REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO. 179 OF 2013

(IN THE MATTER OF THE ESTATE OF MWANIKI NDAMAIYU (DECEASED))

JULIUS MATHIA NDAMAIYU…….....PETITONER/APPLICANT

VERSUS

PETER NJOROGE MWANIKI……..OBJECTOR/PROTESTOR

JUDGMENT

The petitioner, Julius Mathia Ndamaiyu filed a summons for confirmation of grant dated 5th March, 2012 seeking to have the grant of letters of administration intestate made to him in respect of the estate of Mwaniki Ndamayu (deceased) confirmed. The summons was supported by his own affidavit sworn on 5th March, 2012.

In the affidavit in support of the summons, Mr Mathia Ndamaiyu has sworn that the grant of letters he seeking to have confirmed was made on 6th September, 2011. He deposes that the deceased was survived by eight dependants including two step brothers of whom he is one, four sons and two daughters.

According to the petitioner, the deceased's estate comprised four different parcels of land known as **Loc. 20/Gikindu Mirira/1334, Loc. 20/Gikindu Mirira/2695, Loc.20/Gikindu Mirira/2693** and **Loc. 20/Gikindu Mirira/2694**.

Prior to his death, the parcels of land aforesaid were a subject of a court dispute between the deceased and the petitioner and others; the dispute being, **Murang'a Principal Magistrates Court Civil Case No. 104 of 1991** was determined on 17th December, 1992. A copy of the order, rather than the decree, extracted from the judgment is exhibited to the applicant's affidavit.

When the deceased died his son Peter Njoroge assumed his place in the proceedings and contested, in the High Court, the subordinate court's decision in **Civil Appeal No. 10 of 1993**. The appeal was subsequently dismissed; a copy of the judgment of the High Court is exhibited on the affidavit of the applicant though it is not clear from the judgment itself when it was delivered.

According to the applicant, the subordinate court had ordered the deceased to get ten (10) acres of all the four parcels and the remaining twenty-eight (28) acres were to be shared amongst seven houses with each house getting four (4) acres. It is the applicant's case that the estate should be distributed in accordance with the judgment of the subordinate court which was apparently upheld by the High Court. Accordingly, land parcel known as **Loc. 20/Gikindu/Mirira/1893** and land parcel **Loc. 20/Gikindu/Mirira/1894** should be shared equally between Wanjiru Mathia representing the first house, John Mathia representing the second house, and Jacob Karanja Ndamaiyu representing the third house.

The fourth, fifth, sixth and seventh houses respectively represented by Samuel Kimani Ndamaiyu, Ndungu Njoroge, Ndamaiyu Mathia, Peter Maina and Julius Mathia Ndamaiyu should share out, in equal shares land parcels **Loc. 20/Gikindu/Mirira/2693 Loc. 20/Gikindu/Mirira/2694** and **Loc. 20/Gikindu/Mirira/2695.**

In his submissions, counsel for the applicant reiterated his client's depositions and urged the court to distribute the estate as proposed by the applicant.

In an affidavit sworn on 12th July, 2012 by Peter Njoroge who is one of the sons of the deceased, protested against the distribution of his estate as proposed in the affidavit in support of the summons for confirmation of grant. According to him, the deceased left behind four sons and three daughters and not two daughters as alleged by the applicant; he has also omitted the names of persons described as step-brothers and who have been listed in the applicant's affidavit as dependants of the deceased.

The four sons are named in Peter Njoroge's affidavit as John Mwangi, Eliud Ngubia, James Muli and Peter Njoroge. The daughters are Damaris Wamaitha, Mary Muthoni and Jane Njeri.

Again contrary to the list of assets stated in the applicant's affidavit as comprising the deceased's estate, the protester has listed assets in the deceased's as land parcel **Nos. Loc. 20/Mirira/2695** measuring **1.62 hectares; Loc. 20/Mirira/2694** measuring 2.64 hectares; **Loc. 20/ Mirira/2693** measuring **1.62 hectares**; and **Loc. 20/Mirira/164 measuring 5.4 hectares**.

According to the protestor, the land parcel known as **Loc. 20/Mirira/1334** does not exist; its register was closed upon its sub-division. Similarly, **Loc. 20/Mirira/2540** does not also exist since it was sub-divided into three other portions. As for **Loc. 20/Mirira/1893**, the protest says that that parcel of land belongs to one Anne Wanjiru and is not part of the deceased's estate.

It is the protestor's case that the deceased's estate did not comprise 38 acres of land as alleged by the applicant and that the deceased's land was never held in trust for his step brothers at any one time.

In the protestor's view, the deceased's estate should be distributed as follows:-

a. **Loc. 20/ Mirira/2693** measuring **1.62 hectares** should be given to James Muli absolutely;
b. **Loc. 20/Mirira/2694** measuring **2.64 hectares** should be shared out in the following respective shares:-

i. John Mwangi to get one **(1.0) acre**;
ii. Eliud Ngubia to get one **(1.0) acre**;
iii. Jane Njeri to get two**(2.0) acres**;
iv. Peter Njoroge to get two decimal five **(2.5) acres**.

c. **Loc. 20/Mirira/2695** measuring **1.62 hectares** to be given to Peter Njoroge absolutely; and,
d. **Loc. 20/Mirira/164** measuring **5.4 hectares** to be shared out in equal shares among John Mwangi, Eliud Ngubia, James Muli and Peter Njoroge.

The protestor has admitted that the applicant is the deceased's step-brother while the person named as Wanjiru Mathia in the applicant's affidavit as one of the beneficiary of the deceased's estate is the wife of the deceased's step-brother. The other four persons named as beneficiaries in the applicant's affidavit, that is, John Mathia, Samuel Kimani, Ndung'u Njoroge and Jacob Kamanda are also the deceased's step-brothers. The protestor does not know who Peter Maina, also named in the applicant's affidavit as a beneficiary, is.

In support of the protestor's case, counsel for the protestor urged that this court should invoke **section 38** of the Law of Succession Act and distribute the deceased's estate amongst his children only. That section provides:-

38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

Counsel for the protester urged that the petitioner cannot purport to execute the judgment in **Murang'a Principal Magistrates Court Civil Case No. 104 of 1991** in this succession cause. In any event, so he argued, there were two plaintiffs in the case, Julius Mathia Ndamaiyu who is the petitioner/applicant and Peter Mathia Ndamaiyu who is now deceased. It will also be impossible to execute the judgment because one of the parcels of land, being **Loc. 20/Mirira/1334,** which the plaintiffs were claiming on does not exist; its register had been closed prior to the deceased's death. It is therefore impossible that that particular parcel of land could form part of the deceased's estate.

In the same vein, the protester's counsel contended that land parcels **Loc. 20/Mirira/1893 and Loc. 20/Mirira/1894** are also not in the deceased's name and therefore these properties cannot be subject to distribution amongst the deceased's survivors as if they are part of the estate of the deceased. Counsel urged this court to distribute the estate as proposed by the protestor.

After considering the parties pleadings, their affidavits and their respective counsel's submissions, I find that there are four main issues which emerge; the first of this issue is whether the decree which is erroneously titled as an "order" arising from the judgment in **Murang'a Principal Magistrates Court Civil Case No. 104 of 1991** delivered on 17th day of 1992 is enforceable; secondly, if the answer to the first question is in the affirmative, whether the distribution of the deceased's estate is subject to the decree; thirdly, which of the deceased survivors are entitled to a share of his estate; and finally, how much of the deceased's estate is each of these survivors entitled to.

Before examining the first question it is necessary to have a snap view of the circumstances under which this decree was issued and the ensuing subsequent events. According to the judgment out of which the decree arose, Peter Mathia Ndamaiyu and Julius Mathia Ndamaiyu sued Mwaniki Ndamaiyu, who is the deceased whose estate is in issue in this succession cause, apparently for a declaration that land parcels numbers **Loc. 20/Mirira/2693, Loc. 20/Mirira/2694, Loc. 20/Mirira/2695** and **Gakindu/Mirira/1334** were registered in his name as a trustee for his family and that of the plaintiffs. The basis of their claim was that these parcels of land were only registered in Mwaniki Ndamaiyu's name because he was the eldest member of the family and therefore held these parcels in trust for himself and the rest of the members of the family of whom the plaintiffs were a part. The plaintiff sought to have their share of the land transferred to them.

The subordinate court upheld the plaintiff's claim and decreed as follows:-

"1. THAT the defendant holds lands in question-that is Loc. 20/Mirira/2695, Loc. 20/Mirira/2693, Loc. 20/Mirira/2694 and Loc.20/Mirira/1334 as trustee for himself and on behalf of seven other of his late father.

2. THAT in the circumstances the suit lands be shared between him and the plaintiffs.

3. THAT the four suit lands be shared out between the plaintiffs and the defendant in the following order:-

(a) the defendant to get 10 acres of the land.

(b) the plaintiffs to get 28 acres to be shared out between the other seven houses of their late father with each house getting (4) four acres.

(c) THAT the defendant do pay costs of the suit land to the plaintiffs.

DELIVERED this 17th day of December, 1992.

NYAGA NJAGE

ACTING S. RESIDENT MAGISTRATE

MURANG'A

ISSUED this 30th day of March, 2005

RESIDENT MAGISTRATE

MURANG'A"

The defendant appealed to the High Court against the judgment and the decree in **Nairobi Civil Appeal No. 10 of 1993**; the appeal was dismissed and in dismissing it, Shaikh Amin J (as he then was) directed that "*the matter be referred to the Learned Senior Resident Magistrate to work out modalities of implementation of his judgement in view of the time it took for the litigation to end*."

From the material presented before me, there is no evidence that the matter was ever dealt with by the learned senior resident or any other magistrate as directed by the learned judge; neither is there any evidence that the plaintiffs or any other party in the matter took any action to execute the judgment of the subordinate court.

The evidence available shows that as at the time the applicant lodged his petition for the grant of letters of administration intestate in the year 2010, at least three of the parcels of land were still registered in the deceased's name; these are, **Loc. 20/Mirira/2693, Loc. 20/Mirira/2694**, **Loc. 20/Mirira/2695**. The registration in respect of parcel number **Loc.20/Mirira/1334** had been closed because according to a copy of the certificate of official search dated 11th July, 2012 and attached to the objector's affidavit of protest, that parcel had been sub-divided into parcels number **1893** and **1894**.

It is therefore not in dispute that the judgment and its appurtenant decree have never been executed since 1992 when the judgment was delivered; in the premises, the law that I find most suitable for guidance on the viability of this judgment as far as the issues before me are concerned is **section 4 (4)** of the **Limitations of Actions Act, Chapter 22 Laws of Kenya**. This section provides as follows:-

4. Actions of contract and tort and certain other actions

(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

The first part of this provision is the most relevant to the issue at hand and, in my view, is fairly self-explanatory; that no action can be taken upon a judgment after twelve years from the date the judgment was delivered. In the context of this provision, the word "action" includes execution proceedings which the decree holder ought to have initiated to actualise his judgment. That "action" as applied in **section 4(4)** includes execution proceedings was so held by the **Court of Appeal** in **Civil Appeal No. 2 of 1980, Njuguna versus Njau**. The Court (Madan JA) said:-

"***I say that in the context of section 4(4) of the Limitations of Actions Act the word "action" is not intended to bear a restricted meaning and it includes all kinds of legal proceedings including execution proceedings, and the time limit for the execution of a judgment is twelve years."***

If that be the case, it follows that a judgment older than twelve years, is deficient of any legal effect and therefore of no consequence; its potency diminishes upon attaining the age of twelve. I would therefore

answer the first question on whether the judgment is enforceable in the negative; if no action can be taken on it, it simply means it cannot be executed.

As noted, the answer to the first question will obviously influence the answer to the second question which is whether the distribution of the deceased's estate is subject or should be made subject to the judgment or the decree thereto. If the judgment has lost its efficacy and cannot be acted upon, I do not see how it can influence the distribution of the deceased's estate. If the petitioner could not execute the judgment within the limitation period, he cannot purport to do it through a succession cause, as an alternative means of making up for what he ought to have done within the required time; the inevitable answer to the second question therefore is, the deceased's estate can and will be distributed independent of the judgment in **Murang'a Principal Magistrates Court Civil Case No. 104 of 1991.**

The third question is who, amongst the deceased's survivors is entitled to share of his estate.

In both the petition and the affidavit in support of the summons for confirmation of grant, the petitioner listed eight persons as survivors of the deceased; two of these survivors, of whom the applicant is one, are described as step-brothers of the deceased while the rest are his children. In his proposal on how the estate should be distributed, the applicant has gone further to allocate part of the estate to other people besides those he has named "dependants" of the deceased.

The objector, on the other hand, has in his affidavit, listed the deceased's children as the only survivors of the deceased who are entitled to benefit from his estate; he does not recognise the deceased's step-brothers or any of the other persons that the applicant has proposed to allocate a share of the estate as persons who are entitled to any share of this estate.

The answer to the question as to whom and how the intestate estate of a deceased person should be distributed is beyond peradventure; **section 38** of the Law of Succession Act addresses this question and provides that:-

38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

Section 41 deals with the issues of distribution of the estate in a polygamous family set up and the shares of children below eighteen years being held in trust for them while **section 42** talks of taking into account whatever an intestate may have given to a child during his lifetime in determining the share of the net intestate estate accruing to the child. Both sections are not relevant to the issue at hand.

Without belabouring the point **section 38** of **the Act** squarely answers the final issue emerging from the arguments of the contesting parties; that the intestate's estate should be distributed between his surviving children equally.

From the evidence available, the ascertained deceased's intestate estate comprises land parcels **Loc. 20/Mirira/2693, Loc. 20/Mirira/2694**, **Loc. 20/Mirira/2695**. The objector deposed that apart from the three parcels the deceased also owned land parcel **Loc.20/Mirira/164** comprising **5.4 hectares**; this contention was neither challenged nor contradicted.

I have considered the objector's proposal of how these parcels should be distributed amongst the deceased's children and noted that the disparity in the proposed shares; no explanation has been proffered for this disproportionate distribution and neither is there any evidence to demonstrate that all the deceased's children consented to the distribution as proposed by the objector. I would, in the circumstances, invoke **section 38** of the **Act** and order that land parcels **Loc. 20/Mirira/2693, Loc. 20/Mirira/2694**, **Loc. 20/Mirira/2695 and Loc.20/Mirira/164** be divided equally amongst the surviving children of the deceased.

For avoidance of doubt, land parcels numbers Loc**. 20/Mirira/2693, Loc. 20/Mirira/2694**, **Loc.**

20/Mirira/2695 and Loc.20/Mirira/164 be divided equally amongst the following deceased's children:-

1. John Mwangi
2. Eliud Ngubia
3. James Muli
4. Peter Njoroge
5. Damaris Wamaitha
6. Mary Muthoni
7. Jane Njeri

It is so ordered.

Dated and signed at Nyeri this 19th day of November, 2014

Ngaah Jairus

JUDGE

Read and delivered in open court this 13th day of February, 2015

H.P. Waweru

JUDGE