



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2420 OF 2010

IN THE MATTER OF THE ESTATE OF KIBE KIHAGURU MUHOHO (DECEASED)

JUDGMENT

1. This case relates to the estate of Kibe Kihaguru Muhoho, who died on 6th August, 2003.
2. Representation to his estate was sought *vide* a petition for grant of letters of administration intestate filed in the case on 2nd December 2010 by Esther Wangui Kibe, Alice Wangari Kibe and Jane Muthoni Kibe, in their capacities as daughters of the deceased. According to their affidavit in support of the petition, the deceased died possessed of a property known as Kiambaa/Kanunga/1469 and was survived by eight (8) individuals, being Beatrice Wambui Ndungu, Christopher Njenga Kibe, Patrick Kamau Kibe, Mary Wanjiru Wando, Monica Wanjiru Githuka, Mary Muthoni Mwangi, Susan Wanjiru Mwaura and Esther Wanjiku Mburu. Curiously, the three petitioners did not list themselves as survivors of the deceased.
3. There is a letter on record, lodged with the petition, from the Chief of Waguthu Location, dated 15th November 2010, where the survivors of the deceased are listed as Esther Wanjiru Kibe, Alice Wangari Kibe, Jane Muthoni Kibe, Esther Wanjiku Mburu, Beatrice Wambui Ndungu, Christopher Njenga Kibe, Patrick Kamau Kibe, Mary Wanjiru Wando, Monica Wanjiru Githuka, Mary Muthoni Mwangi and Susan Wanjiru Mwaura. Three of the daughters are listed as unmarried, while the rest are said to have been married. Three are listed as daughters-in-law, where one married daughter is said to be dead.
4. The petition was gazetted on 20th May 2011, *vide* gazette notice number 5433, and a grant of letters of administration was duly made to the parties on 13th July 2011.
5. The grant was confirmed on 22nd January 2013 through an application dated 21st August 2012. The asset, Kiambaa/Kanunga/1469, was devolved in equal shares to the three administrators, the unmarried daughters of the deceased. Certificate of confirmation of grant was duly made to the administrators dated 22nd January 2013.
6. On 29th August 2013, Beatrice Wambui Ndungu filed a Summons dated 29th August 2013 seeking revocation of the grant confirmed on 22nd January 2013. It was premised on the grounds that the grant was obtained fraudulently, it left out some survivors and that her consent to the application for grant had not been obtained.
7. The application was responded to by one of the administrators, Esther Wangari Kibe. She asserts that the grant had not been obtained fraudulently, as the applicant had always been aware of the proceedings. She adds that the deceased had distributed the property in question and at the time the applicant had not objected to the proposed distribution.

8. Directions were given on 26th March 2014 that the said application would be disposed of by way of viva voce evidence.
9. The matter was heard for three days – 25th June 2014, 16th September 2014 and 2nd March 2015. The applicant testified and called one witness, while the respondents testified and called two witnesses.
10. The oral evidence of the witnesses did not dwell on the process of the making of the grant, but rather on whether the applicant was entitled to a share in the estate of the deceased, which was in keeping with the directions given on 26th March 2014 by Kimaru J.
11. The testimonies were to the effect that the deceased had distributed his property amongst his sons, and then explained why the sons or their survivors had no objection to the distribution of 22nd January 2013. The remaining property – Kiambaa/Kanunga/1469 – was to be distributed amongst the daughters. There was convergence on these two matters. The divergence arose regarding how the remaining property was to be distributed amongst the daughters.
12. The position taken by the administrators, backed by their brothers and/or the brothers survivors, was that he deceased had said that the said property would be shared amongst those of his daughters who would be unmarried as at the date of his death. It transpired that it was the administrators who were unmarried at the time of his death, hence the distribution of the property equally between them. They explained that the deceased had said that the married daughters were adequately catered for at their respective husbands homes and it was the unmarried daughters who had no access to property.
13. The applicant on her part, supported by one of the other daughters, confirmed that the deceased had said that the property would be shared by the daughters as he had already given land to the sons.
14. From the material before me, I am satisfied that the grant herein was obtained regularly. The only issue for determination is whether the applicant and the other married daughters of the deceased are entitled to a share in the estate.
15. From the recorded evidence, it is common ground that the deceased had distributed his estate *inter vivos* amongst his sons. Indeed, the surviving sons and the widows of the dead sons of the deceased laid no claim to the remaining asset. It is also common ground that the remaining asset was to be shared amongst the daughters. The issue is which daughters of the deceased ought to get a share, all of them or just the unmarried ones.
16. According to Part V of the Law of Succession Act, property ought to be distributed equally amongst the children, unless, of course, there was *inter vivos* distribution. Such *inter vivos* distribution cannot be revisited during succession, and anyone who is dissatisfied with it can only challenge the distribution of the property during lifetime of the deceased.
17. The sons were settled. It is the daughters who remained unsettled and therefore entitled to the remaining asset. Was it open to the deceased to give directions on the distribution as between the daughters? Yes, he still had freedom of testation under Section 5 of the Law of Succession Act. He could by written or oral will distribute the property as between his daughters as he willed.
18. It is alleged that he gave directions on the disposal of the remaining asset as between the daughters. None of the persons who gave evidence was able to tell the date when the same happened. Curiously, none of them appeared to say that the directions had the binding effect of a will.
19. The petition lodged in court on 2nd December 2010 was for letters of administration intestate, and the grant made on 13th July 2011 was for simple administration. There was no allegation of any will, written or oral. Likewise, when the applicant lodged the summons dated 29th August 2013, she did not allude to any will.

20. As there is no evidence of any will having been made by the deceased, the claim that the deceased instructed that the remaining asset should be shared equally between the three unmarried daughters cannot hold. If any such directions were ever given, the same did not amount to a will as there was no material placed before to support existence of a will written or otherwise. In any event, no evidence was adduced to bring the matter within Section 9 of the Law of Succession Act which governs oral wills.

21. The evidence placed before me fell short of establishing an *inter vivos* distribution of the said asset, Kiambaa/Kanunga/1469, in favour of the four unmarried daughters or even to all the daughters of the deceased. However, as there is consensus that the property shall go to the daughters only so it shall be.

22. That being the case, the estate of the deceased shall be shared equally between all the daughters of the deceased, whether married or not. Any married daughter who does not wish to take a share should be at liberty to renounce her right or entitlement to a share.

23. In the end, I order as follows-

1. **That the confirmation orders made on 22nd January 2013 are hereby set aside;**
- b. **That certificate of confirmation of grant of even date is hereby cancelled;**
- c. **That the administrators shall apply a fresh for the confirmation of the grant made to them on 13th July 2011, wherein they shall distribute the estate in the terms of paragraph 22 hereabove,; and**
- d. **That each party shall bear their own costs.**

DATED, SIGNED and DELIVERED at NAIROBI this 18TH DAY OF DECEMBER, 2015.

W. MUSYOKA

JUDGE