



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 3100 OF 2001

IN THE MATTER OF THE ESTATE OF MUNYUA MBEKE (DECEASED)

JUDGMENT

1. What I am tasked with determining is a summons dated 26th May 2008. It is a summons for confirmation of a grant made herein on 8th May 2002. The application is brought at the instance of James Ngige Warobo, one of the administrators of the estate of the deceased. It is premised on the grounds set out at the face of the application, and on the facts deposed in the affidavit of James Ngige Warobo sworn on 26th May 2008.

2. It is deposed that the grant sought to be confirmed was initially made to Beth Wamaitha Kanyoro and Jane Nduta Munyua on 8th May 2002, but Beth Wamaitha Kanyoro was substituted upon her demise with James Ngige Warobo, the applicant herein. The deceased was said to have died intestate and was survived by nine (9) individuals, being Beth Wamaitha Kanyoro, Jane Nduta Munyua, David Mbeke Kanyoro, James Ngigi Warobo, Rahab Waithera Njiu, Wambui Rua, Grace Njeri Kanyoro, Waithera Kimani and Wanjiru Kimani.

3. It is averred that there has been a partial confirmation to Jane Nduta Munyua. The applicant proposes distribution to three individuals – Jane Nduta Munyua, James Ngige Warobo and David Mbeke Kanyoro. Only two assets are up for distribution, being Kiambaa/Thimbigwa/2097 and 2098. It is proposed that Kiambaa/Thimbigwa/2097 be shared between Jane Nduta Munyua, James Ngige Warobo and David Mbeke Kanyoro with the three getting 2.0, 0.65 and 0.65 acres respectively. Kiambaa/Thimbigwa/2098 is to be shared between James Ngige Warobo and David Mbeke Kanyoro each getting 1.3 acres.

4. There is an affidavit of protest on record, sworn on 26th June 2008 by David Mbeke Kanyoro and Grace Njeri Munyua. The deponents aver to be children of the deceased. They claim that the deceased had summoned his members of the family, clan and area Chief and declared how he wished his estate to be distributed upon his demise. A written will of the deceased was allegedly read after the burial of his remains. They pray for the dismissal of the application dated 26th May 2008 and for the allowing of the applications dated 2nd March 2004 and 11th February 2004. They urge that the estate of the deceased be disposed of in accord with his wishes as expressed in the will made on 26th February 1998.

5. The application dated 26th May 2008 was disposed of by way of oral evidence. That was pursuant to directions that had been given on 30th November 2010 by Kimaru J. The said directions were by consent. The order recorded by the court stated as follows:-

‘(1). By consent, Jane Nduta Munyua to inherit 2 acres to be excised from Kiambaa/Thimbigwa/2097;

(2). Njeri Kanyoro to inherit 0.3 to be excised from Kiambaa/Thimbigwa/2097;

(3). The remainder of the estate to go to *viva voce* hearing for one day.’

6. The background to the matter is that the deceased died on 14th February 2000. A grant of letters of administration intestate was made in Kiambu SPMSCS No. 227 of 2000 on 22nd January 2000 on a petition lodged in that cause by David Mbeke Kanyoro on 29th September 2000. The said grant was revoked through an order by Aluoch J. made on 8th May 2002. It was directed in the said order that a fresh grant of letters of administration intestate do issue to the widows of the deceased, Beth Wamaitha Kanyoro and Jane Nduta Munyua. When Beth Wamaitha Kanyoro died, she was substituted with James Ngige Warobo, her son, in orders made on 12th October 2005 and 9th November 2005. It was directed in the order that the matter ‘do proceed as an intestate estate.’

7. There was partial confirmation of the grant by consent recorded on 4th June 2007 before Aluoch J. In that distribution, Jane Nduta Munyua was awarded two (2) acres out of Kiambaa/Thimbigwa/2097, to hold in trust for her children. It was agreed by consent and directed by the court that the distribution of the rest of the estate to the household of Wamaitha Kanyoro was to be agreed, otherwise the dispute to be heard. .

8. It was agreed by the parties, when they appeared before Rawal J. on 22nd October 2008, that the dispute on distribution was within the house of Wamaitha Kanyoro, and her children were David Mbeke Kanyoro, Grace Njeri Kanyoro and James Ngige Warobo. It remained to be determined whether Grace lived on the estate and whether any provision had been made for her. On 5th November 2008, it was agreed that Grace Njeri Kanyoro was a dependant of the deceased, and James Ngigi Warobo expressed his willingness to give her 0.3 acres from the portion accruing to their mother’s house.

9. What I have stated in paragraphs 6, 7 and 8 above formed the background to the consent orders recorded on 30th November 2010 before Kimaru J.

10. The oral hearing commenced on 2nd March 2016. The first to take the stand was Kigondu Mbeke, who was introduced as executor of the will of the deceased. He stated that he was a brother of the deceased, and was in charge of the estate. He testified that the deceased had two wives – Beth Wamaitha and Jane Nduta. He sired children with both women. From Beth Wamaitha he begot James Ngige Kanyoro, David Mbeke and Grace Njeri; while his children with Jane Nduta were Waithera and Wanjiru. He said the deceased had made a will on 26th February 1998. His property was said to have been six (6) acres. In the alleged will, the deceased gave two (2) acres to David Mbeke, Jane Nduta two (2) acres, James Ngige one decimal six (1.6) acres, and Grace Njeri decimal three (0.3) acres. Each of the persons named was said to be living on the parcels allotted to them by the deceased as at the date the testimony was being given.

11. The next on the witness stand was Grace Njeri Kanyoro. She described herself as a daughter of the deceased, and stated that the deceased had distributed his estate before he died. According to her, the deceased had allotted her stepmother – Jane Nduta – two (2) acres, the first born son – who she did not name – two (2) acres, James Ngigi one decimal six (1.6) acres and herself decimal three (0.3) acres. She confirmed that Rawal J. gave her the decimal three (0.30) acres in an order made on 5th November 2008. She complained that she was yet to receive the decimal three (0.3) acres, blaming James Ngige for her troubles, and accusing him of utilizing two (2) acres instead of the one decimal six (1.6) acres allotted to him.

12. David Mbeke was the last witness. He also stated that he was a son of the deceased. He testified that their father had distributed his estate before he died. He stated that the deceased had called them to the Chief’s office where the issue about the distribution was broached and it was agreed that it would be dealt with at home. At home, he proceeded to distribute his property. He stated that the portion due to their mother was distributed three ways with the mother getting nothing. Their stepmother was given a smaller

portion as she did not have male children. He referred to a letter dated 3rd August 1999 written by the deceased indicating how his property was to be distributed. He concluded by saying that James Ngigi was not on good terms with the deceased.

13. I have perused through the record. The deceased died on 14th February 2000. He had married twice under a system of law allowing polygamy. His widows were Beth Wamaitha and Jane Nduta. Beth Wamaitha had six (6) children – James Ngige Kanyoro, David Mbeke Kanyoro, Waithera Njiu, Mary Mukami Njenga, Wambui Rua and Grace Njeri Kanyoro; while Jane Nduta, had two (2) children – Lillian Waithira Kimani and Teresiah Wanjiru Kimani. He died possessed of two assets - Kiambaa/Thimbigwa/2097 and 2098, measuring in aggregate five decimal nine (5.9) acres.

14. As the deceased died after the Law of Succession Act, Cap 160, Laws of Kenya had come into force in 1981; the estate fell for distribution in terms of Part V of the Act. The most relevant provisions to the distribution herein should in the circumstances be those in section 40 of the Act.

15. There has been partial distribution of the estate consequent upon the orders made by my predecessors in the matter – Aluoch J. Rawal J and Kimaru J. – on divers dates. I have set all of them out hereabove. The share due to the second house appears to have been settled, and I am only required to address distribution with respect to the first house. Even in respect of the first house, there has been partial distribution, but limited to the share allotted to Grace Njeri.

16. From the material that was placed before the lower court in Kiambu SRMSC No. 227 of 2000, the first house comprised of the widow and six (6) children. Of the six (6), two (2) were male and four (4) daughters. All the daughters were married, save for Grace Njeri. Before Aluoch J. on 8th May 2002 two of the daughters in the first house, namely Rahab Waithera and Wambui Rua, stated that they were married and had no interest in the estate. Grace Njeri asserted her claim to the estate on the grounds that she was no longer married, while Mary Mukami Njenga was not in attendance. The position of Mary Mukami Njenga regarding the matter is not documented. From the first house, therefore, the persons to share the remaining assets appear to be the two (2) sons of the deceased. I shall take it that Mary Mukami Njenga is not interested in the estate for she has not come forward so far to stake her claim.

17. How should the remainder of the estate be shared out between the two (2) sons? At the hearing on 2nd March 2016, a brother of the deceased testified that the deceased had left a will, and he styled himself as executor of the said will. He then proceeded to state how the remaining assets should be shared out as between the sons. He claimed that David Mbeke had been given two (2) acres, while James Ngige had been given one decimal six (1.6) acres.

18. I find it curious that the alleged executor did not petition for representation to the estate of the deceased if indeed there had been a will duly made by the deceased, naming him as executor as alleged. If he was beaten to it by the parties who obtained representation, one would wonder why he did not find it necessary to move vigorously for revocation of the grants made. The directions made in the matter, which culminated in the hearing that I conducted on 2nd March 2016, were on the understanding that the deceased had died intestate, and neither counsel for the protestor nor the alleged executor ever asserted that they were ready to prove the alleged will. I have noted from the record that when David Mbeke and Grace Njeri testified they made no allusion or reference at all to the alleged will. I shall therefore deal with the matter as if no such will existed.

19. David Mbeke and Grace Njeri talked of the deceased having had distributed his property before he died. They proceeded to state the manner of the alleged distribution. It is not clear from their testimony whether they meant that the deceased had distributed his estate *inter vivos* or that he had an oral will or whether they were referring to the distribution in the purported will placed on record by the first witness. They adduced no evidence as to when the alleged distribution took place.

20. In the absence of a proved written or oral will, or of conclusive evidence of *inter vivos* distribution, I am inclined to conclude that there was no such distribution, and tempted to order equal distribution of

the remaining assets as between the two (2) sons of the deceased. I am disturbed though by the terms of the consents recorded or stated before my predecessors, whereby the second house was given two (2) acres, while Grace Njeri was awarded decimal three (0.3) acres. This mirrors the testimonies of the witnesses who appeared before me on 2nd March 2016. I am persuaded that there could be credence in their evidence with regard to the alleged lifetime distribution by the deceased.

21. That being the case, the final orders that I am moved to make are as follows:-

(a) That Kiambaa/Thimbigua/2097 shall be shared out as follows –

(i) To Jane Nduta Munyua – 2.0 acres;

(ii) To Grace Njeri Kanyoro – 0.3 acres; and

(iii) To David Mbeke Kanyoro – 1 acre; and

(b) That Kiambaa/Thimbigua/2098 shall be shared out as follows –

(i) To David Mbeke Kanyoro – 1 acre; and

(ii) To James Ngige Kanyoro – 1.6 acres.

(c) That a certificate of confirmation of grant shall accordingly issue;

(d) That as the estate comprises of property situated within Kiambu County the cause shall accordingly be transferred to the High Court of Kenya at Kiambu for final disposal; and

(e) That there shall be no order as to costs.

22. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 16TH DAY OF SEPTEMBER, 2016.

W. MUSYOKA

JUDGE