



REPUBLIC OF KENYA

High Court at Nakuru

Succession Cause 260 of 2008

IN THE MATTER OF THE ESTATE OF JAMES KINGORI NDEGWA (DECEASED)

JAMES NDEGWA KINGORI.....APPLICANT

VERSUS

MOSES RUKWARO JAMES.....RESPONDENT

JUDGMENT

This cause relates to the estate of James Kingori Ndegwa who died intestate on 9/7/2005. He was survived by the following:-

- 1. James Ndegwa Kingori, a son**
- 2. Moses Rukwaru James, a son**
- 3. Robert Ndungu Kingori, a son**
- 4. James Thuo Kingori, a grandson**

On 2/7/08, Moses Rukwaro James, petitioned this court for letters of administration and a grant was issued on 13/7/2009. On 26/1/2011, James Ndegwa Kingori filed a summonses for revocation of grant dated 21/1/2011 but on 1/3/2011, the parties recorded a consent by which James Ndegwa was joined to this cause as a co-administrator with Moses Rukwaro. The court directed that parties to agree on distribution failing which either could file a summonses for confirmation. The parties did not agree. By summons dated 14/9/2011, Moses Rukwaro moved the court seeking to have the grant of letters of administration issued to them on 6/10/2010 and 11/3/2011 confirmed.

James Ndegwa Kingori filed an affidavit of protest dated 29/10/2011 and parties took directions that the matter was to proceed by way of viva voce evidence.

The protestor, James Ndegwa, testified first as PW1. He recalled that Moses Rukwaro is his younger brother. Their father, James Kingori died on 9/7/2005. Their mother had died earlier. The parents were blessed with the following children:-

- 1. James Ndegwa – 1st born**
- 2. Moses Rukwaro**

3. Teresia Wambui

4. Steven Mwangi

5. Robert Ndungu

Steven died before their parents and did not leave behind any children. Teresia died before the parents but left behind two children namely James Thuo and Nyokabi. After their father died, Robert Ndungu also passed away in 2008, leaving behind two children namely, James Kingori and Hellen Nyokabi. According to PW1, the deceased left behind the following properties:-

- 1. A house at Mithonge in Nakuru Section 58;**
- 2. Shares in Taifa Hotel, Nakuru;**
- 3. Land at Engashura – Bahati/Kabatini Block 1/2936.**

He also told the court that Robert had been given the house at Mithonge but it was repossessed by Nakuru Municipality; that the shares in Taifa Hotel are managed by Moses Rukwaro whereas the land at Engashura was given to him. He denied that he was aware of this cause and only learnt of it when Rukwaro took surveyors to the land for purposes of subdivision into four (4) parcels. He told the court that the children of Robert are entitled to a piece of that land but the children of Teresia, that is Thuo was supposed to be bought land by Moses Rukwaro from the Taifa shares. Further, that since Moses got shares from Taifa Hotel he is not entitled to any part of the land at Engashura. James also told the court that the deceased distributed his property when he was living at the home of Moses when ailing and that is when he was given the title to the land in Engashura. He denied that he withheld the title after it was given to him to go and fix electricity on the property. He also told the court that the father made a will but Moses is holding it. He denied that the deceased said that he wanted his grandchild, Thuo, to remain in his house and that their aunt Leah was present when the deceased said so. According to PW1, each of the deceased's children was given their share of the inheritance during the deceased's lifetime.

Moses Rukwaro (DW1) testified that the father died intestate and never distributed his property and that he left only the piece of land at Engashura measuring 1.6 Ha. It was divided into four (4) parts to cater for the protestor, Moses, Robert's children and Teresia's son, Thuo (DW2) as per the wishes of the deceased. DW1 testified that when his sister Teresia died in 1990, because she was a single mother, the parents adopted her two children; James Thuo (DW2) and Hellen Nyokabi. Upon the demise of his mother, DW1 took Teresia's daughter Nyokabi while DW2 stayed with the deceased at Engashura. By then, only the deceased and DW2 lived on that land because PW1 had no fixed abode and had no house DW1 got PW1 a job in Milling Corporation, built him a house at their Engashura plot and settled him down. DW1 said that the deceased used to work with Municipal Council of Nakuru and lived in a Council house near Mithonge and that Robert lived in a rental shop at Mithonge which was leased from the Council and both houses were taken back by the Council when rent was not paid.

As regards the shares in Taifa Hotel, Moses said that he merely heard the shareholders talk of dissolving it. James Thuo Kingori the son of Teresia who was PW1's sister testified as DW2. DW2 told the court that when his mother died, him and his sister lived with their grandparents. After the grandmother died, DW1 took both of the children till DW1 finished school and he went back to live with his grandfather, the deceased, while his sister remained with DW1. When the deceased got sick, DW1 took both of them to live with him as he nursed the deceased. After the deceased's death, PW1 did not want DW2 in the home at Engashura and became hostile to him. The matter was referred to the Chief who directed that the deceased's house be locked till this case was resolved. DW2 went to the home recently and found the protestor's son using part of the deceased's house. DW2 said that before the deceased's demise, he had left for him the house and a place to farm.

I have now considered the testimonies of the witnesses, their affidavits on record and the positions taken by Moses and that of James on the distribution of their deceased father's estate which comprises only one

piece of land. Both parties rely on alleged verbal instructions left by the deceased on how the deceased's estate was supposed to be distributed. Although James alleged that there exists shares in Taifa Hotel which were given to Moses, Moses denied that such shares were ever left by the deceased and if there were any, they were shared during the lifetime of the deceased. Indeed PW1 did not attempt to show that the said Taifa Hotel exists or existed at the time of the deceased's demise. It was not enough to just allege. I have, however, seen the affidavit sworn by Leah Waihuni Biringi whom PW1 admitted was their aunt and that she did visit the deceased while ailing and living with DW1. At paragraph 7 of her affidavit, she stated that the deceased said that all the shares of Taifa Hotel would go to DW1 for having assisted the deceased and the grandchildren. What is not disclosed is whether the said shares were given to DW1 when the deceased was ailing or are still available. This affidavit is annexed by DW1's application and affidavit and I believe it represents his case. DW1 deponed that the shares were disposed off during the deceased's lifetime but he was not the beneficiary. His testimony was that he only heard they were disposed off but that evidence contradicts what is deponed to in the two affidavits.

PW1 also alleged that there exists a house in Mithonge, Nakuru Municipality that was given to their deceased brother, Robert. PW1 did not specifically disclose the particulars of the said property. DW1 explained that the house in which Robert lived at Mithonge and shop were rented from the Municipality. PW1 should on a balance of probability show that the said house belonged to their deceased father and is available for distribution. That has not been done.

There is no doubt that DW1 lives on his own property in Nakuru. It seems that he has received some property from the deceased during his life i.e. Taifa shares which he did not disclose how much. It was given to him because of the assistance he gave to the deceased and grandchildren. The only property that the deceased seems to have left is Bahati/Kabatin Block 12936. It is PW1's contention that the deceased bequeathed all of it to him during his lifetime. So far, there is no evidence that the deceased made any will but from Leah's affidavit, it seems he made some of his wishes known. That being the case, the deceased's intestate is subject to distribution. Whereas PW1 claims to have been given the title by the deceased when he was ailing and living with DW1, DW1 on the other hand said that the protestor asked the deceased for the title so that he could go and have electricity fixed in the home because he had received the letter of offer from the Kenya Power and Lighting "MRJ 2". According to DW1, the title was necessary as proof of ownership of the property on which electricity was to be supplied. That makes sense because the Kenya Power Lighting Company had to be satisfied that the power was being supplied with the permission of the owner of the land. Having heard both PW1 and DW1, I am more inclined to believe Moses that the certificate of title was never given to the protestor to transfer the land to himself. This can be gleaned from the fact that he has made sweeping allegations without any proof as regards existence of other property.

The next question then is whether all the deceased's beneficiaries are entitled to a share of the deceased estate which comprises of land Bahati/Kabatin Block 1/2936, and secondly, is James Thuo a grandchild of the deceased entitled to inherit from the deceased.

Since the deceased's wife had died before him, the distribution of the deceased estate would fall under **Section 38 of the Law of Succession Act** which provides as follows:-

“where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provision of Sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

The above provision means that the children of the deceased are entitled to share the deceased's estate equally amongst themselves unless the deceased had given any of his property during his lifetime which would need to be taken into account (S.42). In that regard, it seems DW1 had received the Taifa shares although it was not disclosed how much they were worth. The court will take that into account during the distribution so that the court will use its discretion and give DW1 a smaller portion than the others.

The second question is whether DW2 is a beneficiary of the deceased's estate. Evidence was adduced, and which evidence was not challenged, that DW2 is a nephew to PW1 and DW1. It is also not disputed

that DW2's mother never got married and when she died, her children were left in the care of her parents. It is the deceased who brought up DW2 and lived with him till his death. DW2 knew no other home or parents than the deceased. He was a dependant of the deceased in envisaged under **Section 29** of the **Law of Succession Act**. The section defines dependant to mean:-

“Section 29 for the purposes of this part, ‘dependant’ means–

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**
- (b) such of the deceased's parents, step parents, grand parents, grand children, children whom the deceased had taken into his family as his own, brothers and sisters and half brothers and half sisters as were being maintained by the deceased immediately prior to his death;**
- (c)”**

DW2 was a dependant of the deceased being a grandchild who was like a last born child to the deceased because the deceased brought him up. He was the one living with the deceased in his house before the deceased's demise. By then, PW1 was living with his family in the same compound in his own house. Leah deponed that her brother, the deceased, told her that he would want DW2 to remain on his land. that deposition is supported by the evidence of DW1. I would wish to point out at this stage that the parties herein are Kikuyu. Under Kikuyu customary law, an unmarried daughter was entitled to inherit from the parents' estate. Eugene Contran in his book **Restatement of African Customary Law** said:-

“Inheritance under Kikuyu Customary Law is patrilineal. The pertrilineal of inheritance is based on the equal distribution of a man's property among his sons may get a slightly larger share. Daughters are normally excluded, but may also receive a share if they remain unmarried. In the absence of sons, the heirs are the nearest partrilineal relations of the deceased, namely father, full brother and paternal uncles.”

It would only be proper that DW2 remains in the house in which the deceased left him.

In the end, I find that all the deceased's beneficiaries who include PW1, DW1, DW2 and Robert's children are entitled to a share of the deceased's estate but DW1 will get a little less for reasons given earlier in this judgment. DW1 had gone ahead to have the land subdivided into four (4) equal parts in terms of the four children of the deceased but having found that PW1 may have benefited from the shares from Taifa Hotel, he should get a less share of the land. I will therefore distribute the estate as follows:-

- 1. James Ndegwa - 0.1556 Ha.**
- 2. Moses Rukwaro - 0.100 Ha.**
- 3. Robert Ndungu's children - 0.1556 Ha.**
- 4. James Thuo - 0.1371 Ha**

This being a family dispute, each party to bear its own costs.

DATED and DELIVERED this 17th day of May, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Njeri for the applicant

Mr. Simiyu holding brief for Mr. Mbeche for the respondent

Kennedy – Court Clerk