;

(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;

(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will, if any; and

(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

These provisions suggest explicitly that how close a child or children were to their deceased parent or how far they were alienated from him or her are some of the matters that the court is enjoined to take into account in an application for appointment for a share of the estate. The evidence that at least one of the children was closer to the deceased than the rest of the children; or that any of the children cared for the deceased and his surviving mother more than the rest of the children; or that other children were disobedient to the deceased father and there was no cordial relationship between them and him; and generally, the conduct of the children with respect to their parents are all relevant matters that the court has to consider. The court is also inclined to consider any advancement or gift that was made by the deceased during his lifetime. All these issues have emerged in the dispute between the contestants in this petition; to this extent, the competing evidence of the administratrix and the administrator on the one hand and the protesters on the other is relevant save for one thing-it can only be appropriately considered in the context of an application for appointment under **section 35(3) and (4)** of the Act and not in the proceedings of a protest against the confirmation of the grant of letters of administration intestate.

The law as spelt out in the Law of Succession Act is clear that the administratrix is entitled to her deceased husband's estate subject, of course, to life interest in the net intestate estate which may also be determined upon her remarriage. Ordinarily, the court will confirm the grant and distribute the estate amongst the surviving spouse and children or order that it devolves upon any of them if they have all consented to that arrangement. Whenever they take that course, they are, by necessary implication,

deemed to have sidestepped section 35 or have outrightly opted out of the strict application of this particular provision; however, even with such kind of agreement, they ultimately end up achieving what this particular provision was intended to achieve in the first place. Where they disagree on the distribution of the estate amongst themselves or with their surviving parent, as has turned out to be the case in the present petition, the fallback position for the probate and administration court is to strictly apply the provisions of **section 35** of the Act and inevitably direct that the estate should devolve upon the surviving spouse. It is on this note that I hereby order that the deceased's estate shall devolve upon his surviving spouse; for avoidance of doubt, my final orders are as follows:

1. Title No. Kirimukuyu/Mbogoini/837 shall be transferred and registered in the name of **ELISHIBA NJOKI NJARI** subject to life interest; and,

2. The shares in Equity Bank Limited shall be transferred to **ELISHIBA NJOKI NJARI** absolutely.

The grant of letters of administration intestate made to the administratrix and administrator on 13th April, 2010 is confirmed in the foregoing terms. Accordingly, the protestors' protest is dismissed. This being a family dispute, parties will bear their own respective costs. Orders accordingly.

Signed, dated and delivered in open court this 30th day of June, 2017

Ngaah Jairus

JUDGE