



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
SUCCESSION CAUSE NO. 652 OF 2001
IN THE MATTER OF THE ESTATE OF KARIRA NGUTUI
THEURI KIRIRA.....APPLICANT
VS
SAMUEL WANJOHI KIRIRA.....PROTESTOR

JUDGMENT

Grant of letters of administration of estate intestate of the estate of Karira Ngutui, who died on the 10th of June 1978, were granted to Theuri Kirira and Samuel Kirira. On the 27th of May 2008, Theuri Kirira filed Affidavit in support of summons for confirmation of grant. Those who survived the deceased were listed as Catherine Mugure Kirira (deceased), Samuel Wanjohi Kirira (son), Patrick Nderi Kirira(son) and Peterson Ngutui Kirira (son). He identified the property of the deceased as Kirimukuyu/Kiria/463, (1.78 HA) the beneficiaries and their shares as Theuri Kirira 1.0 acres and Samuel Wanjohi 3.7acres,

The co -administrator Samuel Wanjohi did not agree. He swore an affidavit on the 11th of July 2008 stating that the deceased's estate comprised of two parcels of land Kirimukuyu/Kiria/ 463 and Kirimukuyu/Kiria/459 (4 acres) which was registered in the names of the deceased and one Kagotho Kirira. That the wishes of the deceased were that the two parcels be shared between his two houses and then be shared among the children in each house viz;

Catherine Mugure (deceased) Kirira Kirimukuyu/Kiria/463 to be shared among her children Samuel Wanjohi Kirira, Patrick Nderi Wanjira and Peterson Ndiritu Ngutui in equal shares.

And Susan Wangechi Kirira Kirimukuyu/Kiria/459 to be shared one acre each Theuri Kirira, Mary Gathoni Muhoro, Charity Muringo Nguitui, Rachel Wangechi Kagotho.

A certificate of confirmation of grant was issued in the estate of Kagotho Kirira and two acres out of the land Kirira Kirimukuyu/Kiria/459 was distributed, one acre each to Rachel Kagotho and Raphael Kagotho respectively.

Hearing of the protest proceeded on the 20th February 2013 before Justice Wakiaga.

In his testimony the protester confirmed that the deceased had two wives. He was the grandchild of Catherine, who had only two daughters. Susan had five four sons and one daughter.

He testified that the deceased had decreed that Catherine and her children would occupy 463, and Susan and hers on 459.

He called one witness Charles Weru.

The petitioner Theuri Kirira testified and adopted his statement. He confirmed that the deceased had two wives, and two parcels of land. That the deceased owned only 2 acres in 459, and Kagotho, 2 acres. That the estate of Kagotho was administered in Succession Cause 359 of 2006 whereby his two acres in 459 were shared among his heirs. Hence in total the deceased estate comprised of 6.7 acres. He argued that the protester being a grandchild could only benefit from his mother's share. That the 6.7 acres be shared among the children of the deceased namely the four sons in the first house and the unmarried sister in the second house.

He called two witnesses Naftally Maina Wanjohi, his father's age mate and friend, and Mary Gathoni Muhoro, his sister-in-law. Both confirmed that the deceased had two parcels of land, one of which was shared with his 1st born son, Kagotho.

Both parties filed submissions through their respective lawyers.

The only issue for determination is the distribution of the deceased estate Kirira Kirimukuyu/Kiria/459 and 463.

The court was invited by the protester to peruse the following files;

1. Nyeri RM Succession Cause no. 10 of 1984 in the Matter of the Estate of Kirira Ngutui which was filed by Catherine Mugure Kirira, listing the Protester and Patrick Nderi Kirira and Peterson Ngutui Kirira as her sons. The property identified as Kirimukuyu/Kiria/463.

In that matter Joseph Muhoro Kirira a son to Susan Wangechi Kirira raised objections to the effect that the grant be issued to the two wives of the deceased.

The matter was referred to the elders who made an award on the 13th March 1985 that the parcel be shared between Theuri Kirira 1.0 acres, Catherine Mugure 3.7 acres.

Catherine Mugure appealed against this award.

A new panel was reconstituted on 30th June 1988. The panel made an award to the effect that 463 be inherited by Catherine Mugure and 459 by Susan Wangechi.

2. Nyeri RM Succession cause no 82 of 1987, where Kagotho Kirira went to court seeking to have his share of Kirimukuyu/Kiria/459 which was registered in both his and the deceased's name. His mother, brothers and sister led by Stephen Ngutui objected to his application saying that the two parcels of land belonged to their father and the said Kigotho was registered as a matter of convenience. The elders and the court found that in deed the whole parcel belonged to the deceased. That the elders who arbitrated the case found that the wishes of the deceased were that the 459 be occupied by the family of Susan Wangechi and 463 by the family of Catherine Mugure.

Joseph Muhoro Kirira, the protester, and their mother were aggrieved by this finding and filed High Court Civil Appeal No. 27 of 1989.

The appeal was allowed on the 22nd of March 2001 with orders that the succession cause be heard in the high court.

I have carefully considered the submissions by each counsel.

It appears to me that the argument by the protester is that the narrative has been that the wishes of the deceased were that each of his wives and her children have a separate and distinct parcel of land. The argument by the applicant is that that is not the position and the deceased estate ought to be shared out except for two acres belonging to Kigotho Kirira.

It is also noteworthy that two panels of elders reached two different positions. One shared 463 between the applicant and the protester giving the applicant one acre, and the protester 3.7 acres, a grandson of the deceased. The other decided that the wishes of the deceased were that each family to settle on its own parcel of land.

The fact of the applicant living on 463, planting his coffee, and burying his wife, some of these activities having happened during the life time of his father, can also not be ignored.

Hence my view that the circumstances of this case call for the application of section 40 of the Law of Succession Act which provides;

(1) 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 adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38

I have noted the grant in **Nyeri HC Succession Cause 395 Of 2006** was confirmed on 23rd July 2010 and 2 acres out of the 459 have already been shared out among the heirs of Kigotho Kirira. That cause was not subject to this cause. That grant has not been revoked. That distribution of the two acres out of 459 sealed its fate leaving only 2 acres for distribution in this cause.

In the circumstances, the mode of distribution proposed by the protester that the parcel 459 be assigned to the house of Susan Wangeci, the mother to the petitioner is untenable, as that parcel of land is no longer available for distribution as a whole.

I find therefor that the net intestate estate of the deceased comprises of the parcels of land number Kirira Kirimukuyu/Kiria/463 and 2 acres out of Kirira Kirimukuyu/Kiria/459 as a result of the grant in Succession Cause 395 of 2006.

The deceased had two wives. Each forms a unit in addition to the number of children.

Susan had five children less Kigotho (5 units), Catherine had two (three units) in total 8 units. Hence the house of Catherine is entitled to 3/8 of the net estate and that of Susan, 6/8. In the end the estate is shared equally among the beneficiaries.

The net estate is 6.7 acres

The grant is confirmed in the following terms;

The petitioner's house will get 4.2 acres to be shared equally among the beneficiaries. The 2 acres in Kirimukuyu/ Kiria/459 and 2.2 acres from Kirimukuyu/ Kiria/463.

The protesters' house will get 2.5 acres from Kirimukuyu/ Kiria/463 to be shared equally among the beneficiaries.

A certificate of confirmation of grant to issue accordingly.

Each party to bear its own costs.

Dated at Nyeri this 6th September 2017.

Teresia Matheka

Judge

Delivered and signed at Nyeri this 18th October 2017 in open court.

Right of Appeal 30 days.

Teresia Matheka

Judge

In the presence of;

Court Assistant: Harriet

Waweru Macharia h/b for Kebuka Wachira for the protester

Gori Ombongi for Petitioner Absent

Theuri Kirira: Applicant present