



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2070 OF 2011

IN THE MATTER OF THE ESTATE OF MACHARIA KIMANI (DECEASED)

JUDGMENT

1. The deceased herein died on 5th May 1998. Representation was sought in Kiambu SRMCSC No. 22 of 2000 by Wangari Macharia and Eliud Ndirangu Macharia, in their respective capacities as widow and son, respectively, of the deceased. The deceased was expressed to have been survived by the two and two daughters, Rose Murugi Macharia and Bernadette Murugi Gitau. He was said to have died possessed of Kiambaa/Karuri/T888, Ting'ang'a/Cianda Block 1/488 and Kiambaa/Kanunga/242, 477, T277, T280, T225, T482 and T532/4, and money in two financial institutions. The cause was published in the *Kenya Gazette* of 18th February 2000, and a grant of letters of administration intestate was duly made on 3rd April 2000 to the petitioners, Wangari Macharia and Eliud Ndirangu Macharia. Wangari Macharia died on 15th October 2000 and Eliud Ndirangu Macharia was appointed sole administrator on 7th March 2001. The sole administrator sought confirmation of his grant in a summons dated 11th February 2010, and there is another application dated 27th June 2013 from his two sisters, Rose Murugi Macharia and Bernadette Murugi Gitau, seeking confirmation of the same grant. The two applications are still pending.

2. On 21st September 2011, Bernadette Murugi Gitau, moved this court through this cause in a summons for revocation of grant of even date. The application is grounded on two reasons- lack of pecuniary jurisdiction and failure to administer the estate diligently. In the affidavit in support, the administrator is accused of inaction for failing to have the grant confirmed. It is averred that the estate comprises of an estate far in excess of the pecuniary jurisdiction of the lower court.

3. In the reply, the administrator in the affidavit sworn on 22nd November 2011 explains that the delay to distribute the estate was occasioned by lack of cooperation from beneficiaries, Rose Murugi Macharia and Bernadette Murugi Gitau. He states that the applicant had been out of the country for ten or so years. He argues that the application is brought in bad faith.

4. The applicant filed another application for revocation of grant dated 28th January 2014 in terms similar to that in the application dated 21st September 2011. The application dated 21st September 2011 was withdrawn on 14th July 2014.

5. The parties thereafter entered into a consent which was recorded in court on 6th July 2015 wherein they agreed to have all the surviving children appointed as administrators of the estate. A grant of letters of administration intestate was duly made to Eliud Ndirangu Macharia, Rose Murugi Macharia and Bernadette Murugi Gitau. It transpires that the other administrator, Eliud Ndirangu Macharia, died on 5th May 1998. He was survived by a widow and children.

6. Rose Murugi Macharia and Bernadette Murugi Gitau filed a summons for confirmation of the said

grant dated 13th October 2015. The deceased herein was said to have died possessed of Kiambaa/Karuri/T888, Ting'ang'a/Cianda/488, 1183 and 1185 and Kiambaa/Kanunga/242, 477, T277, T280, T225, T482 and T532/4, and money in two financial institutions, and LR Nos. 209/11373/77 and 128, Kijabe/Kijabe Block 1/391 and 504, Plot No. 36 Karuri Market, Plot No. 5 Kanunga and a plot at Kawaida. They proposed distribution in a manner that will have Bernadette Murugi Gitau take an estate valued at Kshs. 21,250, 000.00, Rose Murugi Macharia Kshs. 20,500,000.00 and Eliud Ndirangu Macharia Kshs. 23,000,000.00. There is an attempt to have the property shared out equitably between all the three groups of survivors.

7. There is an affidavit of protest sworn by Eliud Ndirangu Macharia's widow, on 22nd February 2016. She avers that the deceased had directed that Rose Murugi Macharia and Bernadette Murugi Gitau would inherit what he had invested in jointly with their mothers, with the residue going to her husband. She has attached several documents in the hand of Wangari Macharia, the late widow of the deceased, which allegedly conveyed that information. She avers that Kiambaa/Kanunga/242 no longer formed part of the estate for it was on a road reserve and the deceased had been compensated by the government. She also points out that LR Nos. 209/11373/77 and 128 did not form part of the estate for they were jointly owned by the deceased and a Murimi Wanjie. She claims that Rose Murugi Macharia had inherited named assets from her mother and the deceased had also given her half share of Kiambaa/Kanunga/242. Similarly, Bernadette Murugi Gitau had also inherited property from her mother. She has proposed her own mode of distribution of the estate, in which the bulk of the estate goes to the estate of her late husband.

8. To that protest the administrator swore a further affidavit in reply, sworn on 26th February 2016 to respond to the issues raised.

9. Directions were given on 16th May 2016 to the effect that the application be disposed of orally.

10. The oral hearing commenced on 6th September 2016. Bernadette Murugi Gitau was the first on the stand. She breathed life to the averments made in her supporting affidavit. She asserted that Rose Murugi Macharia had not inherited property from the deceased. She testified that LR Nos. 209/11373/77 and 128 were owned by the deceased and another, but was not sure of the mode of ownership. She could only guess that the two shared the same equally. She, however, did not produce any document to support her contention. She conceded that the estate had not been valued prior to the filing of the confirmation application. Rose Murugi Macharia testified next. She stated that she lived on Kiambaa/Kanunga/T482, while the protestor lived on Kiambaa/Kanunga/T280. She agreed with the testimony of Bernadette Murugi Gitau, arguing that it proposed a more equitable distribution compared with that made by the protestor.

11. The case for the protestor opened on 7th September 2016. The first witness on the stand for that side was King'ang'i Ng'ang'a, an age-mate of the deceased, who alleged to have been party to proceedings where the deceased shared out his property between his widow and three children. No date was assigned to that event, and no documents were allegedly signed, but he identified his signature that was shown to him by counsel for the protestor, being on an annexure to the protestor's protest affidavit. The document is dated 9th November 1997 and it appears to be about the deceased distributing his property. The protestor testified next. She stated that the administrators had previously benefited from a distribution by the will of the deceased, and the proposed distribution did not tally with the said wishes. Although she asserted that the document was made in a meeting between the deceased and a group of elders, she conceded that she was not privy to the said meeting.

12. The matter before relates to the estate of the father of the parties hereto. It has nothing to do with the estates of their respective mothers. Whatever they inherited therefore from their mothers is irrelevant to how the court should proceed to distribute the estate herein.

13. As mentioned earlier, the deceased herein died in 1998, and representation was sought two years later in Kiambu SRMCSC No. 22 of 2000 by the late husband of the protestor with the then surviving widow of the deceased. The two approached the court on the basis that the deceased had died intestate. No

mention was made of the document dated 9th November 1997, which the protestor alleges was a will of the deceased which distributed the estate amongst his people. If indeed there was such a document surely the widow and the son of the deceased would no doubt have mentioned it when they sought representation. It has not been demonstrated that the said document was discovered after the demise of the two initial administrators. I am not persuaded that the deceased died testate, and that the estate herein ought to be shared out as per the terms of the alleged will.

14. From the material placed before me, it would appear that the deceased had initially been survived by a widow and three children. The widow died thereafter, leaving a son and two daughters. The son is now dead, leaving the daughters and grandchildren. The grandchildren are represented by their mother, the protestor herein. That being the case, the estate herein ought to be shared out between the two daughters and the estate of the late son of the deceased.

15. As the deceased died intestate after the Law of Succession Act, Cap 160, Laws of Kenya, had come into effect Part V of thereof should govern the distribution hereof. The relevant provision ought to be section 38 thereof as read with section 41 of the Act. Section 38 says as follows –

‘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 be equally divided among the surviving children.’

16. Section 41 deals with the principle of representation or substitution, where children take the share that would have gone to their dead parents from the estate of the children’s grandparents.

17. The protestor has not proved that there were any *inter vivos* gifts to either of the parties. She has also not pointed me to any statutory provisions or case law that would justify departure from the application of section 38 of the Law of Succession Act to the distribution before me. The estate ought to be divided equally. The administrators propose a distribution that is equitable, while the protestor proposes one that is skewed to her favour and against the administrators.

18. The protestor raises an issue that the administrators did not do any valuations before coming to court. I note that she has not presented any herself, nor has she moved the court for valuation of the assets. I note that the administrators propose subdivision of most of the assets, and therefore I am persuaded that the distribution they propose would be fair. There is also the question as to whether some of the assets did not belong to the estate. The protestor alleged that they did not, but again she presented no evidence. She says one property fell on a road reserve; a document from the relevant government office would have sufficed as proof thereof. She also alleges that other two assets were held as a joint tenancy, a copy of the title would have sufficed as proof of that allegation.

19. In view of everything that I have said, I shall resolve the application dated 13th October 2015 in the terms proposed. A certificate of confirmation of grant shall issue accordingly. As the bulk of the estate is situate within Kiambu County, the matter herein shall be transferred to the High Court at Kiambu for final disposal.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH DAY OF SEPTEMBER, 2017.

W. MUSYOKA

JUDGE