



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 435 OF 2012

(formerly RUNYENJES SUCCESSION CAUSE NO. 76 of 2011)

IN THE MATTER OF ESTATE OF

MARIKO KANYAKIRI GAKUTHI (DECEASED)

BETWEEN

ONARAT VUKO MARIKO APPLICANT

AND

CIAKUTHII NJOROGE 1ST PROTESTOR

JOHN IRERI NJOROGE 2ND PROTESTOR

JOHN MUTHEE NJOROGE 3RD PROTESTOR

RULING

1. Before the court is an application for the confirmation of grant of the letters of administration. It is opposed by the protestors. Before I traverse the application, it is helpful to set out the history of the matter in order to bring out the facts.
2. Mariko Kanyakiri Gakuthi (“the deceased”) died on 20th January 1996. On 12th May 2011, a petition for the grant of letters of administration (Form P&A 80) was lodged at the ***SRM’s Court Runyenjes Succession Cause No. 76 of 2011*** by Njoka Kanyakiri Mugo, a son of the deceased. According to the petition the deceased was survived by his wife, Onarat Vuko Mariko (“Onarat”) and several children; Njiru Kanyakiri, Mungatia Kanyakiri, Nicasio Kanyakiri, Riungu Kanyakiri, Riungu Kanyakiri, Ndwiga Kanyakiri, Ndwiga Kanyakiri, Njoka Kanyakiri, Salesio Njagi Kanyakiri, Salesio Njagi Kanyakiri and Nicasio Muriuki Kanyakiri. The deceased left one property ***Kyeni/Mufu/3060***.
3. Ciakuthii Njoroge (“Ciakuthii”) objected to the grant of letters of administration to Onarat. In her objection she contended that she was the sister-in-law to the deceased and she sought to be joined as co-administrator to protect her interest and that of the house of her deceased husband Nyaga Ruanderi (“Ruanderi”) who, she contended, is a beneficiary of the estate of the deceased. She asserted that her family had settled on ***Kyeni/Mufu/3060*** is therefore entitled to the entire parcel of land.

4. Onarat responded to the objection by stating that she was the deceased's wife and that the petition and consent to apply for the grant of letters of administration were prepared with the consent of the entire family of the deceased. She denied the Ciakuthii was the sister in law of the deceased. Njoka Kanyakiri responded to the petition by stating that the objector was not even a family member of the deceased.
5. On 27th October 2011, the learned magistrate ordered the parties to file a letter from the chief to confirm the beneficiaries of deceased. By a letter dated 8th November 2011, the Chief of Kyeni North-East Location wrote to the court stating that the deceased had four wives; Ciacuka Kanyakiri (deceased), Gatiri Kanyakiri (deceased), Consolata Werimba Kanyakiri (deceased), Feata Karigu Kanyakiri (deceased) and Onarat Vuko Mariko. The Chief further stated that, "*Some family members of the late Nyaga Ruanderi do occupy land parcel Kyeni/Mufu/3060 on the estate of late Kanyakiri.*"
6. Before the objection was determined, it transpired that another petition for grant of letter of administration in respect of the estate of the deceased; ***Embu Succession Cause No. 125 of 1990***. The petition was filed by Gabriel Njonge, a son of Ruanderi, and a grant was issued accordingly. The grant was confirmed on 16th June 1995 and the land parcel ***Kyeni/Mufu/3060*** was distributed to Ciakuthii Njoroge, Josphat Njagi Njoroge, John Muthee Njoroge, Videa Warue Njoroge, David Njiru Njoroge and Luka Muthee Mino. The grant was subsequently set aside by the High Court. On 19th June 2012, the court in ***Runyenjes Succession Cause No. 76 of 2011*** issued the grant of letters of administration of the deceased estate to Onarat.
7. Onarat has filed summons for confirmation of grant dated 27th August 2012. In her supporting affidavit she states that the identification and shares of all persons beneficially to the said estate have been ascertained and determined as follows;

LAND PARCEL KYENI/MUFU/3060 to be inherited as follows:-

- a. ***Ciakuthii Njoroge to get 2.0 acres***
- b. ***Videa Warue to get 1.0 acres***
- c. ***Onarat Vuko Mariko to get 1.0 Acres***

8. In the affidavit of protest against confirmation of the grant, the protestors deposed that Ruanderi was a brother to the deceased. That the protestors have been settled on the subject property since 1962 and that they have extensively developed the property. On 17th June 1988, they aver that the deceased transferred ***Kyeni/Mufu/3060*** to Ruanderi as evidenced by a duly signed transfer and consent and before the same could be registered Ruanderi died. It is the wish of the protestors that they be given the land as the wife and children of the deceased have all been settled on their own properties.
9. Ciakuthii also testified that the distribution proposed by Onarat was unfair to her family as Onarat already had another piece of land and there was no reason that Videa Warui, her step-daughter, was receiving a larger share of the land as opposed to her other children. She stated that if the land is transferred to her she would provide for Videa like all the children of Ruanderi.
10. The position of Onarat is that Ruanderi was not a brother of the deceased but that they were from the same clan. The case of the petitioner is that the deceased allowed the family of Ruanderi to settle on ***Kyeni/Mufu/3060*** out of his concern for their welfare while Ruanderi looked for alternative land in Timau. Unfortunately he died before he could get the said land. According to her, the deceased expressed the wish that Ruanderi's family should be provided for and that therefore the proposal for distribution is in keeping with the desire of the deceased to make provision for the family of Ruanderi.
11. Having outlined the facts as they emerged, the following issues fall for determination;

- a. Whether the protestors are beneficiaries of the deceased's estate.
- b. Whether the protestors are entitled property **Kyeni/Mufu/3060**.

12. The deceased died intestate and therefore distribution of the estate is subject to **Part V** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)**. As the deceased was polygamous, his estate is to be distributed in accordance with **section 40** of the **Act** which states as follows;

40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

13. Under **Part V** of the **Act** (and especially **Section 35, 38 40 and 41**) the wife and children of the deceased are the persons entitled to a share in the estate of the deceased. Other than the wives and children of the deceased who are entitled to inherit the deceased property, persons who were dependants of the deceased during his lifetime are entitled to apply for provision under **section 26** of the **Act**.

14. During the proceedings before the subordinate court and before this court, Ciakuthii deponed that she was the sister in law to the deceased. What emerges from the evidence is that the Ciakuthii is not the wife of the deceased and the 2nd and 3rd protestors are not the children of the deceased. In the circumstances they are not beneficiaries of the estate under the **Act** and have no right to inherit the property of the deceased.

15. It is not in dispute that **Kyeni/Mufu/3060** is registered in the name of the deceased. Ciakuthii testified that the deceased sold the land to her husband for Kshs. 14000 but she did not pursue the matter. Her husband died in 1988 while the deceased died in 1996. Although the title is in the name of the deceased, it is in her possession. If the protestors' case is that the deceased sold the property to Ruanderi, it was open for the estate of Ruanderi to file a suit for specific performance to enforce the sale as a contractual matter. Issues concerning the validity of the sale are matters to be determined in other proceedings.

16. If, on the other hand, their case is that the property was a gift to the family of Ruanderi then it is difficult to understand why the gift was not perfected by the deceased during his lifetime. Ruanderi died in 1988 and the deceased followed 8 years later. In this respect I adopt the passage in **Halsburys Laws of England (3rd Ed. Vol. 18)** at para. 755 dealing with incomplete gifts, which states as follows, "*Where a gift exists merely in promise (written or verbal) or unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under law, to complete or perfect it If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.*" I find that had the deceased intended to transfer the property to the family of Ruanderi, he would have done so during his lifetime as Ruanderi died before him. As the deceased took the step of transferring various properties to his children during his lifetime, he would have done the same if he wished to transfer property to the family of Ruanderi. I therefore find and hold the property **Kyeni/Mufu/3060** is part of the free property of the deceased.

17. As the protestors are not beneficiaries of the deceased, the property must be distributed in accordance with the rules governing intestate succession. However, the deceased's heirs have renounced their rights and agreed to the distribution proposed by Onarat.

18. The summons for confirmation of grant dated 27th August 2012 is allowed in terms of paragraph 5 of the affidavit of Onarat Vuko Mariko. There shall be no order as to costs.

SIGNED AT NAIROBI

D.S. MAJANJA

J U D G E

DATED AND DELIVERED AT EMBU THIS 29TH DAY OF MAY 2014.

H. I. ONG'UDI

J U D G E

Ms Muthoni instructed by Muthoni Ndeke and Company Advocates for the petitioner/applicant.

Mr Gacharia instructed by Robi Kerato and Partners Advocates for the protestors.