



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 15 OF 2014

In the matter of the Estate of PETER NYAGA MBOGO (Deceased)

SUSAN NJOKI MWANGI.....PETITIONER

VERSUS

LYDIA THAARA GEREVASI.....1ST PROTESTER

MARY NJOKI.....2ND PROTESTER

LUCY MURUGI.....3RD PROTESTER

J U D G M E N T

1. The cause was gazetted on 21/01/2014 in the names of the petitioners Susan Njoki Mwangi and Lydia Thaara Gerevasio being the widow and the mother of the deceased. Earlier on, the 2nd petitioner had filed affidavit sworn on 7th February 2014 protesting that the 1st petitioner had left out names of some of the beneficiaries.

2. The summons for confirmation of grant were filed by the advocate for the first petitioner and it indicated that the 1st petitioner, her three children E M, K M N and D M were to inherit 0.10 ha. each alongside one Joseph Kinyua and the 1st petitioner herself with 0.10 ha. each.

3. The 2nd petitioner filed an affidavit of protest sworn on 1/12/2014 and filed on the same day. She opposed the mode of distribution proposed by the 1st petitioner and put her interest in one paragraph:-

“6. That the deceased's estate Gaturi/Weru/8708, 8709 and 8710 be shared equally between the children of the deceased and his three widows” ... whom she named as Mary Njoki (herself), Lucy Murugi and Susan Njoki the 1st petitioner. The affidavit contained an expanded list of beneficiaries including her children and those of Lucy Murugi. The two new entrants joined the 2nd petitioner as protesters with Mary Njoki as the 2nd and Lucy Murugi as the 3rd. The 1st petitioner will now be referred to as “the petitioner”.

4. This case was heard by way of *viva voce* evidence. The protesters were represented by Mugambi Njeru advocates while Beth Ndorongo & Co. continued appearing for the 1st petitioner.

5. The 1st protester testified that the deceased had three wives who all had children as follows:-

(i) Mary Njoki has two namely Eric Mutugi and Pius Kinyua.

(ii) Lucy Murugi has three namely Nancy Muthoni, Joseph Kinyua and Mercy Wanja.

6. The 1st protester further testified that she is aware that there is a purchaser of $\frac{1}{4}$ of an acre sold by the deceased and that she was not opposed to him getting his share in the distribution of the estate.

7. The 2nd protester said she married the deceased in 1983 and they were blessed with two children, Eric Mutugi and Pius Kinyua. The parties parted ways in 1986 and the protester returned to her parents home where she lives to date. One of her sons Pius Kinyua passed on in 2015 and was buried in the home of the 2nd protester's parents at Kithungururu. He is survived by a widow and 3 children. She supports the 1st protester that her children should be considered for inheritance in the estate.

8. The 3rd protester told the court that she married the deceased in 1986 and they parted ways in 1991. They had three children namely Nancy Muthoni, Joseph Kinyua and Mercy Wanja. She said her children are entitled to shares in the father's estate. Only one of her sons Joseph Kinyua who remained with his father has been considered for a share by the petitioner leaving the other two out.

9. The petitioner said she married the deceased in 1998 and they were blessed with three children namely E M, K M N and D M who are aged between 13 and 3 $\frac{1}{2}$ years. On joining the deceased in his home, she found Joseph Kinyua staying with the 1st protester. She took care of him and he is now over 18 years.

10. The deceased disclosed to her that the child was the son of one Lucy Murugi. She did not know the 2nd and the 3rd protesters. She considered Joseph Kinyua for a share in the estate but is opposed to other children and the 2nd and 3rd protesters claiming shares in the estate.

11. The petitioner told the court that the deceased fell ill and required very expensive treatment. He sold $\frac{1}{4}$ acre of land LR. 8708 to one Geoffrey Mwangi Ashford. An agreement was made between the parties and the land Board consent obtained. A deposit was paid and balance cleared after death of the deceased. She was desirous of the purchaser getting his share.

12. The 1st protester called the purchaser as her witness. He testified that he was approached by a friend and informed the deceased was selling land. The deceased wanted to raise funds for his medical treatment. He bought $\frac{1}{4}$ of an acre at Kshs.300,000/= leaving a balance of Kshs.200,000/= which he paid after the death of the deceased with the approval of the 1st protester, the 1st petitioner and the deceased's brother. He produced the agreement and the consent of the Land Board.

13. The issues for determination in this case are as follows:-

(i) Whether the 2nd and 3rd protester were wives of the deceased at the time of his death.

(ii) Whether the children of the 2nd and 3rd protesters are entitled to inherit from the deceased's estate.

14. The parties filed submissions in support of their arguments through their respective advocates. The protesters urged the court to adopt Section 40 of the Law of Succession Act that applies to distribution in polygamous households and distribute the estate according to the number of the children in each house. It was also argued that the 1st petitioner's share should be reduced in that she sold the portion of land to the purchaser and benefited from the proceeds personally.

15. The petitioner submitted that the 2nd and 3rd protesters did not adduce any evidence to prove that any marriage existed between them and the deceased. Neither did they produce any evidence to prove that the children purported to be of the deceased existed. For this reason, the court should not consider the protesters and their children as heirs of the estate.

16. The petitioner admitted she knows one child of the 3rd protester whom she found in the home and

took care of him. This is Joseph Kinyua to whom she has given a share together with herself and her own children. This evidence was supported by the protester that the child was sired by the deceased and the 3rd protester.

17. As for the two children Nancy and Mercy, they are said to have gone with their mother in 1991 when she parted ways with the deceased. The two are the 1st and 3rd born of the 3rd protester. The 3rd protester did not avail their birth certificates or other documents to give more information about their place of birth, dates of birth, the names of their parents among other facts.

18. However, the protester who is the mother of the deceased testified that the 3rd protester stayed with the deceased and got three children before she returned to her parents thereby giving room for another wife to come on board. The 1st petitioner said she did not know them for she did not find them in the deceased's home. The 3rd protester said that the 2nd protester was taken as a wife by the deceased which forced her to leave.

19. I find that even in the absence of any documentary evidence, the corroboration of 1st protester and that of the 2nd protester makes it highly probable that Nancy and Mercy were also children of the deceased along with Joseph Kinyua the 2nd born. In their capacity as children of the deceased, it follows that they are heirs in the estate.

20. The 2nd protester testified that she had two sons Eric and Pius. This evidence was supported by the 1st protester who actually named the two children as heirs of the estate. The court found the 2nd protester's evidence reliable in that regard. Pius has since died and is survived by his widow Catherine Kagendo. I am of the considered opinion that Eric and the late Pius are the children of the deceased and are entitled to inherit from the estate.

21. The 2nd and 3rd protester testified that the deceased and his parents had visited their homes and paid dowry. The 2nd protester said the deceased took edible gifts to her parents while the 3rd protester said she does not know what her parents were given. It is not in dispute that the protesters were not formally married by the deceased. He stayed with the 2nd protester for a period of 3 - 4 years and with the 3rd protester for a similar period.

22. The law requires that whoever alleges a fact must prove. The protesters did not adduce any evidence to prove existence of customary marriage which they tried to imply when they talked of payment of dowry or giving gifts to their parents. None of them called a customary law expert to state the customs, traditions or rites required to be fulfilled in a customary marriage. No witness was called to support the case of the protesters.

23. It was held in the case of **ATEMO VS FIMUJARO** where the issue of marriage under African Customary Law arose that:-

“...no valid marriage can be contracted without payment of marriage consideration (dowry). One who seeks to rely on an African customary law must prove by evidence the existence of such custom.”

24. The 2nd and 3rd protester ought to have called witnesses to prove that customary marriage existed between each one of them and the deceased during the respective periods. I find that the 2nd and 3rd protester failed to prove that they are widows of the deceased and therefore, have no right to inherit in the estate.

25. It is not in dispute that the petitioner is the widow of the deceased in this case having lived with him till his death since 1998 when she married him. All the protesters recognize her as such and she had gone an extra mile to look after the child left behind by the 2nd protester.

26. Although the protesters in their submissions alleged that the petitioner sold the ¼ of an acre portion to the purchaser personally and benefited from the proceeds. This was disapproved by her evidence and that of the purchaser who told the court that the deceased sold the land himself to raise cash for medical expenses for he was ill with a heart condition.

27. The purchaser paid him Kshs.300,000/= deposit which was utilized for his medical treatment such. The balance of Kshs.200,000/= paid later was used for the maintenance and education of her minor children who were being supported by the deceased. This was her evidence which was uncontroverted. The protesters' claim has no basis.

28. The protester made it very clear in her evidence that shedid not want to inherit any share in the estate and herself-imposed assignment was to fight for the rights of thedeceased's children who had been left out by thepetitioner. As for the purchaser, none of the parties wasopposed to him being given the plot he bought from thedeceased L.R. Gaturi/Weru/8708.

29. The assets of the deceased available for distribution are the following:-

(i) L.R. Gaturi/Weru/8708-0.10 ha. (¼ acre)

(ii) L.R. Gaturi/Weru/8709-0.10 ha. (¼ acre)

(iii) L.R. Gaturi/Weru/8710-0.56 ha. (1.38 acres)

30. Due to the fact that the land parcels are in different sizes and that there are several beneficiaries eligible forinheritance, I find that it will not be possible to achieveequality in the distribution. The law of succession is more concerned with equity as opposed to equality.

31. I proceed to distribute the estate as follows:-

(i) **L.R. Gaturi/Weru/8708-0.10 ha.**

Geoffrey Mwangi Ashford

(ii)**L.R. Gaturi/Weru/8709-0.10 ha.**

Eric Mukundi

Catherine KagendoIn equal shares

Nancy Muthoni

Mercy Wanja Nyaga

(iii)**L.R. Gaturi/Weru/8710-0.56 ha.**

Susan Njoki Mwangi

Joseph Kinyua

E M In equal shares

K M N

D M

32.Susan Njoki to hold the shares of her minor children (E M, K M N and D M) in trust for them until

they attain the age of majority.

33.The protest therefore partly succeeds and judgment is hereby entered in the foregoing terms.

34.It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF NOVEMBER, 2016.

F. MUCHEMI

J U D G E

In the presence of:-

Mr. Mugambi for protesters/Applicants

Ms. Muriuki for Ndorongo for petitioner/Respondent