



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 747 OF 2013
IN THE MATTER OF THE ESTATE OF KARANJA NJAGA-DECEASED
JOHN NGUGI KARANJA.....PETITIONER
VERSUS
SAMUEL NJAU KARANJA.....PROTESTOR
JUDGEMENT

Karanja Njaga (herein after referred to as the deceased) died intestate on 5th December 1992 at the age of 82 years.

On 16th day of October 2013, the deceased's son **John Ngugi Karanja**, (herein after referred to as the "**Petitioner**") petitioned for letters of administration intestate to the deceased's estate. The "**petitioner**" named the following persons as persons surviving the deceased:-

- i. *Samuel Njau Karanja*-----Son
- ii. *Peter K. Mungai*-----Son
- iii. *Stephen Gitau Karanja*-----Son
- iv. *John Ngugi Karanja*-----Son
- v. *Joram Karanja Njaga*-----Son
- vi. *Mary Njambi Karanja*-----Daughter
- vii. *Felitsta Wairimu Karanja*-----Daughter-Married

Annexed to the said petition s a letter from the local chief dated 10th October 2013 naming the same persons as surviving the deceased.

There is a consent pursuant to Rule **26 (2)** of the Probate an Administration Rules shown to have been signed *Peter Kamau Mungai, Samuel Njau Karanja, Stephen Gitau Karanja and Joram Karanja Njaga*. The only property listed in the affidavit in support of the petition is **Nyeri/Endarasha/551**.

The petition was gazetted on 8th November 2013 and the grant was issued on 27th December 2013. On 17th July 2014 the "**the petitioner**" applied for confirmation of the said grant and proposed equal distribution of the above property among the above seven persons. Attached to the said application is a consent to confirmation shown to have been signed by all the above persons except **Samuel Njau Karanja** and **Stephen Gitau Karanja**.

On 19th September 2014 **Samuel Njau Karanja** and **Stephen Gitau Karanja** (herein after referred to as the **protestors**) filed a joint affidavit of protest arguing that the proposed mode of distribution in the

application for confirmation is against the deceased's ostensible wish and will on how the said property ought to be shared which is in writing in terms of exhibit **S1** annexed thereto. Further, the protestors averred that to effectuate his will, the deceased demarcated the suit land into **6** fairly equal portions and put his sons into possession in their respective portions, but since one of the sons is dead and left no family, the property ought now to be divided into **5** equal portions. The **5th** portion go to **Joram Karanja Njaga** representing his father the late **James Njaga Karanja**. This proposal leaves out the two daughters.

On record is a statement by **Mary Njambi Karanja** dated 27th October 2015, a daughter to the deceased who states that she has not renounced her rights. She proposes equal distribution among the **7** children of the deceased.

On his part, the petitioner filed a statement dated 27th October 2015 insisting that the deceased died intestate and proposed equal distribution among the **7** children as per his affidavit in support of the application for confirmation of grant.

Also on record is a statement by **Felista Wairimu Karanja** who also proposes equal distribution of the estate among the **7** siblings.

On 9th February 2016 both counsels proposed that the matter be determined by way of submissions and pursuant thereto both counsels filed their written submissions.

Counsel for the petitioner argued that the applicable law is the Law of Succession Act^[1] and that distribution ought to be done as provided Section **38** of the act. Counsel submitted that the daughter have a right to inherit their fathers estate and that the proposal to exclude them offends the provisions of Article **27** as read with Article **40** of the constitution of Kenya, 2010.

Counsel cited Court of Appeal decision in the case of *Francis Mwangi Thiong'o & 4 Others vs Joseph Mangi Thiong'o*^[2] where the court held that excluding daughter from the estate cannot be endorsed by the court in this day and age. Counsel also submitted that the deceased died intestate and left no will and disputed the documents said to constitute the deceased's alleged will. Counsel also pointed out that the said document is not in the language of the court and that the same is not signed by the deceased and urged the court to dismiss the protest.

Counsel for the protestor submitted that the deceased had shared out his land prior to his death equally among his **6** sons, that he had put each of the **6** beneficiaries in their respective portions a position that obtains to date, that the deceased had put his wishes in writing, but one son died leaving no family, hence the property ought to be divided into **5** portions. Counsel admits in his submissions that the document relied upon by the protestors does not amount to a valid will, that section 35 of the act comes into play in the present situation, and that it was the deceased wish that his property be distributed as proposed by the protestors and urged the court to up hold the deceased's wishes.

Counsel cited the following cases, namely, *Martha Wanjiku Waweru vs Mary Wambui Waweru*^[3] where the court found that the deceased had sub-divided his land without any uncertainty, *Paul Kiruhi Nyingi & Another vs Francis Wanjohi Nyingi*^[4] where the court upheld the wishes of the deceased. However, in this well considered judgement **Makhandia J** (as he then was) noted as follows:-

"Unless it can be demonstrated that those wishes of the deceased as captured in the black book were illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected in my view. Nothing has been brought to my attention that remotely suggests that the deceased's was biased, unfair and or discriminatory against any of the beneficiaries in the manner he wanted his estate shared out on his demise. In any event, it would appear that some of the beneficiaries were aware of the contents of the black book during the deceased's lifetime. If they were despatched with the distribution they should have taken it up with him."

Counsel also cited the case of *Peter Chira & Another vs Nelson Gathogo*[5] where the court upheld the deceased's wishes. I will comment on all these authorities shortly.

The issues for determination is "*whether the deceased distributed his properties prior to his death as alleged by the protestors and if not how will the estate be shared among the beneficiaries.*"

As pointed above, counsel for the protestors admits that the document relied upon by the protestors does not amount to a valid will, nor do I think it does. With this admission, I find it unnecessary to discuss the ingredients of a valid will. It will suffice for me to point out that the document in question is not signed by the deceased nor is it witnessed and above all, it's not written in the court language. Counsel for the protestors attached a translated copy to his submissions. This is not proper and the said document cannot be said to be properly before the court. I find it necessary to expunge it from the court record.

At the very outset it's important to state the applicable law. Section 2 (1) of the Law of Succession Act[6] provides as follows:-

"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."

The deceased died intestate on 5th December 1992. The Law of Succession Act came into operation on 1st July 1981 hence it is the applicable law in the present case. Section 34 of the Act provides that:-

"A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect."

While it is possible for a person to distribute his properties during his/her lifetime, there are certain elements which must be demonstrated as prove that indeed the deceased gave out a gift *inter vivos*. This brings into play the provisions of Section 42 of the Law of Succession Act[7] which provides:-

"42. Where-

(a) an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate.

That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house."

In my view this Section of the law seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. They are to be honoured and effected.[8] However, there is no clear evidence that the deceased divided his land prior to his death, nor is there anything to show that he left a valid will either oral or written.

Section 9(1) of the Law of Succession Act[9] governs oral wills. It provides: -

'No oral will shall be valid unless –

- a. It is made before two or more competent witnesses; and*
- b. The testator dies within a period of three months from the date of the making of the will ...'*

No evidence was tendered to show that the requirements of the above section has been fulfilled.

Even if we were to accept the document the protestors claim to constitute the deceased's wishes, we will have to subject it to the test proposed by **Makhandia J** cited above, that is:-

*"Unless it can be demonstrated that those wishes of the deceased as captured in the black book were **illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected in my view.** Nothing has been brought to my attention that remotely suggests that the deceased's **was biased, unfair and or discriminatory against any of the beneficiaries** in the manner he wanted his estate shared out on his demise....."*

My understanding of the above is that the proposal ought not to be discriminatory or biased against any or some of the beneficiaries nor should it be unfair or unjust. The proposal contained in the said document or the alleged oral wishes of the deceased is totally discriminatory against the deceased daughter and to that extent it violates the constitution. Daughters have a right to inherit their fathers properties. This position has been reiterated in numerous decisions including the cases cited above.

This court is in agreement with the petitioners advocates that a finding excludes girls from inheriting their parents estate will amount to discrimination which would be contrary to **Article 27** of the **Constitution** which specifically prohibits discrimination of any person on the basis of race, sex, marital status or culture. **Article 27(3)** of the **Constitution** specifically provides that *"women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres."*

In the present case, this court does not see any reason why the **Law of Succession Act**[10] should not be applied in the distribution of the estate of the deceased. In that regard, **Section 29(a)** of the **Law of Succession Act**[11] recognizes **"children"** of the deceased as dependants. It does not state that such children are sons or daughters, either married or unmarried. Any practice that discriminates between the male and female children of a deceased person is a retrogressive and cannot supersede the **Constitution** and the **Law of Succession Act**[12] This court agrees with the holding of **Makhandia J** (as he then was) in **In Re Estate of Solomon Ngatia Kariuki (deceased)**[13] at page 8 where he stated as follows:-

"The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family."

On the question of distribution, the starting point is to refer to the relevant applicable law. **Section 38** of the **Law of Succession Act**[14] provides that:-

"Where an interstate 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"

In my view, the spirit of **Part V** of the **Law of Succession Act**[15] is equal distribution of the estate amongst the beneficiaries of the deceased. My reading of these provisions is that they envisage equal distribution. The word used in **Section 35 (5)** and **38** is *"equally"* as opposed to *"equitably."*[16] This is the plain language of the provisions. The provisions are in mandatory terms-*"the property shall.....be equally divided among the surviving children."* Equal distribution is envisaged. Guided by the above provisions I find that the deceased petitioner now represented by the protestor and the applicants herein are entitled to equal shares of the deceased's estate.

I find the protest has no merits. I accordingly dismiss the protest and order as follows:-

- a. That title number **Nyeri/Endarasha/551 comprising of approximately 8.1 Ha.** be shared equally

among the following:-

- i. *Samuel Njau Karanja*.....1.157 Ha
- ii. *Peter K. Mungai*.....1.157 Ha
- iii. *Stephen Gitau Karanja*.....1.157 Ha
- iv. *John Ngugi Karanja*.....1.157 Ha
- v. *Joram Karanja Njaga*1.157 Ha (*In trust for the house of James Njaga Karanja*)
- vi. *Mary Njambi Karanja*.....1.157 Ha
- vii. *Felitsta Wairimu Karanja*.....1.157 Ha

b. No orders as to costs.

Right of appeal 30 days

Dated at Nyeri this 31st day March of 2016

John M. Mativo

Judge

[1] Cap 160, Laws of Kenya

[2] Civ App No. 8 of 2015- Nyeri, Waki JA, Karanja JA & Kiage JA

[3] {2007}eKLR

[4] {2009}eKLR

[5] {2002}eKLR

[6] Cap 160, Laws of Kenya

[7] Cap 160, Laws of Kenya

[8] See the Judgment of A. Mabeya J. in **Succession Cause No.43 of 2002, In the matter of the Estate of Noah Wanjala Kimawachi-Deceased**

[9] Supra

[10] Supra

[11] Ibid

[12] Ibid

[13] {2008} eKLR

[14] Cap 160, Laws of Kenya

[15] Ibid

[16] See Musyoka J in Succ Cause No 399 of 2007, In the Estate of John Musambayi Katumanga-Deceased.

