



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 177 OF 2013

(IN THE MATTER OF THE ESTATE OF WANGECHI WANGOMBE alias WANGECHI w/o WANGOMBE)

ANNE NYAWIRA NGUMBA.....1ST PETITIONER

SHELIMITH WANGARI MUGO.....2ND PETITIONER

VERSUS

JEREMIAH JOSHUA WANJOHI.....PROTESTOR

JUDGMENT

The deceased, Wangechi Wang'ombe died on 11th August 2010 at the age of 81; she was then domiciled in Kenya and her last place of residence was at Tetu in Nyeri County.

On 8th March, 2013 the protestor took out a citation citing the petitioners to accept or refuse letters of administration of the deceased's estate or show cause why the same should not be issued to the protestor.

In response to the citation, the protestors entered appearance and at the same time petitioned for probate of the deceased's written will the original copy of which was annexed to the petition.

In the affidavit in support of the petition for probate of the letters of administration, the petitioners swore that the deceased died testate and left a valid written will dated 12th October, 1999. They also swore that that the deceased's assets which now constitute her estate are a land parcel known as **Tetu/Unjiru/48** measuring approximately **3.11 hectares** and a quarter share of the property referred to as Title Number **Nyeri/Municipality/Block 3/218**. The deceased is said to have been survived by the petitioners and the protestor; other survivors are stated to be **Grace Wanjiru Wangombe, Hezron Wangai Wangombe, James Gitonga Ndegwa** and **Elizabeth Wangui Ngunjiri** though the petitioners did not disclose their relationship with the deceased.

Although, as noted, the protestor cited the petitioners to take letters of administration in respect of the deceased's estate, he still filed his own petition by way of cross-petition for representation of the same estate even after the petitioners lodged their petition. In the cross-petition he described himself as the only son of the deceased while the petitioners together with one **Grace Wanjiru Wangombe** are described as the deceased's daughters; according to the protestor, these are the only survivors of the deceased. It would appear at the outset that the petitioners and the protestor were not at consensus as to who the rightful survivors and beneficiaries of the deceased's estate are.

The record shows that by a consent filed in court on 4th November, 2013, both the petitioners and the

protestor agreed to be appointed joint administrators of the deceased's estate and that either of them was at liberty to apply for the confirmation of the grant. This consent was endorsed by the court on 4th November, 2013 when the ***grant of letters of administration with written will annexed*** was made to the three contesting parties.

Curiously, despite the fact that the petitioners lodged the petition for letters of administration annexed with the will in which the wishes of the deceased on the distribution of her estate were expressed, they still filed a summons for confirmation of grant dated 16th January, 2014 seeking for the order that:-

“That the grant of probate/or letters of administration intestate made to the said Annie Nyawira Ngumba, Shelmith Wangari Mugo and Jeremiah Joshua Wanjohi in this matter on 4/11/2013 be confirmed notwithstanding that six months from the date of the grant shall not have expired.”(Underlining mine).

They also sought to have the costs in the cause. In the affidavit in support of the summons, they proposed to have the estate distributed contrary to the intentions of deceased as expressed in the will which, as noted, the petitioners themselves filed together with the petition.

Not surprisingly, the protestor took issue with this summons and filed an affidavit protesting against the confirmation of grant in terms proposed by the petitioners. He deposed that the deceased died testate and this was clear from the petitioner's own petition for letters of administration with the will annexed; according to the protestor none of the parties has contested the validity of that will and since the deceased's intentions regarding the distribution of her property are evident, the will should be enforced as it is and it is not open to the petitioners to suggest the distribution of the deceased's estate contrary to her wishes.

In the protestor's view only two properties were the subject of this cause and these are the deceased's interest in **LR No. Nyeri/Municipality/Block 3/218** and **LR. No. Tetu/Unjiru/48**. As far as the property known as **LR. No. Nyeri/Municipality/Block 3/218** is concerned, the protestor swore that the deceased owned a quarter share of the property which she inherited from her husband, the protestor's (and petitioners') father, who co-owned this property together with three other persons in equal shares. He explained in his affidavit that this property was initially registered as **LR. No. Nyeri/Municipality/Block 111/84** but was later sub-divided into different and distinct portions one of which was now registered as **LR. No. Nyeri/Municipality/Block 3/218**. This property, in the petitioner's view, should be shared out amongst the deceased's survivors as stipulated in the will. Similarly, land parcel referred to as **L.R. No. Tetu/Unjiru/48** should also be shared out as indicated in the will with **Gerald Muruthi Wanjohi, Andrew Maina Wanjohi, Nancy Wangechi Wanjohi, Fiona Wanjiru Wangai and Irene Nyawira Wanjohi** sharing **3.5 acres** while **Joshua Wangombe Wanjiru** and **Samuel Munyori Wanjiru** getting **2.0 acres** and **2.3 acres** respectively.

The petitioners' petition and the protestor's protest clearly show that it is not in dispute that the deceased died testate; she left behind a valid written will which, in its pertinent parts on the distribution of the deceased's immovable assets states as follows:-

I WANGECHI WANGOMBE ID/3725675 of Post Office Box Number 157, Nyeri in the Republic of Kenya hereby revoke all former wills and testamentary disposition made by me and declare this to be my last will.

1. I Declare that land title number TETU/UNJIRU/48 is registered in my name and the said land comprises 7.80 acres or thereabouts

2. THAT I give devise and wish to state that the said land I give devise and bequeth (sic) the said land title number TETU/UNJIRU/48 to the following:-

(i) To Jeremiah Wanjohis (sic) children to be registered all of them and not their father Jeremiah Wanjohi a portion of 3.5 acres out of the said land title number TETU/UNJIRU/48.

(ii) To Joshua Wangombe Wanjiru to hold 2.0 acres out of the said land title number **TETU/UNJIRU/48** and that the said portion of **2.0 acres** to be on the Nyaikwa area.

(iii) That the remaining portion of **2.3 acres** to be shared equally between;

(a) **Jeremiah Wangai Wanjiru.**)

(b) **Samuel Munyori Wanjiru.**).....**2.3 acres**

3. I FURTHER state that I was given half share of **Plot Number NYERI/MUNICIPALITY/BLOCK 111/84** by my late husband one JOSHUA WANGOMBE WANGAI and the transfer has not been done in my name. I GIVE DEVISE AND BEQUETH (sic) my share on the said plot number **NYERI/MUNICIPALITY/BLOCK 111/84** to my four children:-

1. Jeremiah Wanjohi (my son)

2. Maryanne Ngumba (My daughter)

3. Grace Wanjiru (My daughter)

4. Shelmith Wangari Mugo (my daughter)

In the face of this will and considering that the **grant of letters of administration with written will annexed** was, with the consent of the parties, made to the petitioners themselves, their summons for confirmation of “**the grant of probate/or letters of administration intestate**” was obviously misconceived and inconsistent with the grant that had been made in their favour. As the three quoted clauses in that will would suggest, the testator had expressed her intentions on how the her estate should be distributed upon her demise and since the will was not contested, the distribution of the deceased’s estate cannot be subject to any different proposal other than what the testator herself desired; there is simply no room for application of the intestacy provisions in the confirmation proceedings in respect of the deceased’s estate and more particularly, the distribution thereof. This appears to be the meaning of the proviso to **section 71** of the **Act**, whenever the issue of distribution of the estate arises in confirmation proceedings. That section states:-

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) ...

(a)...

(b)...

(c)...

(d)...

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. (Underlining mine).

Where there is a valid written will and, the wishes or intentions of the deceased are clear as to the sharing out of his or her property, the question as to the respective identities and shares of all persons beneficially entitled to that property would not arise; according to this section, it is only in cases of *intestacy* that the

court may inquire into the question of the identities and shares of the persons beneficially entitled. Whenever there is a valid will, as is the case here, it is up to the court to give effect to the will subject, of course, to such applications as may be necessary, for instance the application for reasonable provisions for dependants not adequately provided for in the will under **section 26** of the **Act**.

In my humble view, the deceased's will is such a will that is unambiguous and is clear about what the deceased must have intended concerning the distribution of her estate. However, I have noted from the record that when parties took directions on the disposal of the pending summons for confirmation of grant and the protest, the court asked them to file written submissions in respect of the property described in the will as "**plot number Nyeri/Municipality/Block 111/84**".

These directions were taken before I was seized of this matter but looking at the parties' submissions, the contention which the court intended to resolve here must be the dispute about the persons rightly entitled to share this particular asset of the deceased's estate. Its existence at the time of the deceased's demise may also have been in question.

The petitioners contend that the property was initially registered in the name of the deceased's husband who allegedly left behind a will on how it should be distributed; an unmarked copy of the purported will was attached to the petitioner's counsel's submissions. Counsel submitted that based on the deceased's husband's will, the property should be distributed according to his wishes rather than those of his widow. This argument does not carry any weight and should be discounted outrightly because this cause is about the succession to the estate of Wangechi Wangombe and not that of her husband.

I must also say here that the manner the purported will was introduced to the proceedings by the petitioners' counsel leaves a lot to be desired; I say so because, the petitioners have not made any reference to the so-called will anywhere in their pleadings or affidavits, including the affidavit in support of the summons for confirmation of grant. A late introduction of this document into the proceedings through what I would consider as unorthodox means is simply mischievous or it is just out of sheer ignorance on the part of the petitioners' counsel. This document is, to say the least, a foreign document which does not merit any attention in this cause; it can only be expunged from the record and it is hereby so expunged.

Coming back to the property in issue, the protestor, on his part, swore that this property was initially registered as **LR. No. Nyeri/Municipality/Block 111/84** and that it only evolved into **LR. No. Nyeri/Municipality/Block 3/218** when it was divided and registered as distinct parcels of which this latter parcel is one; this information by the protestor was not controverted by the petitioners and, therefore, there is no reason to doubt it; in any event, there is nothing on record to suggest that the parcel referred to as **LR. No. Nyeri/Municipality/Block 111/84** still exists.

A certificate of official search in respect of title number **Nyeri/Municipality/Block 3/218** filed in court on 8th March, 2013 shows that this particular property is registered in the names of four people; they are the deceased, **Wangechi Wangombe, Jeremiah Joshua Wanjohi, Hezron Wangai Wangombe** and **James Ngotho Wangombe**. The registration of this property in the proprietors' names was effected on 4th April, 2001, more than a year after the deceased had written her will. It is therefore probable as suggested by the protestor that this property was initially registered as **LR. No. Nyeri/Municipality/Block 111/84** hence the deceased's description of it as such in her will; it is also probable, as stated by the protestor, that this property was subdivided and the deceased's interest in that property was ultimately registered in one of the sub-divisions registered as **Title Number Nyeri/Municipality/Block 3/218**. It follows therefore reference the deceased's interest in "**plot number Nyeri/Municipality/Block 111/84**" in the deceased's will must have meant her interest in **Title Number Nyeri/Municipality/Block 3/218**. It is this interest that is subject to distribution and this court can do no better than effect the deceased's wishes in respect of this particular interest which is that the deceased's share in **Title Number Nyeri/Municipality/Block 3/218** shall be shared equally between her children, to wit:-

1. Jeremiah Wanjohi

2. Maryanne Ngumba

3. Grace Wanjiru

4. Shelmith Wangari Mugo

In view of the foregoing, my conclusion is that the protestor's protest was well taken and I am persuaded that it ought to be upheld; in that same vein, I would dismiss the petitioners' summons dated 16th January, 2014. For completeness of record, however, I hereby hold and order that the deceased's estate be distributed in accordance with her wishes as captured in her will dated 12th October, 1999 and for avoidance of doubt:-

1. Land parcel described and registered as Title Number **TETU/UNJIRU/48 measuring 7.8 acres** shall be shared out as follows:-

(a) Jeremiah Wanjohi's children shall get **3.5 acres**.

(b) Joshua Wangombe Wanjiru shall get **2.0 acres** at Nyaikwa area.

(c) Jeremiah Wangai Wanjiru and Samuel Munyori Wanjiru get the remaining **2.3 acres** in equal shares.

2. Land parcel described and registered as **Title Number NYERI/MUNICIPALITY/BLK 3/218** shall be shared out equally amongst the deceased's children named as follows:-

(a) Jeremiah Wanjohi

(b) Maryanne Ngumba

(c) Grace Wanjiru

(d) Shelmith Wangari Mugo

The grant will be confirmed in the foregoing terms; parties will bear their own costs.

Signed, dated and delivered in open court this 13th day of April, 2015

Ngaah Jairus

JUDGE