REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 1187 OF 2010

FRANCIS MUREGI KIRAGU……..……..PETITIONER

VERSUS

JOSEPH GACHII KIRAGU…….1ST PROTESTOR

DAVID MWANIKI KIRAGU……2ND PROTESTOR

JUDGMENT

On 15th September, 2011, the petitioner petitioned for letters of administration intestate of the estate of Kiragu Gachii who died on 20th June, 1980 at the age of 85 years old. At the time of his death, the deceased was domiciled in Kenya and his last known place of residence was Ihwagi location in Nyeri county.

According to the affidavit in support of the petition, the deceased was survived by six children, two of whom were daughters while the rest were sons; the petitioner and the protestors are the three of these sons. His estate comprised land known as **Title No. Iriaini/Kairia/504** measuring 3.92 hectares; he had no liabilities.

The grant of letters of administration intestate was made to the Petitioner on 28th February, 2012. By a summons dated 22nd day of September, 2012, the petitioner sought to have the grant confirmed. According to the affidavit in support of the petition, he proposed to have the estate distributed equally amongst the deceased's four sons so that each of them was to get 0.98 ha of the estate. A consent filed alongside the summons shows all the deceased's children were in agreement with this proposal except the 1st protestor who did not sign the consent.

According to his affidavit of protest which he swore and filed in court on 10th April, 2014, the 1st protestor demanded a larger share of the estate than his three brothers for the reasons that, first, he was solely responsible for his late father's medication and burial and, second, he funded his late father's case, being **Nyeri Senior Resident Magistrate's Court Civil Case No. 258 of 1982** in which he had sued the protestor's step-brother over ownership of a land parcel known as **Title No. Iriaini/Kairia/511**. He proposed to have 3 acres of the estate while his brothers could have 2.2 acres each.

The 2nd protestor also swore an affidavit of protest on his own behalf and on behalf of his two sisters; he deposed that though he consented to the confirmation of the grant and the distribution of the estate as proposed by the petitioner, he was not aware that the petitioner had proposed the estate to be shared out in the way he did. Even then, he still proposed that the estate should be distributed equally amongst the deceased's four sons which I think is the same thing that the petitioner had proposed.

The 2nd protestor added that in distributing the estate, the court should take into account the fact that the deceased gifted the 1st protestor land parcel **Title No. Iriaini/Kairia/518** in his lifetime. The land, according to the 2nd protestor, was to be held by the 1st protestor in trust for himself and for the benefit of the rest of his brothers. Contrary to his earlier depositions, he swore that the 1st protestor shouldn't get a share of **Title No. Iriaini/Kairia/511**.

At the hearing, the 1st protestor admitted that **Title No. Iriaini/Kairia/518**, which measures 8 acres, was initially registered in the name of his father but that he transferred it into his (the petitioner's name). He further admitted that he has allocated his brothers their respective shares of this land except that they have not registered their respective parcels into their names. As of to date, according to his evidence, they all dwell on land parcel **Title No. Iriaini/Kairia/504**.

Having died in 1980, there is no doubt that the deceased died before the **Law of Succession Act, cap 160** came into force and therefore under **section 2** of that Act, and in particular subsection (2) thereof, the law applicable to the deceased's estate would ordinarily be the written laws and customs which applied at the time of the deceased's death. That section 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) …***
>
> ***(4) …***

None of the parties submitted on any written laws that may have been applicable to the deceased's death at the time of his death. Neither was there any proof of any customs that the estate may have been subject to at the material time. However, assuming that there was proof of written laws or customs to which the deceased's estate was subject, subsection (2) still provides a window for the application of the Law of Succession Act despite the fact that the deceased died prior to the commencement of the Act. In these circumstances, there is every reason to apply to the deceased's estate those provisions of the Law of Succession Act that govern the administration and distribution of intestate estates.

When I consider the evidence before me, the appropriate provision applicable to this case is **section 38** of the Act which states:

> ***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***.

Section 41 to which reference has been made is all about protection of property devolving upon a child; such property, according to this provision, ought to be held in a trust until such a time that the child or children are of age. According to the affidavit in support of the petition, the youngest of the deceased's survivors was aged 51 as at 15th September, 2011 when the petition for letters of administration was filed; it follows that this particular provision is not applicable.

Section 42, on the other hand, appears to capture what the 2nd protestor alluded to; that in distributing the deceased's estate, the court should take into consideration the *inter vivos* transfer made to the 1st protestor in the deceased's lifetime. This position is consistent with **section 42** which takes into account previous benefits in distribution of a deceased person's estate; it states as follows:

> ***Where—***
>
> ***(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or***
>
> ***(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house***

I would have applied this section to the present case but I am hesitant to do that for the following reasons; first, the 2nd protestor himself agreed with the petitioner that **Title No. Iriaini/Kairia/504** should be shared out equally amongst the deceased's four sons, who in this case include the 1st protestor in whose name the deceased transferred **Title No. Iriaini/Kairia/518** in his lifetime. Second, and more importantly, the 1st protestor himself admitted that though this particular parcel was transferred into his name, he was only to hold it in trust for the benefit of himself and his three brothers. He therefore holds this particular parcel in a fiduciary capacity. As matter of fact, so I understood him to say, he has already divided this particular parcel into four equal portions except that he has not formally transferred them into the beneficiaries' respective names. This being the case, **Title No. Iriaini/Kairia/518** cannot be said to have been given to the 1st protestor to the exclusion of his brothers and which, therefore, should be taken into account in the distribution of the deceased's estate. The timing when this particular parcel of land shall be shared out amongst the 1st protestor and his brothers is something that should be left to them to decide; for our purposes, when and how they eventually share out that land is immaterial to the distribution of the deceased's estate.

Going back to **section 38** I am persuaded that the land comprising **Title No. Iriaini/Kairia/504** should be shared out equally amongst the deceased's four sons as all of them, except the 1st protestor, agree. I have not found the 1st protestor's reasons that he facilitated his late father financially in a court case or that he took care of him while he was indisposed to be sufficient grounds to allocate him a larger share of the estate than the rest of his brothers. I agree with the 2nd protestor that if the 1st protestor has any valid claim against the deceased's estate, then the appropriate course to take would be to institute a separate claim against it.

In conclusion, therefore, I would dimiss the protestors' protests respectively dated 10th April, 2014 and 6th August, 2014. It follows that the Petitioner's summons for confirmation of grant dated 22nd September, 2012 is allowed and the grant made to the petitioner on 28th February, 2012 confirmed. The deceased's estate shall be distributed as proposed in paragraph 5 of the affidavit in support of the summons. For avoidance of doubt the parcel of land known as **Title No. Iriaini/Kairia/504** shall be shared out as follows:

1. Joseph Gachii Kiragu……0.98 ha (absolute)

2. David Mwaniki Kiragu……....0.98 ha (absolute)

3. James Gachanja Kiragu……...0.98 ha (absolute)

4. Francis Muregi Kiragu……..….0.98 ha (absolute)

Being a family dispute, there shall be no orders as to costs. Orders accordingly.

Signed, dated and delivered in open court this 18th August, 2017

Ngaah Jairus

JUDGE