



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CAUSE NO. 702 OF 2009**

***IN THE MATTER OF THE ESTATE OF NGARAGARI KARUGI alias NGARAGARI KAROGE  
alias HOSEA NGARAGARI (DECEASED)***

**JOSEPH KARUGI NGARAGARI.....PETITIONER**

**VERSUS**

**SIMON MACHARIA NGARAGARI.....1<sup>ST</sup> PROTESTOR**

**PETER KAROKI NGARAGARI.....2<sup>ND</sup> PROTESTOR**

**EDWARD NDERUI NGARAGARI.....3<sup>RD</sup> PROTESTOR**

**JUDGMENT**

The petitioner and the protestors are sons of the deceased, who, according to a copy of the certificate of death filed alongside the petition for grant of letters administration intestate for his estate, died on 13<sup>th</sup> February, 1991 aged 85.

The record shows that the succession to the deceased's estate was commenced by a citation in which the petitioner was the citor while the protestors were the citees cited to accept or refuse letters of administration in respect of the deceased's estate or show cause why those letters should not be granted to the petitioner.

It is also evident from the record that indeed the citees entered appearance to the citation, more particularly on 20<sup>th</sup> August, 2009. It would appear that apart from entering appearance, the protestors did not take any further action on the citation.

On his part the petitioner proceeded to petition for letters of administration intestate and his petition was filed in court on 30<sup>th</sup> October, 2009. The grant was subsequently made to him on 23<sup>rd</sup> April, 2010. The petitioner followed this with the summons for confirmation of grant dated 6<sup>th</sup> October, 2010 and which was filed in court on 25<sup>th</sup> October, 2010.

By an affidavit of protest sworn on 7<sup>th</sup> day of February, 2011 and filed in court on the same date, the protestors opposed the distribution of the estate as proposed in the summons for confirmation of grant.

Even after the grant was made and a protest filed against confirmation of the grant, the protestors still filed a petition on 7<sup>th</sup> March, 2011 "by way of cross application for a grant" for letters of administration for the same estate. As far as is relevant to the determination of their protest, this is what the petitioners

said in their own petition:-

***“We, Simon Macharia Ngaragari, Peter Karoki Ngaragari and Edward Nderui Ngaragari of Post office Box 1039, Karatina in the Republic of Kenya contemporaneously with the filing of my Answer to the said petition HEREBY PETITION this Honourable court for a grant of letters of administration intestate of the above named Ngaragari Karugi who died domiciled in the Republic of Kenya on 13<sup>th</sup> February, 1991...” (Underlining mine).***

What happened thereafter is pertinent to the determination of the protestors protest. On 28<sup>th</sup> July, 2011, the two parties recorded a consent in which they agreed that the petitioner and the protestors (who were then described as objectors) be appointed as joint administrators of the deceased’s estate. Following this consent, afresh grant was made to the petitioner and Edward Nderui Ngaragari on 28<sup>th</sup> day of July, 2011.

In the consent, parties also agreed that either of them was at liberty to file a summons for confirmation of grant. Taking cue from that consent, the petitioner filed the summons for confirmation of grant dated 2<sup>nd</sup> December, 2011 on 6<sup>th</sup> December, 2011.

There was no protest filed in response to this summons but the record shows that on 6<sup>th</sup> June, 2014, directions were given to the effect that the ‘protest’ be heard by way of oral evidence. Although it was not so expressly stated, the implication of this direction was that all the concerned parties were at consensus that the affidavit of protest that had earlier been filed in protest against the initial summons of 6<sup>th</sup> October, 2010 would be adopted as the protest against the subsequent summons for confirmation of grant. For avoidance of doubt this was the protest that was fixed for hearing on 18<sup>th</sup> March, 2015.

The major contention, as far as I can gather from pleadings and affidavits filed by the respective parties and also from the evidence at the trial is whether the deceased died testate and if so whether his estate should be distributed in accordance with his will as opposed to the manner of distribution proposed by the petitioner in the summons for confirmation of grant.

The existence or non-existence of a will is a question that can be disposed of fairly easily. First, it is clear from the cross-petition filed by the protestors themselves that they acknowledged that their father died intestate; there cannot be any other reason why they petitioned for “*a grant of letters of administration intestate*” as stated in their cross-petition if it were not for this acknowledgment.

Secondly, if there was a written will as the protestors have suggested, there is no explanation as to why it was not annexed to their cross-petition. It must be noted that under **section 53(3)(a)** of the **Law of Succession Act, Cap 160**, an applicant or petitioner who alleges the existence of a valid written will must attach to his application or petition the original will in which case his petition will be a petition for letters of administration “with the will annexed”.

Thirdly, the grant to which the protestors consented to be joined as joint administrators and which was subsequently issued following their consent is clear on its face that “*it is a grant of letters of administration intestate*”. This is the grant sought to be confirmed and being party to it, the protestors cannot turn against it on the pretext of a non-existent will.

There is no doubt therefore that the deceased died intestate and hence, in the absence of any or any valid will, the distribution of his estate is subject to intestacy provisions of the **Law of Succession Act**, aforesaid.

The extent of that estate is indicated in the affidavit in support of the petition for letters of administration as comprising the following assets:-

1. L.R. NO. KONYU/ICHUGA/552 (0.64 ha)
2. L.R. NO. RUGURU/KIAMARIGA/377(4.9 acres)
3. L.R. NO. KIAWARIGI PLOT NO. 6

4. L.R. NO. MATHIRA/GITARAGA/KIHINDUI/1681(4 acres)

There were no liabilities attached to the estate.

In the same affidavit, the petitioner and the protestors are listed as the only survivors and beneficiaries of the deceased's estate.

According to the petitioner, each of the deceased survivors should get an equal share of each of these assets. In his proposal each of the deceased survivors should get 0.16 hectares of L.R. NO. KONYU/ICHUGA/552, 1.225 acres of L.R. NO. RUGURU/KIAMARIGA/377, 1 acre of L.R. NO. MATHIRA/GITARAGA/KIHINDUI/1681. As for L.R. NO. KIAWARIGI PLOT NO. 6 the petitioner has suggested that all the beneficiaries should be registered as proprietors in common.

The protestors are in agreement with the petitioner that land parcel **KONYU/ICHUGA/552** should be shared out in equal shares amongst them all; they, however, disagree with him on the distribution of the rest of the estate. In their view, the remaining assets should be shared out as follows:-

1. **L.R. NO. RUGURU/KIAMARIGA/377** should be divided in equal shares and distributed to:-
  - i. Simon Macharia Ngaragari
  - ii. Peter Karoki Ngaragari
  - iii. Edward Nderui Ngaragari
2. **MATHIRA/GITARAGA/KIHINDUI/1681** should be divided in equal shares and distributed to:-
  - i. Simon Macharia Ngaragari
  - ii. Peter Karoki Ngaragari
  - iii. Joseph Karugi Ngaragari

They have not given any proposal on how the Kiawarigi Plot No. 6 should be distributed.

Be that as it may, the basis of the protestors' proposal on the distribution of the deceased's estate is a "will" the deceased is alleged to have left behind. It has been noted, however, that such a will does not exist and therefore it cannot be a basis for distribution of the estate.

In the absence of a valid will and in view of the disagreement of the deceased's survivors on how part of his estate should be distributed, this court can only fall back to the intestacy provisions of the **Law of Succession Act** to resolve this question. **Section 38** of that Act provides some guide on how the estate can be distributed in these circumstances; it says:-

***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** referred to deals with the holding of the property in a trust where it is supposed to devolve upon a child. According to the affidavit filed in support of the petition for the grant of letters of administration, the youngest of the deceased's survivors was aged 57 in 2009; it is thus clear that the deceased's 'children' are all adults and therefore **section 41** of the Act is inapplicable in these circumstances.

**Section 42**, on the other hand, deals with property subject to appointment under **section 35**, advancements or *inter vivos* transfers or such property as is subject to an order for reasonable provision of a dependant who has not adequately been provided for under **section 26**. Such circumstances do not obtain with respect to the deceased's estate and therefore **section 42** of the Act does not also apply in this case.

In view of the clear language in which **section 38** of the Act is couched, I need not belabour the point that the deceased's estate should be divided equally amongst his children. Accordingly, I will allow the summons dated 2<sup>nd</sup> December, 2011 and confirm the grant as prayed. The deceased's estate shall be distributed equally amongst his children as proposed by the petitioner in paragraph 5 of the affidavit in support of the summons of the confirmation of grant.

For avoidance of doubt the estate shall be distributed as follows:-

**1. L.R. NO. KONYU/ICHUGA/552 (0.64 ha)**

- i. Joseph Karugi Ngaragari will get 0.16 ha
- ii. Simon Macharia Ngaragari will get 0.16 ha
- iii. Peter Karoki Ngaragari will get 0.16 ha
- iv. Edward Nderui Ngaragari will get 0.16 ha

**2. L.R. NO. RUGURU/KIAMARIGA/377(4.9 acres)**

- i. Joseph Karugi Ngaragari will get 1.225 acres
- ii. Simon Macharia Ngaragari will get 1.225 acres
- iii. Peter Karoki Ngaragari will get 1.225 acres
- iv. Edward Nderui Ngaragari will get 1.225 acres

**3. L.R. NO. MATHIRA/GITARAGA/KIHINDUI/1681 (4 acres)**

- i. Joseph Karugi Ngaragari will get 1 acre
- ii. Simon Macharia Ngaragari will get 1 acre
- iii. Peter Karoki Ngaragari will get 1 acre
- iv. Edward Nderui Ngaragari will get 1 acre

**4. L.R. NO. KIAWARIGI PLOT NO. 6**

This property shall be registered in the names of the following persons as proprietors in common:-

- i. Joseph Karugi Ngaragari
- ii. Simon Macharia Ngaragari
- iii. Peter Karoki Ngaragari will get
- iv. Edward Nderui Ngaragari will get

Being a family dispute, parties will bear their own respective costs. It is so ordered.

**Dated, signed and delivered in open court this 14<sup>th</sup> day of December, 2015**

Ngaah Jairus

**JUDGE**