



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 100 OF 2011

(IN THE MATTER OF THE ESTATE OF THE LATE MWENENIA KAGUMBA (DECEASED))

FRANCIS NDUNGU MWENENIA.....PROTESTOR

-VERSUS-

ELIJAH NGUNJIRI MWENENIA.....APPLICANT

JUDGMENT

The protestor and applicant are joint administrators of the estate of Mwenenia Kagumba (deceased) who died domiciled in the Republic of Kenya on 29th November, 1982.

By a summons for confirmation of grant dated 24th July, 2012, the applicant sought to have the grant confirmed and the land parcel known as **Title No. Tetu/Kabage/30** comprising the deceased's estate (herein the "suit property") distributed in equal shares amongst three of the deceased's survivors named as Agnes Muthoni and Naomi Nyawira Gatumwa both of whom are the deceased's daughters-in-law and the applicant himself.

In his affidavit in support of the summons for confirmation of grant, the applicant named the deceased's survivors as Francis Kagumba (the protestor), Elijah Ngunjiri (the applicant), David Murigu, Daniel Mathenge, Joseph Wambugu, Florence Mumbi and Mary Wangechi.

While he acknowledged that the applicant was survived by seven children he insists that the deceased devised part of his property *inter vivos* to two of those children and as such they are not entitled to a share of the remainder of the deceased's estate which is the subject of this succession cause. Those survivors alleged to have benefited from the deceased's estate in his lifetime are the protestor himself and Daniel Mathenge.

According to the applicant, it was the wish of the deceased that the remainder of the deceased's estate be shared out amongst David Murigu Mwenenia, Florence Mumbi Mwenenia and Joseph Wambugu Mwenenia. As fate would have it, all these beneficiaries singled out by the applicant died before the distribution of the estate; it is for this reason that the applicant has now proposed to have the estate shared out amongst the intended beneficiaries' widows and himself. As for Florence Mumbi Mwenenia, the applicant has deposed that that she died without any heir and, presumably, it is her share that the applicant has proposed to inherit.

The protestor, on the other hand, does not agree with the applicant's proposed distribution of the

deceased's estate; according to him, the deceased left a will in which he expressed his wishes on how he intended the estate to be distributed and had in fact, prior to his demise, sub-divided the land comprising the estate into five portions to be shared out among Elijah Ngunjiri, David Murigu, Daniel Mathenge, Florence Wanjiru and Joseph Wambugu. The protestor denied that the deceased had, during his lifetime, devised to him or any other person his property that would, legally, have been taken into account in the distribution of the net intestate estate.

At the hearing of the summons for confirmation of grant and the protest the protestor acknowledged his siblings as David Mathenge, Elijah Ngunjiri, Joseph Wambugu (deceased), David Murigo (deceased), Flora Wanjiru (deceased) and Mary Muthoni. He reiterated that before his death, the deceased had divided the suit property to be shared out amongst each of these siblings except Mary Muthoni. The protestor urged this court to order the division of this land into parcels of 1.1 acres each so that each of his five siblings, except for Mary Muthoni, would get an equal share. He testified that he was not interested in any share of the estate, apparently because he has his own parcel of land which he claimed was bestowed upon him by the clan.

The protestor's brother Daniel Mathenge Mwenenia also disputed the distribution of the estate as proposed by the applicant; in his view the land comprising the estate should be shared out among Francis Ndungu Mwenenia, Florence Wanjiru Mwenenia, Elijah Ngunjiri, David Murigo, Daniel Mathenge and Joseph Wambugu. Mr Mathenge testified that he has land in Endarasha but denied that it was given to him by his late father; he said that it was his mother who gave it to him and that he has been residing on that parcel of land since 1977.

The applicant, in his testimony insisted that land parcel number **Tetu/Kabage/30** should be shared out amongst three of the deceased's survivors and these are himself, Agnes Muthoni and Joseph Wambugu; however, since Joseph Wambugu was deceased, the applicant proposed to have his share given to his wife and children. The applicant's case was that considering that Francis Ndirangu and Daniel Mathenge have land elsewhere, they are not entitled to a share of the deceased's estate; he, however conceded that he does not have any evidence to demonstrate that the land which Francis Ndirangu and Daniel Mathenge owned initially belonged to the deceased.

I have considered the respective parties' cases as more particularly expressed in their respective testimonies, pleadings and affidavits. The dispute between the parties is made against the backdrop of the undisputed fact that the grant of letters of administration intestate in respect of the estate of Mwenenia Kagumba jointly made in the names of the contesting parties was based on the petition filed by the protestor on 16th March, 2011. Of note in that petition are the persons who have been identified and listed as the survivors of the deceased and the extent of the deceased's estate; these two aspects of the estate appear to me to be undisputed. As a matter of fact, when the court resolved the dispute as to whom between the contesting parties was entitled to the grant of letters of administration of the deceased's estate, it ruled that in its view, the only contest was in respect of distribution of the estate.

The petition identified the following persons as the survivors of the deceased:-

1. Francis Ndungu Mwenenia (son aged 73)
2. Elijah Ngunjiri Mwenenia (Son aged 70)
3. Florence Wanjiru Mwenenia (daughter aged 68)
4. Daniel Mathenge Mwenenia (son aged 70)
5. Mary Muthoni Mwenenia (daughter aged 55)
6. Mary Muthoni Murigu (daughter in law aged 55)
7. Charles Muthui Wambugu (grandson aged 26)

As to the assets of the estate, the land parcel known as **Title No. Tetu/Kabage/30** measuring approximately 5.5 acres was identified as the only asset in the estate. The deceased had no liabilities.

It follows, therefore, that having agreed on the identity of the beneficiaries and the extent of the deceased's estate, the only question for determination between the parties is the proportion in which the estate should be shared out amongst the deceased's surviving survivors. My description of the survivors as 'the surviving survivors' is deliberate because it has been deposed, and these depositions have not been controverted, that at least one of the deceased's children, Florence Mwenenia died, apparently after the deceased's demise while two of his sons appear to have predeceased him; these are David Murigu Mwenenia and Joseph Wambugu Mwenenia who, according to the petitioner, were survived by their wives, Agnes Muthoni Murigo and Naomi Nyawira Gatumwa respectively. I note, however, that of the two widows only the former is listed amongst the survivors of the deceased; she is identified as Mary Muthoni Murigo and I suppose, in the absence of any evidence to the contrary, she is the same person as Agnes Muthoni Murigo.

In the letter from the Chief of Muhoya location where the deceased hailed from and which letter was filed together with the petition for the letters of administration intestate, it is also clearly indicated that David Murigu Mwenenia and Joseph Wambugu Mwenenia are deceased.

The demise of some of the potential beneficiaries of the deceased's estate prior to and after his own demise leaves the survivors listed in the petition as the potential beneficiaries of his estate except for Florence Mwenenia who is said to be deceased. In particular, these survivors are:-

1. Francis Ndungu Mwenenia
2. Elijah Ngunjiri Mwenenia
3. Daniel Mathenge Mwenenia
4. Mary Muthoni Mwenenia
5. Mary Muthoni Murigu
6. Charles Muthui Wambugu

Of these people, Francis Ndungu Mwenenia has renounced his right to inheritance by declaring that he does not want any share of the deceased's estate since he has his own land which he was given by his clan. This leaves us with five potential beneficiaries three of whom are the deceased's children, while the other two are his daughter in law and grandson respectively.

In the result, the distribution of the deceased's estate in these circumstances would be governed by **section 38** of the **Law of Succession Act**. This provision of the law states as follows:-

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 is of little relevance here since it deals with the property held in trust for persons who are not of full age; as noted, the deceased's children are all advanced in age. **Section 42** is pertinent to the extent that it deals with the question of whether the deceased had, during his lifetime, paid, given or settled any property to or for the benefit of a child. This question was raised by the applicant who alleged that the protestor had benefitted from the deceased's property during his lifetime. However, nothing much turns on this question as the protestor, as earlier noted, has renounced his right of inheritance.

Section 38 of the Act is categorical that where an intestate has left no spouse the net intestate estate shall devolve upon the surviving child or children. Apart from the protestor who has renounced his entitlement,

the only other children of the deceased upon whom the estate would devolve under this provision of the law are Elijah Ngunjiri Mwenenia, Daniel Mathenge Mwenenia and Mary Muthoni Mwenenia.

Although one Agnes Muthoni and one Naomi Nyawira have been stated in the parties' pleadings and in their testimony to be the deceased's daughters-in-law, and indeed the former was listed as one of the deceased's survivors, there is no provision for them, under **section 38** of the Act. They could, in my view, have come in the petition as personal representatives of the deceased's persons under whose rights they are claiming a share of the deceased's estate; however, there is no evidence that either of these two persons took out any representation on behalf of the deceased and obtained this court's authority to pursue the interests of any of the deceased persons in the deceased's estate under which they are claiming.

It would follow therefore, that if **section 38** of the Act is applied strictly, the deceased's daughters-in-law would be left out of the estate. I have noted, however, that both the contestants have embraced the deceased's daughters-in-law as their late brother's wives. The petitioner/protestor has in fact, in his proposal, made a provision for each of his deceased sibling in the distribution of the deceased's estate; these shares can only go to the deceased's respective wives, subject of course to the intestacy provisions of the Law of Succession Act. The applicant on the other hand is categorical in the affidavit in support of the summons for confirmation of grant that both Agnes Muthoni Murigu and Naomi Nyawira Gatumwa should get what their respective late husbands would have been entitled to.

In these circumstances, I would opine that failure to take out grant of representation albeit limited only to pursuing their late husbands' interests in the deceased's estate is a technicality which can be overlooked for the sake of the wider interests of justice. The deceased men lived with their wives on the suit property; they eventually died and were interred on the same property leaving behind their wives. These widows have not known any other home apart from the suit property; it would be a mockery of justice if, merely for technical reasons, they suddenly find themselves without a home and nothing to lay hold on as property of their own. I would in this regard invoke **article 159(1) (d)** of the Constitution which prods this court to exercise judicial authority without undue regard to procedural technicalities. In my humble view, to deprive these widows and their households of what their departed husbands would rightly have been entitled to would be tantamount to sacrificing justice at the altar of legal technicalities.

For the reasons I have stated I would conclude that the persons entitled to benefit from the deceased's estate are as follows:-

1. Elijah Ngunjiri Mwenenia,
2. Daniel Mathenge Mwenenia,
3. Mary Muthoni,
4. Agnes Muthoni Murigu, and
5. Naomi Nyawira Gatumwa.

It was intimated that the deceased's only surviving daughter Agnes Muthoni Murigu was not interested in any share of the estate; however, she did not testify and there is nothing on record to suggest that she had renounced her right. The court will give her share and remind her that she reserves the right to transfer it to any other beneficiary or deal with it as she deems appropriate.

In conclusion and for the reasons I have stated I would order that land parcel **Title Number Tetu/Kabage/30** shall be shared out in equal shares amongst the following persons:-

1. Elijah Ngunjiri Mwenenia,
2. Daniel Mathenge Mwenenia,

3. Mary Muthoni,

4. Agnes Muthoni Murigu, and

5. Naomi Nyawira Gatumwa.

The grant of letters of administration intestate in respect of the estate of Mwenenia Kagumba (deceased) issued by this court on 3rd February, 2012 is confirmed in the forgoing terms. Parties will bear their respective costs. It is so ordered.

Signed, dated and delivered in open court this 17th April, 2015

Ngaah Jairus

JUDGE