



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1058 OF 2005

IN THE MATTER OF THE ESTATE OF CECILIA WANJIRU KIBICHE (DECEASED)

RULING

1. There has been considerable delay in the preparation of the ruling herein. The reason for this is that the copy of the summons dated 5th April 2006 in the court file is incomplete. I directed staff in my chambers to contact the counsel involved to avail a complete copy of the application. The staff informs me that they did contact them, but to date none of them availed a complete copy of the application. I shall not wait any longer and shall endeavour to determine the application on the basis of what is before me.

2. The Summons dated 5th May 2006 is premised on Section 71 of the Law of Succession Act, Cap 160, Laws of Kenya. It seeks confirmation of the grant made on 4th August 2005. The application is brought at the instance of Alice Wamaitha and Harriet Wanjiru Githinji, the administrators of the estate of the deceased. It is premised on the grounds set out on the face of the application. The same is supported by an affidavit sworn by Alice Wamaitha. The said application was lodged at the registry on 10th April 2006.

3. There is on record a document that appears to have been lodged at the registry together with the application. It bears the court's date stamp of 10th April 2006 and is headed 'Affidavit in Support of Summons for Confirmation of Grant of Administration Intestate.' It is purported to be the affidavit of Alice Wamaitha. The document is incomplete for it does not have the last page which should have the deponent's signature and the signature and stamp of the Commissioner for Oaths. I have no way of telling whether the purported affidavit had been properly executed and commissioned. However, as no objection has been raised as to its form, I shall take it that the same had been properly filed, but the last pages fell off the court file.

4. The purported affidavit has only one page carrying four paragraphs. The first one identifies the deponent. The second states when the grant was made. The third identifies the survivors of the deceased, being the widow and four (4) children. The widow is Alice Wamaitha, while the children are Eliud Kibiche, Cecilia Wangeci, Loise Kanyi and Eliud Charles Kibiche. The fourth paragraph identifies the assets and makes proposals on their distribution. The assets set out in the portion of the affidavit in the court file are:-

(a) Plot No. 32/Mai Mahiu – allotted to Alice Wamaitha and in trust for her children, Cecilia Wanjiru, Loise Kanyi and Eliud Charles Kibiche;

(b) Limuru/Kamirithu/538/62 'A' – allotted to Eliud Kibiche;

(c) Longonot Kijabe/ Block 4/528 (Lare) total 91 acres – 61 acres thereof allotted to Alice Wamaitha on her own behalf and in trust for Cecilia Wanjiru, Loise Kanyi and Eliud Charles Kibiche; and 30 acres allotted to Eliud Kibiche;

(d) Longonot/Kijabe Block 2/6878 (Utheri wa Lari) – allotted to Eliud Kibiche.

5. There is an affidavit of protest in opposition to the summons for confirmation. It was sworn by Jane Wanjiru Gakuha on 18th May 2010. The protestor alleges to be a daughter-in-law of the deceased on account of her having been married by the deceased's only son, Peter Gakuha Kibiche. The marriage allegedly happened in 1977 and produced three issues – Faith Nyambura (1978), Stella Cecilia Wanjiru (1980) and Eliud Kibiche Gakuha (1983). She states that she remained married to the deceased's son till he died in 2001. She avers that she worked out of the country at certain times including when the deceased's son died, but she did attend his funeral. She states that the deceased's son had married a second wife called, Alice Wamaitha, with whom he had two (2) children, but she got a third one with another man after the deceased's son's demise.

6. The protestor has stated several grounds of opposition to the proposed distribution. She protests:-

- (a) that the court had prematurely ruled on distribution of the estate when it stated that the her children, being girls, would only inherit from their father's estate, if they remained unmarried;
- (b) that she had been left out as a beneficiary of her late husband's property;
- (c) that her two (2) daughter – Faith Nyambura and Stella Cecilia Wanjiru – had also been left out;
- (d) that her consent and that of her daughters had not been sought when the application was made;
- (e) that one petitioner is a stranger to the estate;
- (f) that the assets sought to be distributed belonged to the estate of her father-in-law, Eliud Kibiche, and therefore the proceedings were a nullity; and
- (g) that the petitioners had misused the assets of the estate, they could not be trusted and had used unlawful methods to get the grant.

7. The protestor proposes in her protest affidavit that the estate be shared out equally between herself and Alice Wamaitha. That is to say that the estate be distributed between the deceased's two (2) houses and thereafter each household to distribute their share to the children in each house.

8. The deceased herein died on 17th January 2005. Representation was sought in this cause through a petition file herein on 26th April 2005 by Alice Wamaitha and Harriet Wanjiru Githinji, in their capacities as daughter-in-law and sister-in-law, respectively, of the deceased. The departed was expressed to have been survived by the daughter-in-law – Alice Wamaitha, and grandchildren – Eliud Kibiche Gakuha, Cecilia Wanjiru, Loise Kanyi and Eliud Charles Kibiche. She was said to have died possessed of the following assets – Longonot/Kijabe Block 2/6878 (Utheri wa Lari), Naivasha/Mwichirigiri Block 4/3882, Longonot/Kijabe Block4/528, Plot No. 32 Mai Mahiu Trading Centre, Limuru/Kamirithu/538/62'A', shares in Barclays Bank of Kenya Limited, shares in Rea Vipingo Plantations Limited, shares in Kenya Airways Limited, money in account number 227300226009 with Limuru Dairy & Pyrethrum Farmers Coop Union Limited, money in account number 11184 with Post Bank and money in account number 01201786002 with National Bank of Kenya. A grant of letters of administration intestate was made to the petitioners on 4th August 2005.

9. After the application for confirmation of grant was lodged in the registry in 2006 and before it could be disposed of, the protestor herein moved the court on 23rd August 2007, seeking revocation of the grant made on 4th August 2005. The application for revocation of grant was dismissed by Gacheche J. in a ruling dated 31st March 2009, on the finding that the protestor had not proved that she was dependent on the deceased. It was further held that the protestor's children, that is her daughters, were entitled to a share in the estate unless they were married.

10. The protestor thereafter moved the court for a review of the ruling of 31st March 2007. The said ruling was reviewed on the grounds that a determination as to whether the protestor was a dependant had been made prematurely as what was before the court then was a determination of who was entitled to administer the estate of the deceased. It was ruled that that issue ought to be dealt with at the confirmation of the grant, or even earlier should the protestor be minded to file an application for dependency under section 26 of the Law of Succession Act, Cap 160, Laws of Kenya, prior to the determination of the determination of the confirmation application.

11. I have perused through the record before me, and I am satisfied that the protestor has not filed an application for dependency under section 26 of the Law of Succession Act.

12. The first issue I will need to address before I consider the confirmation application is whether the protestor and her daughters were dependants of the deceased. I should seek to answer the question whether the issue of dependency is relevant to the proceedings that are now before me, for confirmation of the grant.

13. Dependency is dealt with in Part III of the Act. The discretion given to the court under section 26 to make provision for dependants is intended to remedy situations where a dependant has not been provided for whether in intestacy or in the will of the deceased or in gifts in contemplation of death or a combination of all three. Such a dependant is required by section 26 to make a formal application for determination by the court of that question. The procedure for applying for reasonable provision is set out in Rule 45 of the Probate and Administration Rules. He should file a summons, or a petition depending on the stage at which the application is being made, supported by an affidavit setting out the matters detailed in that Rule.

14. The persons who qualify to be dependants who can seek the court's discretion under section 26 are stated in section 29. Put differently, the term dependant is defined in that section. Section 29 states as follows:-.

'For the purposes of this Part, 'dependant' means –

(a) The wife or wives, former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) Such of the deceased's parents, stepparents, grandparents, grandchildren, stepchildren, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to her death.'

15. It will be noted that the use of the term dependant is limited, according to section 29, to the purposes of Part III of the Act. That would mean that a person is a dependant only for the purposes of Part III. Put differently, the issue of dependency or reasonable provision should only arise where a person moves the court under Part III of the Act, asking the court to declare him as having been a dependant of the deceased and inviting the court to make provision for him out of the estate.

16. To my mind, the provisions of Part III of the Act create a special remedy for persons who fall under the definition of dependants. It creates a special process for handling claims that are brought by such persons, which is apart from the process envisaged by Part VII of the Act. This is a special process which cannot be undertaken within the confirmation process set out in section 71 of the Act. It is for this reason that section 72(a) of the Act states that –

'No grant of representation shall be confirmed until the court -

(a) is satisfied that no application under Part III is pending...'

17. In my understanding, a person who claims to me a dependant who should be provided for from the estate of the deceased must move the court under section 26 of the Act. Upon being so moved, the court should make a determination as to whether such a person is a dependant, and if it does find him to be such a dependant, proceed to make provision for him in terms of sections 27 and 28 of the Act.

18. Section 30 of the Act states that an application for reasonable provision under Part III, should not be brought after a grant has been confirmed. This suggests that the order made under Part III would probably have profound effect on the confirmation process, particularly on distribution. So the order regarding reasonable provision ought to be obtained first. Once such order is obtained, the court handling the confirmation application ought to take cognizance of and give effect to it.

19. I feel driven to state that the terms ‘dependant,’ ‘survivor’ and ‘beneficiary’ ought not be used interchangeably. A dependant may be a survivor of an intestate or a beneficiary named in the will of a deceased testator, but such survivor or beneficiary can only be referred to as a dependant if they have moved the court under section 26 and have been declared to be a dependant by the court.

20. As the protestor has not filed an application for provision under section 26, there cannot be any basis for me to begin to consider whether or not she was a dependant of the deceased. The same case would apply to her daughters. I should also add that a daughter-in-law is not listed in section 29(b) of the Act as being among persons who may move the court under section 26 for reasonable provision and who the court may declare to be a dependant.

21. I am tasked with considering an application for confirmation of grant. I am required by the proviso to section 71 to be satisfied as to the identities and shares of all the persons beneficially entitled, and upon confirming the grant to specify all such persons and their respective shares. I will cite the said provision for avoidance of doubt, it says –

‘Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.’

22. When confronted with a confirmation application in intestacy, with regard to distribution of assets, which appears to me to be the main dispute in this case, there are three key matters to be addressed. These are: identification of the persons entitled to a share in the estate of the intestate, identification of the assets available for distribution amongst the persons identified as survivors of the deceased, and determination of the mode of distribution of the said assets.

23. It is not in dispute that the deceased died intestate. Intestacy is dealt with in Part V of the Act. The persons entitled to the estate of an intestate are those identified in sections 35, 36, 38 and 39 of the Act. These provisions recognize as survivors spouses, children, parents, siblings and other relatives to the nearest degree of consanguinity upto and including the sixth degree. In defining the category of the relatives entitled, particularly those referred to in section 39, the critical word is ‘consanguinity;’ which is defined in *Black’s Law Dictionary*, Ninth Edition, 2009, as ‘the relationship of persons of the same blood or origin.’ This would mean the persons entitled in intestacy ought to be the blood relatives of the deceased, save for the surviving spouse. There is a table of consanguinity in the Second Schedule to the Act, setting out all those who would be entitled upto the sixth degree.

24. So who were the persons who survived the deceased and who ought to get a share out of his estate? Sections 35, 36, 38 and 39 of the Act indicate the priority of successors. The surviving spouse has the first priority, followed by the children, parents, siblings, in that order. It is common ground that the deceased’s husband, Eliud Kibiche Gakuha, had pre-deceased her, having died on 21st July 1993. She had only one child, a son, Peter Gakuha Kibichi, who also pre-deceased her, having died on 1st December 2001. From the record it would appear that the deceased’s son had married twice, and had had children with the two women.

25. From the scheme of things set out in Part V of the Act, it can be deduced from the facts that the

deceased was neither survived by a spouse nor children, but there were grandchildren. Are the grandchildren the next in line? It would appear so. An intestate who had married is survived, in the order of priority, going by the scheme in Part V, by spouse, children and grandchildren. As the deceased's spouse who should have had priority to her estate was dead, the next in line was her son. As the said son was also dead, the next in line were her grandchildren.

26. The applicant in the confirmation application is a daughter-in-law of the deceased, by dint of her having had married the deceased's son, Peter Gakuha Kibiche. She is not a blood relative of the deceased. She, therefore, does not qualify to be among the survivors of the deceased as defined in Part V. She is, consequently, not entitled to a share in the deceased's estate. However, her children with the deceased's son would be blood relatives of the deceased in their capacity as grandchildren of the dead.

27. The status of the protestor as a daughter-in-law of the deceased is highly contested. In the burial documents placed before me relating to the deceased, her husband and her son, the protestor was not acknowledged. However, there are other documents on record that point to her as having been a spouse of the deceased's son. One such document is the proceedings that were conducted before elders in 1992. From the minutes of 24th March 1992, it is quite clear that she was recognized in those proceedings as having been a spouse of the deceased's son. In the judgment of MM Mwai SRM in Limuru SRMCCR No. 526 of 2005, delivered on 24th June 2005, she was categorically identified as having been married to the deceased's son. There is a similar holding in the ruling delivered herein on 31st March 2009 by Gacheche J. The affidavit of the second applicant, sworn on 14th February 2014, pointedly refers to a marriage having existed between the objector and the deceased's son which was terminated by divorce. Although there is reference in several documents to a divorce, nothing was placed before me as proof thereof.

28. However, in view of what I have stated with respect to the applicant, the fact that the protestor had been married to the deceased's son may not be a relevant fact in determining whether she was a survivor of the deceased in terms of Part V of the Act. She was not a blood relative of the deceased, and the fact of having been a spouse of the deceased's son does not make her a survivor of the deceased. She is therefore not entitled to a share in her estate. However, her biological children with the deceased qualify automatically to be survivors of the deceased, by virtue of being the biological grandchildren of the deceased.

29. The applicant and the protestor have fought gallantly for a share in the estate. The fight appears to have been hinged on the fact that the deceased had only one child, a son, the husband of the parties hereto, and therefore, according to them, they were automatically entitled to that estate. That is a misconception. The son predeceased the deceased and that being so the persons entitled to the deceased's estate are the immediate next blood relatives, her grandchildren, not her daughters-in-law. The fight between these two women ought to be over the estate of their dead husband, but not that of their mother-in-law. They have no right at all to the estate of their mother-in-law.

30. I have already stated that the grandchildren of the deceased are the persons who are entitled to her estate. The two (2) wives of the deceased's son had six (6) children between them, each with three (3) children. The first applicant's children are Cecilia Wanjiru, Loise Kanyi and Eliud Charles Kibiche; while the protestor's children are Eliud Gakuha Kibiche, Stella Cecilia Wanjiku and Faith Nyambura.

31. In the eyes of the applicants, the legitimate grandchildren of the deceased are Eliud Gakuha Kibiche, Cecilia Wanjiru, Loise Kanyi and Eliud Charles Kibiche. Legitimate in the sense of being the biological children of the son of the deceased. According to the objector all her children and the first applicant's first two children are the biological grandchildren of the deceased. There is clearly no unanimity concerning the status of the Faith Nyambura and Eliud Charles Kibiche. They are considered by some of the disputants to the outsiders, on the grounds that they are not biological children of the deceased's son. According to some of the material before me, Faith Nyambura, who is the first child of the objector, had been born before her mother came into the life of the deceased's son, presumably sired by another man. Eliud Charles Kibiche is the last child of the first applicant; he was allegedly born after the deceased's

son had died. The deceased's son, Peter Gakuha Kibiche, died on 1st December 2001, while the child was allegedly born in 2004.

32. The issue that I have to determine is who among the purported six (6) children of the deceased's son qualify to be survivors of the deceased herein. Those who qualify to be the grandchildren of the deceased are the persons who should be treated as her survivors and therefore qualified to get a share out of her estate.

33. Guidance with regard to this is to be found in section 3(2)(3) of the Act, which provides as follows:-

' (2) References in this Act to 'child' or 'children' shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

(3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.'

34. There is unanimity as between the applicants and the objector that Eliud Gakuha Kibiche, Stella Cecilia Wanjiku, Cecilia Wanjiru and Loise Kanyi are the biological children of the deceased's son. They are therefore legitimate grandchildren of the deceased. Regarding Faith Nyambura, the objector alleges that she was born within wedlock in 1978 following the marriage between the objector and the deceased's son in 1977. The applicants, however, do not concur. In their view, the objector brought that child into her relationship with the deceased's son, having been previously sired by someone else.

35. The applicants position is that the objector and her children lived with the deceased's son until 1988 or thereabouts, when they parted ways and the objector left to live in Mombasa with her two daughters, leaving the son behind with the deceased's son. They describe the two daughters of the objectors as granddaughters of the objector, who continued to visit to visit 'the grandparents even after the split. That, in my view, would mean that the objector's first daughter, if indeed she had been born outside wedlock, had been accepted into the family of the deceased's son by the son and the said son assumed responsibility of her for she remained in his care until he parted ways with her mother. She is therefore a child of the deceased's son by virtue of section 3(2) (3) and therefore a legitimate grandchild of the deceased.

36. As regards the first applicant's last child, the facts establish that he was born three (3) years after the deceased's son died. He cannot therefore be the biological child of the deceased's son. As he was born after the demise of the deceased's son, it cannot be said that the deceased's son had accepted him as his own or recognized him as such or assumed responsibility over him. It cannot be said that he had informally adopted him. It cannot also be said that the child had been conceived but not yet born as at the date of the deceased's son's death, for he was born way out of the known gestation period for a human being. The said child is clearly not a child of the deceased's son within the definition of child as set out in section 3(2) (3).

37. I am conscious of the position under customary law, which I take judicial notice of, where children born after the death of a husband are regarded as the legitimate children of the dead man regardless of who sired them. However, customary law does not apply in the circumstances of this case. Its application has been ousted by section 2(1) of the Law of Succession Act, for the deceased herein died long after the said Act had become law, and the persons who qualify for inheritance intestate are very clearly set out in various provisions in the Act. Such persons would not include a person in the position of Eliud Charles Kibiche.

38. As Eliud Charles Kibiche is not a child of the deceased's son by any definition, it follows that he cannot be considered as a grandchild of the deceased. Therefore he cannot be defined as a survivor of the

deceased, entitled, by virtue of Part V of the Act, to a share in her estate.

39. It may perhaps be argued that Eliud Charles Kibiche was a child that the deceased had recognized as her grandchild, or accepted as such or even assumed grandparental responsibility over. In my opinion, such a position would not hold. The legal position is stated in section 3(2) of the Act, and it is specifically intended to apply to a male person, and crucially to the relationship between a parent and a child, rather than a grandparent and a grandchild. Whether a child is a grandchild of an individual is necessarily dependent on the status of the relationship between the alleged grandchild and the offspring of the alleged grandparent.

40. In view of everything that I have said so far, and for the purpose of avoiding any doubt, the persons who qualify to be the grandchildren of the deceased, and therefore her survivors by virtue of Part V of the Act, are Eliud Gakuha Kibiche, Stella Cecilia Wanjiku, Cecilia Wanjiru, Loise Kanyi and Faith Nyambura. It does not matter that the objector had moved out of the matrimonial home with Stella Cecilia Wanjiku and Faith Nyambura. The two children did not cease to be grandchildren of the deceased by the fact of that act of their mother. The question of either of the daughters of the deceased's son getting married does not disentitle them to a share in their grandmother's estate. There is nothing to that effect in the Law of Succession Act. Ideally, what the applicants are stating is the customary law position, which has been overridden by the coming into force of the Law of Succession Act.

41. Having established the persons who are entitled to inherit from the estate of the deceased, I shall proceed to determine the assets that are available for distribution as part of the estate of the deceased. According to the petition filed herein, the deceased died possessed of the assets listed therein. I have cited them in paragraph 8 hereof. There are also on record copies of the relevant documents of title relating to these assets. There is no counter evidence that the deceased did not own these assets.

42. I have noted that the deceased was at the time of her death the administrator of the estate of her dead husband, which was the subject of Nairobi HCSC No. 1705 of 2002. The said grant was confirmed on 25th June 2003, and a certificate of confirmation of grant of even date issued. The certificate was rectified on 21st July 2004. According to that certificate the estate of the deceased's husband devolved wholly upon the deceased herein. The assets making up the assets of the estate of the deceased's husband are Limuru/Kamirithu/965, 966 and 1936, Longonot/Kijabe Block 4/528, Plot No. 62A Kamirithu trading centre, Plot No. 32 Mai Mahiu trading Centre, 1, 116 shares with Barclays Bank, and money at A/C No. 0025447 in an unidentified bank.

43. It would appear that some of the assets for distribution in the estate of the deceased are from the estate of the deceased husband's estate. That is to say Longonot/Kijabe Block 4/528, Plot No. 62A Kamirithu trading centre and Plot No. 32 Mai Mahiu trading Centre. The rest are assets that belonged exclusively to her. The assets that made up the estate of her deceased husband were devolved absolutely to her. There is therefore nothing wrong with them being subjected to succession in her estate, so long as they had been transmitted to her by the date of her death or thereafter.

44. Having identified the assets to be distributed, my next task is to work out a mode for their distribution amongst the survivors identified in paragraph 40 hereabove. I have already identified these survivors as grandchildren of the deceased. They fall in the category in section 39(1) (e) of the Act. Consequently, the estate of the deceased should be shared equally between Eliud Gakuha Kibiche, Stella Cecilia Wanjiku, Cecilia Wanjiru, Loise Kanyi and Faith Nyambura.

45. The Summons dated 5th May 2006 shall be disposed of in the following terms:-

(a) That the persons who survived the deceased and are entitled to a share in her estate are hereby identified as Eliud Gakuha Kibiche, Stella Cecilia Wanjiku, Cecilia Wanjiru, Loise Kanyi and Faith Nyambura;

(b) That the assets that form part of the estate of the deceased and which have been identified as available for distribution are Longonot/Kijabe Block 2/6878 (Utheri wa Lari),

Naivasha/Mwichirigiri Block 4/3882, Longonot/Kijabe Block4/528, Plot No. 32 Mai Mahiu Trading Centre, Limuru/Kamirithu/538/62'A', shares in Barclays Bank of Kenya Limited, shares in Rea Vipingo Plantations Limited, shares in Kenya Airways Limited, money in account number 227300226009 with Limuru Dairy & Pyrethrum Farmers Coop Union Limited, money in account number 11184 with Post Bank and money in account number 01201786002 with National Bank of Kenya; and all the estate of the deceased husband of the deceased as devolved to her as per the certificate of confirmation of grant in Nairobi HCSC No. 1705 of 2002 dated 25th June 2003 and rectified on 21st July 2004;

(c) That all the assets listed in (b) above shall be shared equally amongst all the persons listed in (a) above;

(d) That Loise Kanyi being a minor her share in the estate of the deceased shall be held in trust for her by her mother, Alice Wamaitha, until she turns eighteen (18) years of age;

(e) That the grant dated 4th August 2005 is hereby confirmed in terms of paragraphs (a), (b), (c) and (d) above; and

(f) That as the bulk of the estate of the deceased comprises of assets located within Kiambu County, it is hereby directed that the matter herein be transferred to the High Court of Kenya at Kiambu for final disposal.

46. It is so ordered. There shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 23RD DAY OF SEPTEMBER, 2016.

W. MUSYOKA

JUDGE