



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 1115 OF 2011

IN THE MATTER OF THE ESTATE OF AYUB NJUA KAMAU -DECEASED

LEAH WAMBUI KARWERU.....PETITIONER

ELIZABETH WANJERI NJUA.....BENEFICIARY

MARIAM MUTHONI NJUA.....BENEFICIARY

VERONICA WAMAITHA MUIRURI.....BENEFICIARY

MARGARET NYAMBURA KIMATHI.....BENEFICIARY

VS

PAUL KAMAU NJUA.....1ST PROTESTOR

JOHN GATIMU NJUA.....2ND PROTESTOR

### JUDGEMENT

**Ayub Njua Kamau** (herein after referred to as the deceased) died intestate on 29<sup>th</sup> day of December 2009 at the prime age of 109 years. On 1<sup>st</sup> November 2011 the deceased's widow, **Leah Wambui Karweru**, a daughter to the first wife of the deceased (herein after referred to as the "**Petitioner**") took out citations to accept or refuse letters of administration for service upon **Elizabeth Wanjeru Njua** (second wife), **Mariam Muthoni Njua**, **Cecilia Nyambura Kimathi**, **John Gatimu Njua**, **Paul Kamau Njua**, **Veronica Wamaitha Muiruri**, **Loise Wangui Wachira** and **Margaret Wacheke Njua**.

On 21<sup>st</sup> day of November 2011, the petitioner herein petitioned for letters of administration intestate to the deceaseds' estate. The only property listed in form P & A 5 is **Nyeri/Narumoro/1322** measuring approximately **1.47 ha.** registered in the name of the deceased.

On 19<sup>th</sup> December 2011 **Margaret Wacheke Njua** filed a notice of objection to making the grant and proposed *inter alia* that the above property be distributed equally among all the beneficiaries of the deceased.

The Grant of letters of administration was issued on 7<sup>th</sup> September 2012 to the petitioner and on 15<sup>th</sup> April 2013 the petitioner applied for the grant to be confirmed and proposed that the above land be shared equally between the **petitioner**, **Janet Muthoni Wandani** and **Elizabeth Wanjeri Njua**.

On 12<sup>th</sup> August 2013 **Elizabeth Wanjeri Njua**, the second wife to the deceased filed an affidavit of protest arguing *inter alia* that the land was given to her by the deceased at a family meeting on 31<sup>st</sup> May 2008, that she exclusively occupies the land, that the petitioner had been give a separate parcel of land, that the deceased was buried on her portion of the land. The contents of this protest were supported by a one **Michal Mugwe Wangari** in a supplementary affidavit filed on 18<sup>th</sup> day of September 2013.

On 17<sup>th</sup> March 2014, **Paul Kamau Njua**, the first protestor herein filed an answer to the petition claiming that the deceased left a written will and attached a document signed by the assistant chief. I will revert to the contents of this document later and comment on its evidential value if any.

On the 7<sup>th</sup> day of October 2014, the parties herein filed a consent document stating *inter alia* that they consented to the above property being shared equally among the surviving children of the deceased, that each beneficiary be bequeathed equal rights to the burial site, that all the protests referred to above be withdrawn and **Paul Kamau Njua, Maragaret Wacheke Njua** and **Leah Wambui Karweru** be appointed as joint administrators to the deceased's estate. It was also a term of the said consent that **Elizabeth Wanjeri Njua** renounces her interests to the estate. The only person who did not sign the consent is the second protestor while the first protestor signed it but in court insisted that he has since changed his mind and subsequently filed an affidavit dated 7<sup>th</sup> September 2016 stating that the deceased had a will.

The second protestor testified that he did not agree with the consent because the deceased left behind a will referring to the document written by the assistant chief. He admitted that the deceased did not sign the said document. In cross-examination he admitted that the alleged will was never read to the beneficiaries' after the deceased's death.

The first protestor associated himself with the evidence of the first protestor and insisted that the deceased divided his land prior to his death into 5 portions as outlined in the alleged will. He insisted that his father never gave land to his daughters and that they could only get a share from their mother.

The petitioners evidence was that the deceased never left a will, that at the time of filing this petition every one signed the consent. She insisted that the dispute before the assistant chief related to some crops that had been planted on the land and had nothing to do with a will or distribution of land. She also stated that everyone agreed to the consent and it was the second protestor who had called them to discuss the consent.

**Elizabeth Wanjeri Njua**, the deceased's widow confirmed that she withdrew her protest and urged the court to adopt the consent. She also insisted that her husband never distributed his land prior to his death and refuted the alleged will. Her position is that both the sons and daughters ought to benefit from their fathers estate. Her evidence was adopted by the other beneficiaries.

Essentially, this is a dispute between the two sons (that is the protestors) and their sisters. The sons insist that the deceased shared his land during his life time and relied on the document prepared before the assistant chief which they say constituted the deceased's will. The widow and all the beneficiaries maintain that the dispute before the assistant chief related to some crops that were planted on a portion of the land and there was nothing like distribution of the estate.

Section **11** of the Law of Succession Act,[\[1\]](#) provides for the formal requirements of a valid will. It states:-

*11. No written will shall 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.*

There are four main requirements to the formation of a valid will:-

- a. The will must have been executed with testamentary intent;*
- b. The testator must have had testamentary capacity;*
- c. The will must have been executed free of fraud, duress, undue influence or mistake; and*
- d. The will must have been duly executed.*

Testamentary intent involves the testator having subjectively intended that the document in question constitute his or her will at the time it is executed. First the alleged document was not signed by the deceased. There is nothing before me to show that the deceased ever intended the said document to be his will.

After evaluating the law, the authorities and the facts of this case, I find that the alleged document does not satisfy the above requirements. Accordingly, I find that the deceased died intestate.

There is no tangible evidence to demonstrate that the deceased divided his land during his life time as alleged. The protestors actions are aimed at ensuring that the daughter(s) of the deceased do not inherit their fathers land. They stated so in their evidence. This explains why a consent was arrived at, but they changed their minds.

The evidence tendered by the protestor is manifestly inadequate to warrant this court to conclude that the deceased divided his land during his life time. I had the opportunity of observing the demeanor of the protestors as they gave evidence in court, and in addition to the evident inconsistencies and contradictions in their evidence, I found their evidence to be totally untruthful.

Section 34 of the Law of Succession Act<sup>[2]</sup> 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.*"

Having found that the deceased died intestate, the deceased's estate falls for distribution in accordance with part V of the Law of Succession Act.<sup>[3]</sup> The deceased was survived by a widow and children and therefore the relevant provision is Section 35 of the Law of Succession Act.<sup>[4]</sup>

The petitioner and all the daughters insisted that all the deceased's children are entitled to benefit from their fathers estate. In my view, a finding that 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**<sup>[5]</sup> 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**<sup>[6]</sup> 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**.<sup>[7]</sup> This court agrees with the holding of **Makhandia J** (as he then was) in **In Re Estate of Solomon Ngatia Kariuki (deceased)**<sup>[8]</sup> 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 my view, the spirit of Part V of the Law of Succession Act<sup>[9]</sup> 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."<sup>[10]</sup> 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 all the children of the deceased are entitled to equal shares of the deceased's estate.

I have examined the consent filed by the beneficiaries and signed by all except the second protestor. I find that the proposed mode of distribution is fair and ensures equality. I find no reason not to adopt the said proposal. I find the protest has no merits. I accordingly dismiss the protest and enter judgement as follows:-

a. ***That*** the Protest/objection filed herein by **John Gitimu Njua and Paul Kamau Njua** in these proceedings be and is hereby dismissed.

b. ***That*** the Grant of letters of Administration issued to **Leah Wambui Karweru** on 7<sup>th</sup> September 2012 to the deceased's estate be and is hereby revoked and the same is hereby issued to **Paul Kamau Njua, Margaret Wacheke Njua and Leah Wambui Karweru** and the said grant be and is confirmed.

c. ***That*** Title number **Nyueri/Naromoru/1322** measuring approximately **1.47 Ha.** be divided as follows:-

i. ***A portion comprising of the burial grounds measuring approximately 0.1633 ha. to be registered in the joint names of all the beneficiaries listed below.***

ii. ***Paul Kamau Njua--Approximately 0.1633 Ha,***

iii. ***John Gitimu Njua--Approximately 0.1633 Ha,***

iv. ***Margaret Wacheke Njua--Approximately 0.1633 Ha.,***

v. ***Miriam Muthoni Njua--Approximately 0.1633 Ha.,***

vi. ***Leah Wambui Karweru--Approximately 0.1633 Ha.,***

vii. ***Janet Muthoni--Approximately 0.1633 Ha.***

viii. ***Veronica Wamaitha Muiruri-- Approximately 0.1633 Ha.***

ix. ***Cecilia Nyambura Kimathi-- Approximately 0.1633 Ha.***

d. ***That Paul Kamau Njua*** and or the protestors herein are ordered to execute such documents as may be necessary to cause sub-division and transfer of the above portions to the respective beneficiaries.

e. ***That*** in the event that the said **Paul Kamau Njua** or the protestors herein do not execute the requisite documents to facilitate the said sub-division and transfer as aforesaid **within 30 days**

*from the date of this judgement, then the Deputy Registrar of this court shall upon request by the petitioner or any of the beneficiaries sign the said documents.*

*f. **That** each beneficiary shall pay the requisite survey fees and transfer charges for their respective portion(s)*

*g. **That** the protestors shall pay the costs of this cause.*

Right of appeal 30 days

Signed, Delivered and Dated at Nyeri this 27<sup>th</sup> day September of 2016

**John M. Mativo**

**Judge**

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[1] Cap 160, Laws of Kenya

[2] Cap 160, Laws of Kenya

[3] Ibid

[4] Ibid

[5] Cap 160, Laws of Kenya

[6] Ibid

[7] Ibid

[8] {2008} eKLR

[9] Ibid

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