



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 610 of 2005

IN THE MATTER OF THE ESTATE OF KARANJA KINYANJUI (DECEASED)

JUDGEMENT

A perusal of the record reveals that the proceedings herein relate to the estate of one deceased person named Karanja Kinyanjui. There is an affidavit in support of the petition for letters of administration intestate. The list of beneficiaries is given in paragraph 4 of the affidavit as follows.

- (a) E.N.K -widow
- (b) R.W.K (daughter) 22 years
- (c) M.M.K (Daughter) -17 years
- (d) J.K.K (son) -13 years
- (e) J.W.K (son) -46 years
- (f) B.N.K (son) 43 years,
- (g) V.M.K (married Daughter) 48 years.
- (h) A.W.N (married Daughter) 41 years
- (i) P.M.K (son) 39 years
- (j) G.N.K (son) 36 years
- (k) E.K.W (grand son) 11 years
- (l) W.N.W (grand daughter) 11 years.

The assets belonging to the estate are listed in paragraph 6 as follows:-

- (a) Kiambaa/Waguthu/1640-0.12 ha
- (b) Kiambaa/Waguthu/521-2 acres
- (c) Kiambaa/Waguthu/T13 -¼ acre
- (d) Kiambaa/Waguthu/T13-1/4 acre
- (e) Kiambaa/Waguthu/T508- 0.044 ha

(f) Kiambaa/Waguthu /T 45- ¼ acre

(g) Loc B/Gakoe 471 0.88 ha.

It is on record that the grant was initially issued to one J.W.K and B.N.K who had described themselves as sons of the deceased. Along the lines, a citation was taken out and served on to R.W.K to refuse or accept the petition for issuance of the grant. It is on record that the said E.N.K responded by entering appearance dated 27th day of April 2005 and filed the same date.

The original grant had been made to the two original applicants namely J.W.K and B.N.K on the 16th day of September 2005. On the basis of this grant the said two applicants presented to court a summons for confirmation of a grant dated 10th day of April 2006 and filed on 11th day of April 2006.

In the affidavit in support, a schedule of distribution is set out. For purposes of the record it reads as follows:-

1. Kiamba/Wanguthu/1640 comprising 0.12 ha to go to J.W.K.
2. Kiambaa Waguthu/T3 comprising ¼ of an acre to go to B.N.K and P.M.K who are to share the same equally.
3. Kiambaa/Waguthu/T13 comprising ¼ acres to be shared by J.W.K and G.N.K and the same to be shared equally.
4. Kiambaa/Waguthu/T45 comprising ¼ acres to be shared equally between J.W.K and E.N.K as trustees. J.W.K to hold in trust for E. K.W and E.N to hold in trust for J.K.K.
5. Kiambaa/Wanguthu/T508 comprising 0.044 ha to J.N.K to hold in trust for W.N.W.
6. Kiambaa/Waguthu/T521 was to be shared by:-
 1. E.N.K
 2. R W K
 3. M M K
 4. J K K
 5. B N K
 6. G N
 7. P M
 8. V M
 9. H W
 10. J W K. Each to get 0.2 acres. But the share of J W K is to be held in trust by him for the benefit of EKaranja W and W N K. It is noted that this portion is to be located in the area where the permanent house stands.
7. LOC B/Gakue/471 to go to
 1. E N K
 2. R W K

3. M M K

4. J K K

5. J W K

6. B N K

7. G N K

8. P M K

9. V M

10. H W

11. J W K. Each is to get 0.08 ha. The last share of J W K is to be held in trust for E K W and W N W.

8. All household goods namely tools, utensils, furniture and livestock comprising 3 cows, 7 goats and 3 sheep all to go to E N K.

Further perusal reveals that two people did not sign the consent and distribution.

One E N filed summons for the revocation of the grant dated 18th day of November 2005, and issued on the 25th day of November 2005. The reason given for the application for revocation was that she E N K was the second wife of the deceased, after the death of the mother of the applicants. She was not consulted when the petition was being filed, and neither was she included as an administrator and the shares and identification of the share entitlement of each beneficiary had not been determined.

In response to the summons for revocation, one J W K put in a replying affidavit deponed on the 24th May 2006 and filed the same date. The salient features of the same are that:-

- The applicant E K had been included as a beneficiary.
- She refused to sign form P38
- As a consequence of the said refusal, a citation was issued to her, where she entered appearance but took no further steps in the matter till the original petitioners filed an application for confirmation.

On 12/11/2007 the parties entered a consent whereby, the earlier grant was revoked and a new one issued in the name of J W K and E N K

Following the issuance of a fresh grant in the name of J W K and E N K, a fresh application for confirmation of grant dated 15th July 2008 and issued on 30th day of July was filed. J W K reproduced the affidavit and the schedule of distribution that had supported the first grant. The distribution proposed by J W K was endorsed by B N K, V M K, A W N, P M K and G N K. But was not endorsed by R W K, M M K, J K K and E N K.

E N K put in an affidavit in protest against confirmation. A perusal of the content of the same reveals that the protester is in agreement as regard the list of beneficiaries and the list of assets but does not agree with the mode of

distribution of J W K. Her proposed mode of distribution for purposes of the record is as follows:-

1. Kiambaa/Waguthu/1640 comprising 0.12 ha is to be shared equally between J W K and E N K.
2. Kiambaa /Waguthu/T3 comprising $\frac{1}{4}$ acre is to be shared equally by B N K and P M K.
3. Kiambaa/Waguthu/T13 comprising $\frac{1}{4}$ acre to be shared equally by J W K and G N K.
4. Kiambaa/Waguthu/T45 to be shared by E N K as the sole beneficiary.
5. Kiambaa/Waguthu/T508 comprising 0.44ha to go to J W K to hold in trust for E K W and W N W.
6. Kiambaa/Waguthu/521 measuring approximately 2 acres. $1\frac{1}{4}$ acres to go to J W K. B N K, V M K, A W N, P M K and G N K. The remainder $\frac{3}{4}$ of an acre where the permanent house is located is to be shared by E N K, R W K, M M K and J K K. Members of the 2nd house.
7. LOCB/Gakoe/471 which comprises 2 acres. one acres is to be shared equally by J W K, B N K, V M K, A W Nj, P M K and G N K who are members of the first house. While the other one acre was to go to E N K, R W K, M M K, J K K. Members of the second house and the same is to be shared equally.
8. All households' goods, tools, utensils, furniture and livestock of 3 cows, 7 goats and 3 sheep were to be taken by Esther Njeri Karanja.

Directions has been taken by Gacheche J that parties do proceed by way of Viva Voce evidence, which was changed by consent of the counsels on 13/10/2009, whereby the counsels agreed that the court, do rule on the matter on the basis of affidavits filed and documents listed.

Counsel for J W K filed skeleton arguments dated 9th November 2009 and filed the same date. The salient features of the same are as follows:-

- The units in the first house comprise

1. J W K- the first administrator
2. B N K
3. V M K
4. A W N
5. P M K
6. G N K.

The first house also comprises one more unit of a deceased daughter but who left behind two children namely E K W and W N W.

- The second house on the other hand has the following units.

1. E N K
2. R W K

3. J K K

4. M M K

That the two administrators are in agreement on the mode of distribution on two properties namely

(a) Kiambaa/Waguthu T3

(b) Kimbaa/Waguthu T13

And the court, was urged to confirm that distribution.

- That property No. Kiambaa/Waguthu/1640 should be given to the first administrator solely because he is not getting a share in land parcel number Kiambaa/Waguthu/521.
- That Kiambaa/Waguthu T.45 to be given to E K W a son to a deceased daughter and a son of the 2nd administrator. The same to be held in trust for both.
- Whereas Kiambaa/Waguthu/T508 to be held in trust for W N W a daughter of a deceased daughter of the deceased.
- That in Kiambaa/Waguthu/521 the children of the deceased daughter be given the portion where the house is, because they are orphans and have nobody to put up a house for them.
- There should be equal sharing of land parcel number LOCB Gakoe/471 inclusive of the children of the deceased daughter.
- The court is invited to be guided by the provisions of section 40 (1) and 2 of the law of succession Act cap 160 laws of Kenya.

The second administrator protestors written skeleton arguments are dated 9th November 2009 and filed on the 20th day of November 2009. The salient features of the same are as follows:-

- The two administrators are a step son and step mother.
- That the deceaseds' estate comprises the assets set out by both sides.
- There are two houses entitled to share in the benefit of the deceased because the first wife died and then the deceased married the second administrator on 22/7/2002 before he died on 6/5/2004.
- The court, is also invited to take note of the provisions of section 41 of the law of succession Act whereby the children of the deceased daughter are entitled to the share of their deceased mother. But the court to note that the name of the mother of these children did not feature in the affidavit of deponement but only in the submissions. It is the counsels submissions that this should have been indicated in the affidavit and details given as to when she died and documentary proof of the same exhibited.
- They contend the deceased had declared a wish as to how he wanted the estate distributed

which wish is represented in the affidavit of protest.

- That the mode of distribution by the 1st administrator is not fair because the first administrator has allocated to himself plot No. Kiambaa/Waguthu/1640 which is a prime plot and yet the deceased had wished that it be shared amongst the two administrators.
- That plot No. Kiambaa/Waguthu/T.45 had been given to the 2nd administrator by the deceased.
- That plot No. Kiambaa/Waguthu/T508 had been given to Cecilia Wambui and it should go to her children.
- That the second administrator resides in the permanent house which is on plot No. Kiambaa/Waguthu which the first administrator has suggested that it be given to the grand children of the first house and yet the second administrator does not have means to construct another house. It is their stand that it be given to the 2nd administrator because this will be fair and just as it is her matrimonial home.
- By reason of what has been stated above the court, is invited to be guided by the provisions of section 41 of the laws of succession Act and distribute the estate of the deceased equally amongst his children with the second administrator as an additional unit.

The court, has been referred to both provisions of the law and one case law but the court, will revert to this a later stage in the assessment of the facts.

Due consideration has been made by this court, of the rival argument and the court, makes the following findings as regards the common ground to the dispute namely:-

1. That the deceased had two household units although he was not polygamous. It is common ground that the first wife who was mother to the first administrator passed on and that is when the second administrator was married but it is not clear as to when this change took place.
2. It is common ground that both household units have beneficiaries entitled to benefit from the estate.
3. The assets forming the intestate estate asset are also in agreement.
4. The number of beneficiaries is also agreed. This is confirmed by the second administrator protestor admitting paragraph 1, 2, 3 and 4 of the first administrators' affidavit in support of summons for confirmation of the grant save for the mode of distribution.
5. It is common ground that the estate is intestate and not testate. Counsel for the 2nd administrator protestor introduced the issue of the deceased wish on how the estate should be distributed. It is however to be noted that the first administrator never mentioned a deceased's' wish. The second administrator also did not mention this in her affidavit when she applied to revoke the grant or in her current affidavit of protest. This being the case,

the issues of existence of a wish of the deceased as regards the mode of distribution of the deceaseds' estate is a statement from the bar by counsel for the protestor and the same will be ignored.

6. The protestors' counsel also raised the issue of lack of information on the name of the deceaseds' daughter who died leaving behind two children who are also entitled to inherit. Indeed the particulars of this deceased daughter and when she died have not been given. However since both sides agree that these two children are among the beneficiaries and form one unit, failure to disclose the details of the name of the mother, when she died, and failure to annex documentary proof of their deceased mother has not prejudiced the protestor in any way and can be ignored as being inconsequential.
7. It is common ground that each administrator has stuck to his/her mode of distribution and that is why the court, has been asked to rule on the issue of distribution.

On the law and case law, the court, was invited to be guided by the provisions of section 35-38 dealing with distribution of the deceaseds' estate where there is one surviving spouse with no children, where there is no surviving spouse and no children. But more particularly to where there is one surviving spouse but the deceased had married more than once like in the circumstances of this case. The applicable section is section 40(1) and (2) of the law of succession Act cap 160 laws of Kenya. The section reads:-

“Section 40 (1) where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residence of the net intestate 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 section 35 to 38”

On case law the court, was referred to the case of **RONO VERSUS RONO AND ANOTHER (2008) IKLR (G&F)** decided by the court of appeal where it was held inter alia that

“1, 2.....

(3) The fact that the girls would one day get married was not a determining factor when it came to the distribution of the net estate of the deceased. The court, had a duty to exercise its discretion judiciously when it came to distributing the estate.

(4) The deceased treated all his children equally and therefore the court, should have done the same. There was no indication that the daughters were going to get married as they were at an advanced age. There was therefore no justification for the court, reducing their shares. The distribution should have been done according to the number of children in each house.

Due consideration has been made by the this court, of these guiding principles and applied them to the rival

modes of distribution presented herein by the administrator, the same have also been considered in the light of the submissions of both sides and the court, proceeds to make the following findings in respect of the same.

1. Both administrators and both modes of distribution are in agreement in the distribution of two properties namely, items 2 and 3 in the schedules which have been distributed as follows:-

(a) Kiambaa/Waguthu/T3 comprising $\frac{1}{4}$ acre to be shared equally by B N Karanja.

(2) P M K

(b) Kiambaa/Waguthu/T13 also comprising $\frac{1}{4}$ of an acre to be shared between J W K and G N K in equal shares.

The court confirms the distribution of the said 2 items.

2. Both administrators are also in agreement that household goods, tools, utensils, furniture and livestock comprising 3 cows, 7 goats and 3 sheep should go to E N K, the widow of the deceased and the court, confirms that distribution.

3. Item 5 is land Parcel number Kiambaa/Waguthu/T508 comprising 0.044 ha. In the first administrators schedule it has been given to G N K to hold in trust for W N W only. Whereas in the schedule of the second administrator, protestor the same asset has been given to J W K to hold in trust for E K W and W N W. The two minors are said to be sharing a mother and are getting the share of inheritance on account of their mother. The court, is of the opinion that had the mother been alive, he would have been given the whole asset. This being the case, since the children share a mother it is only proper that they be treated equally. The court, therefore confirms the distribution of the second administrator protestor on this item to the effect that land parcel number Kiambaa/Waguthu/T508 be given to J W K to hold in trust for

(i) E K W and

(ii) W N W

4. Kiambaa/Waguthu/T45 comprises $\frac{1}{4}$ acre. In the schedule of the first administrator the same has been given to J W K to hold in trust for E K W and to E N K to hold in trust for J K K, to be shared equally. Whereas in the schedule of the second administrator protestor the entire parcel goes to E N K. Due consideration has been made of these two propositions and the court, finds that since E K W and his sister have solely benefited from Kiambaa/Waguthu/T508 a unit from the first house, it is only proper that the second house should also get one whole asset to it as a unit.

In this court's, opinion since J K stands to benefit from 2 other properties, it is only proper that the entire portion go to E N K. The court, therefore confirms the distributions by E N K and order that land parcel number Kiambaa/Waguthu/T45 to go to E N K as the sole beneficiary.

5. In the first administrators schedule land parcel number Kiambaa/Waguthu/521 comprising 2 acres has been shared equally amongst all the beneficiaries except J W K who is only getting 0.2 acres to hold in trust for E K

W and W N W, with a recommendation that the share of the minors should be cited where the permanent house is because they have nobody to built a house for them whereas, on the schedule of the second administrator she has subdivided the property into portion of $\frac{1}{4}$ to be shared by members of the first house equally minus the two grand children of that house. Where as herself and children in her house to get $\frac{3}{4}$ portion sited where the house is. It has been argued on her behalf that the permanent house is the matrimonial home and it is only fair that she gets it. There has been no rebuttal evidence that this is not the matrimonial home.

According to the rules, spouses rank in priority over children and grandchildren. It is only proper that the surviving spouse do get the matrimonial home where she had been living with the deceased. In deed she has given concession by giving the first house $\frac{1}{4}$ more. But it has to be born in mind that the permanent house appreciates the value of the portion where the permanent house is located. It also has to be borne in mind that the first house has more units than the second house. The second administrator also left out the two minors representing a unit of a deceased daughter without assigning any reasons. Due consideration has been made of the two schedules and find that the distribution of the first administrator is fair in so far as each got an equal share with the exception that the portion where the permanent house will go to the widow as that has been her matrimonial home. The share of the minors will be held in trust for them by J W k

6. 2 acres out of LOCB/Gakue/471 on the first administrators schedule has been shared out equally amongst all the beneficiaries including the minors representing the unit of a deceased daughter. Whereas in the schedule of the second administrator protestor each house is to get 1 acre and then share equally amongst themselves. The second administrator left out the minors representing the unit of a deceased daughter and also failed to take into consideration the fact that the first house has more units. Due consideration has been made by this court, of the two schedules and the court, finds that of the first administrator to be fair as the same has been shared out on equal basis.
7. The last item to be dealt with is item one comprising land parcel number Kiambaa/Waguthu/1640 comprising 0.12 ha. In the first administrators schedule, this has gone solely to J W K. The members of this house have no objection as they endorsed the consent. Where as according to the schedule of the second administrator protestor, the portion is said to be a prime plot and the deceased had left a wish that it be shared equally between J W K and E N K. This court, has already ruled that the issue of the deceaseds' wish in so far as the distribution of the estate is concerned, was only a statement from the bar and is not even supported by the deponements of the protestor. It therefore follows that what is to be applied herein are the rules on distribution and fairness of the court to both sides in the exercise of its discretion.

Due consideration has been made of the above by this court, and the court, is of the opinion that of the two, E N K has benefited twice as the sole beneficiary of parcel number Kiambaa/Waguthu/T45. She also has the benefit

of all household goods, tools, furniture and livestock and a permanent house. She also has shares in Kiambaa/Waguthu/521 and in the 2 acres in LOCB/Gakoe/471. Whereas J W does not have any property solely to himself and does not have a share in home portion, namely Kiambaa/Waguthu/521. It is only fair that he gets this portion solely to himself. Ordering E N K to share with him will result in an over compensation to the house of E N K which in fact has less units than those of the first house.

For the reasons given in the assessment the summary of the distribution done by the court is as stated hereunder:-

1. Kiambaa/Waguthu/1640 comprising 0.12 ha to J W Karanja absolutely
2. Kiambaa/Waguthu/T3 comprising $\frac{1}{4}$ acre to
 - (a) B N K
 - (b) P M K to be shared equally.
3. Kiambaa/Waguthu/T13 comprising $\frac{1}{4}$ acre to
 - (a) J W K
 - (b) G N K to be shared equally
4. Kiambaa/Waguthu/T45 to E N K absolutely.
5. Kiambaa/Waguthu/T508 comprising 0.44 ha to J W K to hold in trust for
 - (a) E K W
 - (b) Winnie Njeri Wambui in equal shares
6. Kiambaa/Waguthu/521 measuring approximately 2 acres to
 - (a) E N K
 - (b) R W K
 - (c) M M K
 - (d) J K K
 - (e) B N K
 - (f) G N
 - (g) P M
 - (h) V M
 - (i) H W
 - (j) J W K who is to hold the share in trust for E K W and W N W.

NOTE/ To be shared equally. The permanent house which is the matrimonial home to go to the widow E N K. The shares of E N K, R W K, M M K and J K K who are members of the 2nd house to be sited in the portion where their mothers permanent house is located

7. 2 acres out of LOCB/Gakue/471 to

- (a) J W K
 - (b) B N K
 - (c) V M K
 - (d) A W N
 - (e) P M K
 - (f) G N K
 - (g) E N K
 - (h) R W K
 - (i) M M K
 - (j) J K K
 - (k) J W K to hold in trust for E K, W and W N W to be shared equally. Again to be shared equally and the shares of the second house to be sited or located in one place.
8. Household goods, tools, Utensils, furniture and livestock comprising 3 cows, 7 goats and 3 sheep to E N K absolutely.
9. Each party will bear own costs.

DATED, READ AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2010.

R.N. NAMBUYE

JUDGE