



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 563 OF 2008

IN THE MATTER OF ESTATE OF ELIUD MACHARIA MURIU alias ELIUD MACHARIA MUREU – (DECEASED)

MARY NYAGUTHII PETITIONER

VERSUS

KENNEDY KAGUNDA PROTESTOR

JUDGMENT

This judgment is the outcome of the summons for confirmation of grant dated 14th July, 2009 and the affidavits of Protest. A grant of letters of administration in respect of the Estate of **Eliud Macharia Muriu alias Eliud Macharia Mureu**, deceased was made in the joint names of **Mary Nyaguthii and Kennedy Kagunda**. **Mary Nyaguthii**, the Petitioner herein has now applied for the grant to be confirmed. **Kennedy Kagunda**, the Protestor herein filed an affidavit of Protest to resist the summons. Grace Thuguri, Anna Wamaitha, Juliana Wachuka Macharia, Joseph Mukua Kanyora, Tabitha Wakonyu Mundia and Lydia Wangui Mundia each filed an affidavit of Protest to also oppose the Summons.

The history behind this dispute appear to be largely straight forward. Eliud Macharia Muriu, passed away on 29th November, 1993. Mary Nyaguthii applied for a grant of letters of administration before the Karatina Senior Resident Magistrate's court to succeed the deceased after taking out citation proceedings against the widow and the children of the deceased. On 17th September, 2003, a grant of letters of administration intestate was made in the joint names of Mary Nyaguthii, Kennedy Kagunda and Michael Mundia. The record indicates that Michael Mundia passed away thus leaving Mary Nyaguthii and Kennedy Kagunda as the remaining administrators. The cause was transferred to the High Court when it became apparent that the value of the Estate was beyond Kshs. 100,000/=. When the cause was transferred to this court, the Petitioner filed a fresh summons for confirmation of grant dated 14th July, 2009. The summons received serious resistance from the deceased's family.

In the summons for confirmation of grant, the Petitioner has proposed for the Estate to be distributed as follows:

L.R.NO. Iria-ini/Kaguyu/649 to be inherited by Kennedy Kagunda absolutely;

L.R.NO. Iria-ini/Kaguyu/514

- i. Kennedy Kagunda - 0.53 acres
- ii. Tabitha Wakonyu Mundia
- iii. Lydia Wangui Mundia - 1.78 acres jointly
- iv. Eunice Njeri - 1.78 acres

- v. Anna Wamaitha- 1.78 acres
- vi. Grace Thuguri - 1.78 acres
- vii. Juliana Wachuka - 1.78 acres
- viii. Mary Nyaguthii- 1.78 acres
- ix. John Muturi
- x. Stephen Macharia
- xi. Ann Njoki - 1.78 acres jointly
- xii. Rose Muthoni

Kennedy Kagunda opposed the Petitioner's mode of distribution claiming the deceased had distributed his property inter vivos to his children. He proposed for the Estate to be distributed as follows:

Land parcel No. Iria-ini/Kaguyu/649

- 1. Eunice Njeri Ruoro
- 2. Ann Wamaitha Njoroge Whole parcel jointly
- 3. Grace Thuguri Gacengo

Land parcel No. Iria-ini/Kaguyu/514

- 1. Kennedy Kagunda - 6.5 acres
- 2. Tabitha Wakonyo Mundia - 2.0 acres jointly
- 3. Lydia Wangui Mundia
- 4. Mary Nyaguthii - 2.5 acres
- 5. John Muturi -2.0 acres jointly
- 6. Stephen Macharia
- 7. Ann Njoki -
- 8. Rose Muthoni

Grace Thuguri on her part also opposed the summons for confirmation of grant. She proposed for the Estate to be distributed as follows:

- a. Grace Thuguri
- b. Eunice Njeri
- c. Anna Wamaitha
- d. Mary Nyaguthi
- e. Kennedy Kagunda
- f. Lydia Theru(deceased) to be represented by her children Stephen Macharia, John Muturi, Ann Njoki and Rose Muthoni

That the deceased had during his lifetime made devices to Michael Mundia (deceased) and Juliana Wachuka by bequeathing to them 2.0225 Ha and 1.05 Ha of Land respectively vide L.R.No. Iriaini/Kaguyu/512 and Iriaini/Kaguyu/513 annexed hereto and marked GTI are copies of green cards which they have continued to use up to date. They are not therefore entitled to share in the remainder of the estate.

That Tabitha Wakonyu Mundia and Lydia Wangui Mundia mentioned in paragraph 4(ii) and (iii) in the supporting affidavit for confirmation of grants Mary Nyaguthii respectively are the widows of Michael Mundia (deceased) and are already occupying Iriaini/Kaguyu/512. They should be contended with that.

That if the widows of Michael Mundia and Juliana Wachuka as mentioned in paragraph 5 above owning Iriaini/Kaguyu/513 pursue for more shares of the estate, what each own should be added to

Iriaini/Kaguyu/514 and 649 and then the whole 514,649,513 and 512 should be shared equally to all children of Eliud Macharia.

That being all children of the deceased and owner of the estate have equal right before the law to share equally.

That Kennedy Kagunda may have L.R. Iriaini/Kaguyu/649 and a portion from L.R. 514 to have equal share with other children of the deceased.

Annah Wamaitha made a proposal for the distribution of the Estate similar to that proposed by Grace Thuguri. In a supplementary affidavit, Annah Wamaitha, urged this court to issue orders to compel Kennedy Kagunda and Stephen Macharia to compensate the Estate for the trees the duo cut and disposed of from L.R. No. Iriaini/Kaguyu/514. She also sought for injunctive orders to restrain the duo from interfering with the Estate assets. Juliana Wachuka Macharia on her part proposed for the Estate to be shared as follows:

L.R.NO. Iria-ini/Kaguyu/649 to be inherited by Kennedy Kagunda absolutely.

L.R.NO. Iria-ini/Kaguyu/514

- i. Kennedy Kagunda - 0.53 acres
- ii. Tabitha Wakonyu Mundia - 1.78 acres jointly
- iii. Lydia Wangui Mundia
- iv. Eunice Njeri- 1.78 acres
- v. Anna Wamaitha - 1.78 acres
- vi. Grace Thuguri - 1.78 acres
- vii. Juliana Wachuka - 1.78 acres
- viii. Mary Nyaguthii - 1.78 acres
- ix. John Muturi
- x. Stephen Macharia
- xi. Ann Njoki - 1.78 acres jointly
- xii. Rose Muthoni

In a supplementary affidavit, Grace Thuguri, urged this court to issue an order to force Kennedy Kagunda and Stephen Macharia to tender accounts for the sale of produce and rental incomes from the Estate. Kennedy Kagunda filed the affidavit of one Joseph Mukua Kanyora in support of the Protest. Joseph Mukua averred that he was a close friend and neighbour of the deceased. He deponed in paragraph 4 of his affidavit that he attended a meeting called by the deceased on 24.08.1992 at the Chief's office, Iriaini location where the deceased distributed his land as follows:

- a. **That Kennedy Kagunda was to get 7 acres of the main land comprising of 14 acres or thereabout.**
- b. **That Michael Mundia was to get 2.5 acres since he already had given him 4.5 acres in a separate parcel.**
- c. **That Mary Nyaguthii was to get 3 acres of the main land parcel.**
- d. **That the 4 children of the late Lydia Theru were to get 2 acres.**
- e. **That the remaining 1 acres was to be reserved for the married daughters of the deceased in the event that any of them was divorced.**

It is averred that the deceased made his wishes known in the presence of his children. In a joint affidavit of Protest sworn and filed by Tabitha Wakonyu Mundia and Lydia Wangui, the duo claimed that some of the beneficiaries are already married and settled in their homes hence they are not entitled to

share the Estate as they are no longer dependants of the Estate. They proposed for the Estate to be distributed as follows:

a) **Iriaini/Kaguyu/514**

- i. Kennedy Kaguna - 5.5. acres
- ii. Tabitha Wakonyu & Lydia Wangui - jointly 2.5 acres
- iii. Mary Nyaguthii - 3 acres
- iv. John Muturi- 1 acre
- v. Stephen Macharia - 1 acre

b) **Iriaini/Kaguyu/649**

Kennedy Kagunda - whole portion

I have considered the material placed before this court together with the submissions filed by the parties herein. It is not in dispute that the assets of the Estate have been identified as follows:

- i. **L.R. No. Iriaini/Kaguyu/514 and**
- ii. **L.R.No. Iriaini/Kaguyu/649**

According to the letter of the chief, the deceased was survived by the following:

1. Lucy Muthoni Macharia – widow
2. Mary Nyaguthiii - daughter – adult
3. Kennedy Kagunda - son – adult
4. Michael Mundia - son - adult
5. Eunice Njeri - daughter – adult
6. Anna Wamaitha - daughter - adult
7. Grace Thuguri- daughter – adult
8. Juliana Wacuka - daughter – adult
9. John Muturi - Grandson – adult
10. Stephen Macharia - Grandson – adult
11. Ann Njoki - Grandson – adult
12. Rose Muthoni - Granddaughter -adult

It is apparent from the averments made in the affidavits that there is no dispute as to the identification of the assets of the Estate. However there is a dispute as to who should be the rightful beneficiary of the Estate. There is also a dispute as to the mode of distribution. There is no dispute that the deceased died intestate. The question which this court must grapple with now is whether the deceased made his wishes known inter vivos. If there is evidence showing that the deceased expressed his wishes during his life time the court will normally give effect to those wishes unless they are impossible to implement. A careful perusal of all the affidavits filed herein indicates that the deceased gave land inter vivos to the following beneficiaries:

i. **Michael Mundia (now deceased)**

L.R. No. Iriaini/Kaguyu/512 – 2.0225 Ha

ii. **Juliana Wachuka**

L.R.No. Iriaini/Kaguyu/513 – 1.05 Ha

The law requires that the property given to those beneficiaries should be taken into account as gifts while sharing out the remainder of the Estate.

The deceased passed on leaving the following assets:

a) L.R.No. Iriaini/Kaguyu/514 – 13 acres

b) L.R.No. Iriaini/Kaguyu/649 – 2 ½ acres

According to Kennedy Kagunda (*1st Protestor*), the deceased had given him 6½ acres to be excised from **L.R. No. Iriaini/Kaguyu/514** which he alleged he commenced extensive developments on the land. The 1st Protestor stated that the deceased expressed his wishes in the presence of the beneficiaries and clan elders on 24.08.92 in the Chief's office. I have looked at the affidavits of Protest and those filed in support of the summons and I have found none which has controverted the 1st Protestor's assertion. In the end, I am convinced that the deceased expressed his wishes on how his land should be shared as stated by the 1st Protestor. I find the 1st Protestor's Protest to be well founded.

Consequently, the grant is ordered confirmed in terms of the schedule of distribution proposed in the affidavit of Protest by the 1st Protestor i.e Kennedy Kagunda. For the avoidance of doubt the Estate should be distributed as follows:

L.R. No. Iriaini/Kaguyu/649

- i. Eunice Njeri Ruoro
- ii. Ann Wamaitha Njoroge jointly
- iii. Grace Thuguri Gacengo

L.R.NO. Iriaini/Kaguyu/514

- i. Kennedy Kagunda - 6.5 acres
- ii. Tabitha Wakonyo Mundia - 2.5 acres jointly
- iii. Lydia Wangui Mundia
- iv. Mary Nyaguthii - 2.5 acres
- v. John Moturi
- vi. Stephen Macharia
- vii. Ann Njoki - 2.0 acres jointly
- viii. Rose Muthoni

This dispute involves close family members therefore I order that each of them meets his or her own cost.

Dated, signed and delivered this 23rd day of August, 2013.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Maina Karingithi

N/A Kinyua Kiama

Beneficiaries are present