



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 691 OF 1995

IN THE MATTER OF THE ESTATE OF WAWERU MWANIKI GATUHA – (DECEASED)

RULING

1. The summons for confirmation of grant dated 22nd May 2009 seeks confirmation of the grant made on 17th April 1997 to Stephen Mutembei Waweru and Peter Mwangi Waweru. They would like the grant confirmed as per the ruling of 7th May 2009.
2. There is only one asset, being Nyandarua/Mkungu/48. It is proposed that 38 acres be hived off and given to Peter Karanja Kiarie, Francis Kaigu Kinuthia and Joseph Njoroge Kimani in the ratios of 30:6:2. The remainder is to be divided amongst the widows and children of the deceased in equal shares.
3. There is a protest to the proposed confirmation. It was filed by Charles Mwaniki Waweru, a child of the deceased from the second house. He raises three issues:-
 - (a) that each child should get individual shares;
 - (b) that a child, James Mburu Waweru, who is presumed dead for he has not been seen or heard of for over fifteen (15) years should not be provided for; and
 - (c) that the third parties – Francis Kaigu Kinuthia and Joseph Njoroge Kimani – had bought only 6 acres and not the 8 allotted to them.
4. The protest was heard orally on 24th September 2013 and 31st March 2014. Francis Kaigu Kinuthia, one of the purchasers, testified on 24th September 2013. He stated that the deceased sold five (5) acres of land to him. They sought consent of the Land Control Board for subdivision; but the deceased died before consent was granted for sale and transfer. He stated that the deceased agreed with his wife to sell him another one (1) acre in addition to the five (5) acres. Stephen Mutembei was said to have been aware of the said sale. He stated on cross-examination that he did not pay for the one (1) acre and that there was no written agreement on the sale of the one acre.
5. Peter Karanja Kiarie who claims thirty (30) acres out of the subject land was offered on 31st March 2014 as a witness but Mr. Rakoro for the protestor stated that the objector had no issue with the thirty acres granted to him and prayed that he be excused.
6. Veronica Wamaitha Njoroge testified next. She stated that the deceased had sold to her three (3) acres out of Nyandarua/Mkungu/48. Her husband was present. She could not recall the year when the transaction was done. She did not buy all three at once. She acknowledged two sale agreements dated 6th November 1991 and 15th March 1992, and said that there was a third one. On cross-examination, she

stated that the said agreements were between the deceased and her dead husband. She could not recall when her husband died nor whether she had taken out representation to his estate. She conceded that there was a balance on the agreement of 6th November 1991, but the balance had since been paid as per the third agreement which was not available. There was another balance on the sale the subject of the agreement of 15th March 1992, and she was not certain whether the balance had been settled or not. By the time her husband died the property had not yet be transferred to his name. She stated that she occupied three acres of the land.

7. Next came the first administrator, Stephen Mutembei. He testified that he was aware of the agreement of 15th March 1992 as he witnessed it. His father had instructed him to sell three acres of his land to raise money for his medical bills. The three acres were not brought at once. A sum of Kshs.13,000.00 was paid. It was utilized to settle the deceased's medical bills. He confirmed knowing Veronica Wamaitha who occupies the three acres. He asserted that as administrator of the estate he was familiar with all the land purchases, and all the debts. He stated that Veronica Wamaitha was not indebted to the estate for all the debts had been cleared. On cross-examination, he conceded that although six acres were to be sold to Francis Kaigu Kinuthia, only five of the six were paid for. He stated that he had no evidence in court that debts in respect of the sale to Peter Njoroge Kimani had been cleared. On re-examination he reiterated that only five acres were paid for by Francis Kaigu Kinuthia. He also confirmed that the balances in respect of the sale to Francis Njoroge were settled.

8. The protestor testified last. He is a child in the second house. He stated that he had issues with the sale of one acre to Francis Kaigu and three acres to Joseph Njoroge. He confessed that he did not participate in the sales although one of his mother's sons did. He asserted that Mr. Joseph Njoroge had bought only one acre where he put up a home. He stated that he was not aware that the said Joseph Njoroge bought two other acres. He denied that she occupies three acres, asserting that she occupies only one acre. He proposed that the third parties should be provided for as follows:- Peter Karanja Kiarie – 30 acres Francis Kaigu Kinuthia – 5 acres and Veronica Wamaitha (Joseph Njoroge)– 1 acre. On cross-examination the witness asserted that he was not new in the family, although he did not participate in the sales. He said that the person from his side of the family who was familiar with the sale was his brother, Benson Wariua. On re-examination he stated that as per the ruling of 7th May 2009 only 36 acres had been sold to these persons.

9. The parties thereafter filed written submissions where they analysed the facts and re-stated their respective positions.

10. The summons for confirmation seeks that the estate be distributed in accordance with the ruling of 7th May 2009. The court had ruled that the deceased died a polygamist, survived by two widows. The first wife had nine (9) children, while the second house had two children. It was decided that the estate be divided in accordance with *Sections 40 and 42* of the Act.

11. *Section 40* provides 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). Distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be distributed in accordance with the rules set out in Sections 35 and 38.”

Section 42 of the Act states as follows:-

“42. Where-

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) Properly has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35,

That property shall be taken into account in determining the share of the net intestate finally accruing to the child, grandchild or house.”

12. The deceased is expressed to have been survived by his two widows and eleven children. Put together the widows and children add up to thirteen. According to *Section 40* estate of the deceased should be divided into thirteen units and thereafter distributed equally amongst all thirteen units.

13. I note that although the proposed distribution identifies the thirteen (13) survivors of the deceased, when it comes to distribution a number of them have been suppressed, yet no explanation has been given. The distribution schedule lists only ten members of the family. The list of the members of the second house is complete, but that of the first house is not complete for it omits the names of Naomi Wanjiku Waweru, Njoki Waweru and Hannah Mwiwaki Waweru. I note that the three have not renounced their entitlement to a share in the estate.

14. The protestor argues that each child should get individual shares instead of getting shares globally. I do not understand the protestor on this. The proposal in the application splits the estate into thirteen units, each of the thirteen members of the family is entitled to a single unit. The effect of this is that each individual family members would get their own individual shares.

15. He says that James Mburu Waweru has been missing for over fifteen (15) years, and therefore he is presumed dead. He argues that the said person should not be allotted shares in the estate. Presumption of death is a declaration made in a legal process. A person cannot be legally presumed dead unless a court of law makes a declaration to that effect. The protestor has not placed before me a valid court order making such a declaration. In the absence of such declaration, the said James Mburu Waweru has to be provided for.

16. The oral evidence recorded on 24th September 2013 and 31st March 2014 was for the purpose of determining the acreage out of the estate land due to Peter Karanja Kiarie, Francis Kaigu Kinuthia and Joseph Njoroge Kimani. There is no dispute as regards what is due to Peter Karanja Kiarie; he is entitled to thirty (30) acres out of Nyandarua/Mkungu/48. The dispute is on entitlement of the other two third parties.

17. The administrators have allotted six (6) acres to Francis Kaigu Kinuthia Kinuthia. The protestor argues that he is entitled to only five (5) acres. From the recorded evidence it transpires that Francis Kaigu Kinuthia had only purchased five (5) acres. There was a proposal to buy a further one (1) acre, however the transaction on the said one acre did not take place. No agreement was signed nor did money change hands. Consequently, Francis Kaigu Kinuthia is entitled to only five (5) acres.

18. The protestor is opposed to the allotment of two acres to Joseph Njoroge Kimani. He argues that the latter bought only one acre and that is what he is entitled to. The recorded evidence on this is not conclusive. The widow of Joseph Njoroge alleged that they bought three acres, but she was only able to produce documentary proof of purchase of two acres. The documents put in evidence suggest that the purchase price was not paid in full, but the widow asserted that they had paid in full. The administrator alleged that he was party to the transactions for the sale of the three acres and asserted that the purchase price was paid in full. I find this a little curious, for if he acknowledges sale of three acres why allot the purchaser only two acres? The evidence on these transactions is cloudy. I will take the middle ground, and allow two acres to Joseph Njoroge Kimani. I note that the protestor was not party to the sales and had not even been living with the family for a long time. He could not have been privy to a lot of the dealings within the family. I will give the administrator the benefit of the doubt.

19. It emerges from the ruling of 7th May 2009 that the protestor had been given 5 acres out of the estate land by the deceased. This was an *inter vivos* gift. Such gifts are addressed in Section 42 of the Law of Succession Act, they ought to be taken into account in distribution. The court had this in mind when it was directed on 7th May that the estate be divided in accord with the provisions of *Sections 40 and 42* of the Act.

20. In distributing the estate of the deceased among the survivors, the interests of the third parties as well as the interests of the protestor as defined in the ruling of 7th May 2004 shall be taken care of first.

21. Nyandarua/Mkungu/48 should be distributed as follows:-

1. (a) 30 acres to Peter Karanja Kiarie

(b) 5 acres to Francis Kaigu Kinuthia

(c) 2 acres to Joseph Njoroge Kimani

(d) 5 acres to Charles Mwaniki Waweru;

2. The balance of the land shall be distributed in accordance with the provisions of Sections 40 and 42 of the Act;

3. To facilitate the distribution stated in (1) and (2) above, the estate land, Nyandarua/Mkungu/48 shall be valued before final orders on distribution are made;

4. Valuation to be done within 45 days;

5. Mention on 28th January 2014 to confirm valuation and for further orders.

DATED, SIGNED and DELIVERED at NAIROBI this 11th DAY OF December 2014.

W. MUSYOKA

JUDGE

No appearance of the advocate for the respondent.

In the presence of Mr. Wangalwa for Mr. Cakoro advocate for the applicant.