



IN THE MATTER OF THE ESTATE OF DANIEL NYAGA GACHIETHIRE - DSD

EMILY MUTHONI NYAGA.....PETITIONER

VERSUS

MARGARET MARIGU NYAGA.....PROTESTOR

R U L I N G

Pursuant to the ruling by Hon. Justice Lenaola dated 26th May 2005, the Petitioner (Emily Muthoni Nyaga) and the Objector/Protestor (Margaret Marigu Nyaga) were issued with joint letters of administration, in respect of the estate of Daniel Gachiethire (deceased).

Thereafter the Objector/Protestor filed summons for confirmation of grant with a proposal that the only property in the estate viz GATURI/NEMBURE/525 be shared equally between her and the Petitioner. This elicited a protest from the Petitioner. She filed her affidavit of protest dated 12/11/2007. In it she states that the Objector/Protestor did not contribute to the acquisition of the property, which is very small. And that the Objector/Protestor had inherited her parents land.

The main bone of contention here is that though the Objector/Protestor was married to the deceased in 1956 they went separate ways in 1966 and the Petitioner was then married by the deceased. The Objector/Protestor then lived with her parents. The deceased died in 2001 and that's when the Objector/Protestor resurfaced. These are the facts I have picked from the material before me. This court had already made a finding that for purposes of the Law of Succession Act the Objector/Protestor was a wife and entitled to an inheritance of the deceased's property.

Both Counsels agreed to file written submissions in respect of the Summons for Confirmation of Grant. Mr. Utuku for the Objector/Protestor submitted that the property should be shared out equally and cited the case of;

CATHERINE NYAGUTHII MBAUNI –VERSUS- GREGORY MAINA MBAUNI NYERI COURT OF APPEAL NO.34 OF 2004

M/s Waruhiu K'Owade & Ng'ang'a for the Petitioner/Protestor submitted that the Petitioner should get $\frac{3}{4}$ of the property for the reason that the Objector never participated in the development of that property. He cited the cases of;

1. *RONO –VS- RONO C.A. NO. 66/02 ELDORET*

2. *GRACE MUTHONI NDILYEI –VS- CHARLES GITONGA MURIUKI NAKURU HCCA NO.137 OF 2006.*

3. *In the Estate of AGGREY ORIENO AMBALA (DECEASED) SUCCESSION CAUSE NO.68/1986.*

I have considered the submissions and the findings by their lordships in the authorities cited. I have found

them to be extremely useful.

Section 40 of the Law of Succession Act gives a guideline on how the property of a polygamous intestate should be distributed. It provides;

“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 interstate estate shall in the first instance,7 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”.

Section 40 (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 the sections 35 to 38”.*

There has already been found to have been two households in the intestates estate.

The issue for determination here is whether there should be equal distribution between the two households. It should be noted that section 40(1) of the **ACT** does not provide anywhere that distribution to the houses and even to the children must be equal. To me this gives a discretion to the court in making the distribution which must however be done judiciously and on sound legal and factual basis. The same discretion is also given to the court under section 27 of the Act.

The distribution must be fair and just.

It has been shown in the submissions before me that the Objector/Protector has 4 children of the deceased. I disagree with that. Upon reading the Judgment of the lower court on the divorce case, it's clear that the Objector/Protector left the deceased's home in 1966. The deceased did not prior to his death accept the Objector back. Her 4th child was born in 1969. Unless otherwise proved this could not be the deceased's child. She can therefore only inherit through her mother.

Thereafter the people who legally have a share in the intestate's estate from the Objector/Respondent's house are the first 3 children. i.e. 4 units. In the Petitioner's house are the 4 children and the Petitioner i.e. 5 units. Besides the units indicated above the circumstances revealed herein which are not disputed are that the Objector herein left the deceased's home in 1966. She only resurfaced in 2001 after the deceased's death. Even her children have not been in occupation of the land which is the sole property in the intestate's estate. For all the years the Objector/Protector was away the property was in the exclusive occupation of the Petitioner and her children. It is not property that has been lying idle and I believe there are developments on it.

Taking all these and the applicable Law into account plus the fact that the suit property only measures 1.62 hectares (copy of register) I do find that the estate cannot be shared equally between the two households as suggested by the Objector/Protector. The parcel known as GATURI/NEMBURE/525 will be shared out between the two households as follows;

1. Margaret Nyaga to get 0.54 hectares for herself and her children.
2. Emily Nyaga to get 1.08 hectares for herself and her children.

Owing to the relationship of the parties each party to bear her own costs. Right of Appeal explained.

SIGNED AND DELIVERED AT EMBU THIS 10TH DAY OF MAY 2012.

H.I. ONG'UDI
J U D G E

In the presence of;

Mr. Utuku for Protestor

Parties

Njue – C/c