



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO.55 OF 2009
IN THE MATTER OF THE ESTATE OF JOHANA NGOTHO WANDEMI – (DECEASED)
JUDGMENT

The petitioner took out a summons for confirmation of grant on the 8th November, 2011.

The said summons elicited a protest from Peter Ngotho Mwangi which was filed through his affidavit sworn on the 24th November, 2011. There is a replying affidavit to the affidavit in protest.

Oral evidence was taken and both parties filed written submissions.

The petitioner told the court that the deceased died on 18th February, 2006 leaving her with four (4) children. He left two (2) parcels of land – Kanyagia 369 and Shamata/2138. She produced an alleged will written in Kikuyu language and another written in English translated by the chief, Kanyagia. She said the protestor was given his share which he sold.

On cross-examination the petitioner said she was the 3rd wife. She confirmed the protestor is a child of the deceased. He has built a small house on the land Shamata/2138. He is a child of the 1st wife. She confirms there were no witnesses to the will. The 2nd document was a letter from the chief dated 14th October, 2005. The chief did not sign it. She added that her husband gave all the land at “Maili Nne” to the protestor. She didn't know the acreage.

P.W. 2 told the court that the deceased had 2 wives before he married the petitioner. The protestor's mother was Naomi Wambui Ngotho. Naomi got two (2) parcels of land given to her boys – Ndemi, Ndiritu, Peter and one sister.

The 3rd wife was given land at Kanyagia and Shamata. The protestor and his brothers sold all the land that was given to them as inheritance.

On cross-examination P.W.2 said the deceased gave out land to Esther but he (P.W.2) had no papers to show that.

The protestor told the court that the wills referred to are not genuine. He said there were disparities in the documents written in Kikuyu and the one in English. He denied being allocated any land by his father. He has built on the land at Shamata.

D.W.2 testified that he was called to the offices of Lawrence Mwangi Advocate where a document in Kikuyu was translated into English. He was asked to sign as a witness. He did. The Kikuyu letter did not have his name but only the identity card number.

The petitioner submitted that the Will produced was made by the deceased. She is a widow of deceased. The protestor should not be allowed to inherit twice. She urges that the protest be dismissed.

Counsel for the protestor submits that the document produced does not meet the threshold of a Will. What was produced was a copy. The chief from whom it was retrieved was not called as a witness. The document is not attested. The English document was made long after deceased died.

It is urged that the deceased died intestate. The estate should be divided equally. The petitioner proposes that land be distributed to one Moses Waweru Wagura who is not a beneficiary.

I have had occasion to consider the summons for confirmation of grant, the supporting affidavit, the affidavit of protest, the oral evidence adduced and the submission on record.

The document purported to be a Will fails miserably to meet the threshold set. **Section 11** of the **Law of Succession Act** provides that:

“No written will shall be valid unless be valid unless:

- a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;**
- b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;**
- c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”**

The document produced is not signed and is not attested. It does not qualify to be a valid Will.

The deceased thus died intestate. The petitioner has testified that the protestor and his brothers were given land and they sold. The protestor denies this. From the evidence on record there is no clear evidence supporting the bequeathing of land to the protestor and his brothers. In the absence of such evidence, this assertion cannot stand.

The effect of the above then is that the deceased died intestate. He was married more than once in a system that allows polygamy. The applicable law on distribution will be found in **Section 40(1)** of the **Law of Succession Act**. The section provides:

“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.”

In the present case, I note the affidavit in support of summons for confirmation of grant only lists four (4) children of the petitioner as the only children of the deceased. In the affidavit of protest the protestor names seven (7) children of the deceased from the 2nd wife of the deceased.

It is the duty of this court to consider all surviving widows and children of deceased at distribution.

The 1st house has seven (7) surviving children. The 2nd house has four (4) children and a surviving

widow who according to **Section 40(1)** of the **Law of Succession Act** should be considered as a unit in distribution.

The ratio applicable in distribution of the 2 properties herein would thus be 7:5.

I am also alive to the fact that distribution need not be equal but equitable. There is also need not to dislocate the petitioner from the property in Kanyagia where she resides.

The justice in that matter would necessitate an order that the grant herein be confirmed in the following terms:

1. Esther Wambui Ngotho – Nyahururu/Kanyagia/369 to hold in trust for:

i) Nicholas Waichungo

ii) Monica Njoki

iii) Ann Wanjiru

iv) Simon Ndemi

2. Parcel No.Nyahururu/Shamata/2138 to be divided equally amongst:

i) Nyambura Ngotho

ii) Njoki Ngotho

iii) Daniel Wanjohi Ngotho

iv) Peter Ngotho

v) Ndiritu Ngotho

vi) David Kimita

vii) Susan Kagure

Dated, Signed and Delivered at Nakuru this 20th day of April, 2016.

A. K. NDUNG'U

JUDGE