



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 1883 OF 2015
IN THE MATTER OF THE ESTATE OF JOSEPHAT MWANIKI GITAU

(DECEASED)

JUDGMENT

BACKGROUND

1. Josephat Mwaniki Gitau in respect of whom this succession cause relates died on 17th February, 2015 leaving behind three widows and seven children namely:

- (a) Florence Wanjiru Mwaniki (widow)**
- (b) Nancy Wanjiku Mwaniki – (widow)**
- (c) Jane Nduta Kamau (widow)**
- (d) Serah Njeri Mwaniki (daughter)**
- (e) Janet Muthoni Mwaniki (daughter)**
- (f) Kenneth Gitau Mwaniki (son)**
- (g) Daniel Njihia Mwaniki (son)**
- (h) John Kamau Nduta (son)**
- (i) Caroline Gathoni Muthoni (daughter)**
- (j) Mary Ann Wanjiku Mwaniki (daughter)**

2. The petitioners herein Daniel Njihia Mwaniki and Janet Muthoni Mwaniki deceased's son and daughter respectively, petitioned for a grant of letters of administration intestate, on 30th July, 2015, listing properties constituting the deceased's estate as follows:

Assets

- (a) Gatamaiyu/Kagwe/2123**
- (b) Kagwe/Kamahindu Plot No. 8**

(c) Ndumberi/Tinganga/514

(d) Ndumberi/Tinganga/516

(e) Naivasha Plot

(f) Hired land Kamahindu

Shares in

(a) Kengen

(b) Safaricom

(c) KCB

(d) Kenya Airways

(e) Kagwe Tea Factory

(f) Utheri wa Lari

(g) Gema

(h) Rarji Sacco

(i) Tai Sacco

(j) Metropolitan Sacco

(k) Telkom Sacco

Cash in Bank Accounts

(a) Family Bank A/C Nos. [particulars withheld]

(b) Standard Chartered Bank A/C Nos. [particulars withheld]

(c) Kenya Commercial Bank

(d) Barclays Bank

(e) Farji Sacco Society Ltd.

(f) Liabilities

(g) Kshs.5,000,000/=

3. Although notified of the existence of this cause, Jane Nduta Kamau and John Kamau Nduta (beneficiaries) did not sign the petition nor consent thus culminating to the issuance of citation to the two on 18th April, 2016.

4. On 24th June, 2016, the respondents entered appearance through the firm of Gatere and Company Advocates. In answer to the citation, Jane Nduta swore an affidavit deponed on the 19th July, 2016 but filed in court on 4th August, 2016 confirming that she had already been issued with a grant of letters of

administration dated 24th February, 2016 vide Succession Cause No. 2685/2015 (see annexure JNK1). Save for her and her children, the citee did not involve the rest of the family members as beneficiaries of the estate.

5. The citee further revealed that, her late husband (deceased herein) had left a Will wherein she was appointed as the sole executrix hence urged the court to proceed in determining the distribution of the estate under file No. 2685/15 as a testate estate. However, it is worth noting that despite having the said Will, the “executrix” (Jane Nduta) petitioned for a grant of letters of administration intestate which was granted on 24th February, 2016.

6. Upon receiving citees response, both parties agreed to have the matter referred for mediation through court annexed mediation process. During the mediation process, the two files were consolidated and the court later adopted the same as an order of the court.

7. After holding a mediation process before one Silas Mugeria, a settlement agreement was reached and filed in court on 23rd November, 2016 and adopted by the court on 14th March, 2017 with orders that:

(1) The deceased had a Will but its validity shall be determined by the court. Notwithstanding this position, all the parties have agreed on matters listed 2, 3, 4 and 5 here below.

(2) Succession Cause No. 1883/2015 and 2685/2015 be consolidated for determination of the estate of the deceased.

(3) The objectors are dependants within the meaning of Section 29 of the Law of Succession Act. The parties have agreed to adopt as dependants all the nine persons listed as members of the 1st house and 3rd house on letter reference No. GAT/Adm/15/13 dated 8th August, 2015 by Mr. John W. Kirumba Senior Chief Gatamaiyu Location (Appendix B).

(4) The parties have agreed on the sharing of part of the estate of the deceased except Plot No. 8 Kamahindu Market and land parcel Gatamaiyu/Kagwe/2183 as per annexed distribution schedule (Appendix A).

(5) That Jane Nduta Kamau and Janet Muthoni Mwaniki, be the joint administrators of the estate of the deceased.

8. The said Chief’s letter referred to as Appendix ‘B’ in the settlement agreement, listed the deceased’s dependants according to each house as follows:

House One

1. Florence Wanjiku Mwaniki (widow)

2. Serah Njeri Mwaniki (daughter)

3. Janet Muthoni Mwaniki (daughter)

4. Kenneth Gitau Mwaniki (son)

5. Daniel Njihia Mwaniki (son)

House Two

1. Nancy Wanjiku Mwaniki (widow)

2. Caroline Gathoni Mwaniki (daughter)

House Three

3. Jane Nduta Kamau (widow)

4. John Kamau Nduta (daughter)

5. Caroline Wairimu Mwaniki (daughter)

6. Mary Ann Wanjiku Mwaniki (daughter)

9. A perusal of the court file No. 2685/2015 filed by Jane Nduta shows that she had attached a Will dated 13th January, 2013 in which the testator stated that he was married to one Wife Jane Nduta Kamau and were blessed with one child Caroline Wairimu Mwaniki. In the said Will, Jane Nduta was appointed as the sole executrix.

10. In her petition for probate of written Will, Jane Nduta named herself and her daughter Caroline Wairimu as the sole dependants. She obtained a grant of letters of administration intestate on 24th February, 2016. Subsequently, on 6th September, 2016, Janet Muthoni Mwaniki filed affidavit of protest challenging the validity of the Will and that the matter should be heard under file No. 1883/15 being the oldest file.

11. Before I proceed, I wish to note that under file No. 1883/15, proceedings had not reached the level of issuance of a grant of letters of administration intestate hence no application for confirmation. Under file No. 2685/15, the same had gone to the level of issuing a grant of letters of administration intestate instead of a grant of probate with written Will. Although there is an affidavit of protest challenging confirmation, I have not seen such application for confirmation of the grant and proposed mode of distribution on record.

12. It would appear that, this file was referred directly from the registry for mediation without any court order to that effect and that explains why a crucial step was skipped. As things stands now, this court is being asked to distribute the estate without a formal application for confirmation of the estate. I will however assume that there was one and may be it got misplaced.

13. After recording the mediation settlement, this court was left with the task of determining the validity of the Will referred to herein and distribution of L.R. No. Gatamaiyu/Kagwe/2123 and Plot No. 8. Both counsels agreed to dispose of the matter by way of written submissions under file No. 1883/2015.

SUBMISSIONS

(a) Submissions by J.M. Njengo for objectors/applicants

14. In his submission, counsel submitted that the Will dated 13th January, 2015 does not conform in material aspects in that it provided for only three beneficiaries (Jane Nduta, John Kamau and Amos Gitau) leaving the rest of the dependants contrary to Section 26 and 29 of the Law of Succession Act Laws of Kenya.

15. Secondly, counsel asserted that, the fact that the respondent (Jane Nduta) did apply for a grant of letters of administration intestate is sufficient proof that the said Will was not genuine hence obtained under suspicious circumstances. To fortify his submissions, Mr. Njengo referred the court to the case of **(O Julius Wainaina Mwathi vs Beth Mbere Mwathi and Another (1996)eKLR** and the estate of **Lucy Wangui Muraguri (2015) eKLR**.

16. Lastly, learned counsel submitted that if there was any Will left by the deceased, the same was made

under influence or coercion by Nduta hence the reason why it favoured only her house. Counsel urged the court to distribute the estate as an intestate estate.

17. With regard to distribution of the two plots, Mr. Njengo submitted that the two plots be subdivided in accordance with Section 40 of the Law of Succession. He suggested that the property be shared out equally between House No. 1 and 3 excluding House No. 2 who declined to be part of the Succession case.

(b) Submissions by Gatere Counsel for the respondents

18. Mr. Gatere submitted that the Will aforementioned herein meets all material requirements for making of a written Will. He referred the court to the case of **Mary Njoki Karuga vs Charles K. Karuga HCC 3953/1989 Nairobi**. He however invited the court on without prejudice basis to distribute the estate as an intestate estate.

19. In distribution of the two contested plots, Mr. Gatere urged the court to share out Plot No.8 Kamahindu Market to the respondents as their matrimonial home. In support of this assertion, counsel referred the court to Section 6 of Matrimonial Property Act 2013 and the case of **Bob Njoroge Ngarama vs Mary Wanjiru Ngarama and another (2014)eKLR**. As regards Plot No. Gatamaiyu/Kagwe/2123, counsel urged the court to share it between house No. 1 and 3 in accordance with Section 40 of the Law of Succession in the ratio of 5:4 representing 0.291 hectares to 0.233 hectares respectively and then siblings in each house to share their share equally amongst themselves.

ANALYSIS AND DETERMINATION

20. Before I proceed to determine this matter, I wish to set out the issues for determination as follows:

(a) Did the deceased leave a valid written Will;

(b) If the answer is yes, what is the status of the consent order already recorded distributing the estate contrary to the said Will;

(c) If the court finds there was no valid Will, how will the contested property be shared as an intestate estate.

21. What is a Will? Under Section 3 of the Law of Succession, a Will is defined as:

“.....the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II and includes a codicil”....

23. Section 5 of Law of Succession provides that a person making a Will must be of sound mind. **(See HCC No. 3952 of 1989 (OS) between Mary Njoki Karuga vs Charles Karuga Koinange)**. Section 11 of the Law of Succession goes further to provide that no written Will shall be valid unless signed by the testator or somebody else in the presence and direction of a testator; attested by two witnesses in the presence of the testator.

There is no dispute that the deceased was a person of sound mind and that he executed a written Will dated 13th January, 2015 in the presence of two witnesses with Jane Nduta as the sole executrix.

23. What is challenged however is, the exclusion of several dependants calling for suspicion that the objector (Jane Nduta) might have influenced or coerced the deceased into making the Will in the manner and style it was done.

24. Indeed, a Will made under influence or coercion or circumstances suggesting that there was a possibility of such influence or coercion cannot stand. **(See the estate of Lucy Wangui Muraguri**

(2015) eKLR). In this case Judge Musyoka observed as follows:-

“The position is that, where a person who plays the central role in the making of the Will, that is other than the testator himself, takes a substantial benefit under the Will: that would be regarded as a suspicious circumstance. It ought to raise suspicion as to whether the testator who is proposed to have signed the Will under such circumstances knew and approved the contents of the document that she signed.

The role of the court in cases where suspicious circumstances are established is to scrutinize the evidence carefully so as to be satisfied that the maker of the Will did indeed know and approved the contents of documents she signed”.

(See Atter and others vs Atkin Son and another (1869) LRIP and D665).

25. Clearly, Section 26 of the Law of Succession envisages circumstances where a testator may not make provision for either dependants and the court has wide discretion to vary the same to provide for the excluded dependants. In this case, the purported Will only provided for his dependants from one house leaving everybody out and therefore with no property to inherit.

26. To allow the Will in its current form and dictates will automatically render other dependants poor, miserable and disinherited. It is indeed suspicious that the deceased would have excluded three quarters of his family from inheriting his estate without any explanation. Where will the rest of the family go if Jane Nduta and her daughter were to take everything?

27. However, considering that both parties have already recorded a consent distributing the estate contrary to the purported Will, by conduct that is sufficient proof that parties have disregarded the same as impractical and therefore resorted to distribute the same as an intestate estate.

28. It is therefore clear that, the estate does not fall within the purview of a valid written Will hence the purported Will dated 13th February, 2013 is hereby disregarded in its entirety. As conceded by both parties, the estate herein shall be distributed as an intestate estate with Jane Nduta Kamau and Janet Muthoni Mwaniki being appointed as joint administrators.

29. Having held as above, issue No. 1 and 2 are settled. I will now turn to issue No. 3 on distribution of the contested property. Both parties agreed that house No. 2 declined to be part of these proceedings. Although I have not seen that indication in the file, there is no caveat nor objection filed by any one of them. That is why the mediation agreement does not include the dependants from the second house.

30. There is no dispute that the deceased died as a polygamous man. To that extent, Section 40 of the Law of Succession shall apply. Section 40(1) provides that:

“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 admitting any wife surviving him as an additional unit to the number of children”.

31. According to the respondent (Jane Nduta), she was given plot No. Gatamaiyu/Kagwe/2123 as a gift by her husband. She therefore prayed for the property to be given to her as the sole absolute owner. The objector applicant disputed that allegation and urged the court to share the property in accordance with Section 40 of the Law of Succession. Without prejudice basis, Mr. Gatere counsel for the respondent submitted that the property be shared out in accordance with Section 40 of the Law of Succession in the ratio of 5 units representing first house to four units representing the 3rd house hence making a total of 9 units giving rise to 0.233 hectares to 0.291 hectares.

32. There is no proof tendered before this court to suggest that the respondent (Jane Nduta) was given the

said land as a gift *inter vivos* or in contemplation of death. It is trite law and a cardinal principle of the evidence law that he who alleges must prove. The respondent has not discharged this burden. Parties having agreed that in the absence of any consensus Section 40 shall apply, I will distribute the estate in the ratio of 5 units representing first house to 4 units representing the 3rd house, making a total of 9 units against 0.524 hectares of land. Accordingly, the first house shall get 0.291 hectares against 0.233 for the 3rd house. Each house shall then share equally amongst its beneficiaries in equal share. **(See the estate of Gicheru Wambugu deceased (2016)eKLR.**

33. Concerning Plot No. 8 Kamahindu, the respondent claimed that it is her matrimonial home and that she has been staying in that property during the subsistence of her marriage. She further claimed that, she was staying with the deceased in the same property till the time when he died. Nobody challenged this allegation. If this property was to be shared out now, where will the respondent go?

34. Although the court was not told how big the property is and its monetary value, matrimonial property has such a great and important sentimental value to the occupier. In the circumstances, Section 6 of the Matrimonial Property Act 2013 shall come to play. Under that Section it is clearly stated that:

“For purposes of this Act, matrimonial property means the matrimonial home or homes, any other immovable and movable property jointly owned and acquired during the subsistence of the marriage”.

35. In the circumstances Plot No. 8 Kamahindu is not available for distribution as the same shall remain in the name of the respondent Jane Nduta exercising life interest thereon and upon her death or remarriage, the same shall be shared out equally amongst the remaining 8 beneficiaries equally **(See Bob Njoroge Ngarama vs Mary Wanjiru Ngarama and another (supra)** in which the court held as follows:

“A matrimonial home does not only have fiscal value but also has a great sentimental value to a surviving spouse and children of the deceased.

The objector/applicant’s demand that the same be divided is not tenable given that the petitioner/ respondent has an overriding life interest in the same....” In the circumstances I find that at the present time this Povt Reitz plot is not available for distribution. The court will not countenance the eviction of the widow so as to satisfy the wish of any beneficiary for a share. A life interest remains with the petitioner/respondent and it is only after her demise and or remarriage the said plot will be distributed to the other four beneficiaries”

36. In view of the above holding, judgment is hereby entered in favour of the petitioner and grant issued on 24th February, 2016 confirmed with orders as follows:

(a) That the estate of the deceased person herein save for Plot No. 8 Kamahindu Market and LR Gatamaiyu/Kagwe/2123 be and is hereby shared out as per the mediation settlement agreed and filed in court on 23rd November, 2016.

(b) That Jane Nduta Kamau and Janet Muthoni Mwaniki be and are hereby appointed as joint administrators of the estate herein and grant of letters of administration to issue to the two jointly.

(c) That the Will dated 13th February, 2015 be and is hereby disregarded and therefore declared as invalid.

(d) That plot No. 8 Kamahindu Market shall be registered in the name of the respondent Jane Nduta Kamau holding life interest thereon and upon her death or remarriage the same shall be revert to and be shared out equally amongst the remaining other eight beneficiaries listed in the mediation settlement in equal shares.

(e) That Plot No. Gatamaiyu/Kagwe/2123 shall be shared out in the ratio of 5:4 representing the five units from the first house getting 0.291 hectares against four units representing the 3rd house getting 0.233 hectares out of a total of 0.524 hectares. Upon each house getting its share, the same shall be shared out equally amongst the beneficiaries in that house.

(f) That in the event that two properties referred to in paragraph (d) and (e) above, are incapable of sub-division due to the small sizes, the same shall at the appropriate time be sold out and the proceeds shared out equally amongst the beneficiaries provided that anyone or more beneficiaries wishing to buy out the beneficial interest of the other beneficiaries shall be given 1st priority in buying the same before being offered to 3rd parties.

(g) This being a family matter, each party to bear their own costs.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of

.....Counsel for the Applicant

..... Counsel for the Respondent/Objector