



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Succession Cause 286 of 1993

IN THE MATTER OF THE ESTATE OF GIKANG'A WAITHAKA (DECEASED)

RULING

The applicant Lydia Wanjiku Gikang'a is a beneficiary of the Estate of Gikang'a Waithaka who died on 23rd June, 1993. She has moved this court under an affidavit of Protest filed on 23rd May, 2006 in which she claims an equal share of her father's estate as her only brother Simon Gikang'a Waithaka.

The deceased Gikanga Waithaka was a polygamous man who left behind two surviving widows, Sarah Wambui Gikang'a (first wife) and Elizabeth Nduta (third wife) and their respective children. The deceased's second wife Karen Wambui had predeceased him, leaving behind the applicant (Lydia) and her brother Simon. The Succession Cause herein was filed for the purposes, inter alia, of obtaining orders for the distribution of the Estate property in accordance with the wishes of the deceased, who, was found to have given directions regarding the manner in which the Estate would devolve to the three houses. The court having found the proposed mode of distribution equitable delivered a judgment on 17th November, 1998 directing that the petitioners, Sarah Wambui, Simon Gikang'a (for the second house) and Elizabeth Nduta do apply for the confirmation of the temporary Grant issued to them on 29th May, 1995 in terms of the judgment, which were, basically, that the estate would be shared out as arranged by the deceased before he died. The judgment having not been appealed against, the same was followed by the Hon. Mr. Justice Kimaru in a Ruling delivered on 5th November, 2004, dismissing an application by Lydia Wanjiku (the applicant herein) seeking orders that she be given a share of the property inherited by her two step-mothers. When delivering its judgment of 17th November, 1998, the court confirmed the manner in which the deceased had distributed his property among his heirs.

On 6th March, 2006 Elizabeth Nduta Gikang'a moved the court for the confirmation of the Grant to facilitate the final distribution of the remainder of the estate as follows:

(a) Sarah Wambui Gikang'a

(i) 5 acres of Nyandarua/Upper Gilgil/138/1

(ii) Pangani plot No.198

(b) Elizabeth Nduta Gikang'a

(i) 17 acres of Nyandarua/Upper Gilgil/138/1

(ii) Pangani plot No.131

(c) Simon Gikang'a Waithaka

(i) Limuru/Bibirioni/1695

(ii) Limuru/Bibirioni/1696

(iii) Nyandarua Upper Gilgil/152

(iv) Limuru Pyrethrum Growers Share No.290

(v) Pangani plot No.164

(d) Lydia Wanjiku Gikang'a

(i) Limuru Bibirioni/1843

(ii) Limuru Dairy Farmers Share No.440.

It is in respect of the above that the applicant brought this objection by way of a protest, made under her affidavit of 23rd May, 2006. The applicant having deponed in the said affidavit that she had no objection to the distribution of the Estate in as far as it related to Sarah Wambui Gikang'a and Elizabeth Nduta Gikang'a, a consent order was recorded on 2nd February, 2007 pursuant to which the inheritance of the two widows was confirmed and a partial Grant confirmed accordingly.

Viva voce evidence was adduced in this application. The applicant's protest against the brother's share is that he should not inherit more than 21 acres of land and the Pangani plot No.164 whereas she gets 7 acres of land only. She says that whereas she is unmarried with 4 children to take care of, Simon, on the other hand has a wife, who helps him make more money and less children. I do not consider this to be a good reason to claim an enhanced share of the Estate. The applicant does not dispute that her brother was given the property listed under (c) (i) (ii) and (iii) by their father who also gave her the properties listed as (d) (i) and (ii) above.

Indeed, looking at the petition as filed on 25th October, 1993, the only assets available for distribution were:

i) Nyandarua/Upper Gilgil/138/1

ii) Nakuru Pangani/164 /Nakuru Municipality

iii) Nakuru Pangani/131/Nakuru Municipality

iv) Nakuru Pangani/198/1

v) Shares in Limuru Pyrethrum Growers Society Limited. Other assets including Simon Gikang'a's Limuru/Bibirioni/1695 and 1696 and Nyandarua/Upper Gilgil/152 had been bequeathed to the beneficiaries prior to the deceased's death.

In his evidence, the Respondent admitted that the Nakuru plot – Pangani plot No.164 was still in the deceased's name which clearly shows that the same could not have been given to him by his father prior to his demise. His own testimony was that the immovable property bequeathed to the various beneficiaries before the deceased's demise were registered in the beneficiaries' names prior to the death of the deceased. The applicant does not deny this. It is clear from the evidence adduced before me and as reflected by the judgment of 17th November, 1993 that the agreed mode of distribution of the three Nakuru properties was that each house gets one of the said properties. It is evident from the Replying Affidavit of Elizabeth Nduta of 6th July, 2005 that Simon Gikang'a Waithaka would get the Pangani plot

No.164 as the representative of his deceased mother's house in accordance with the terms of the judgment of 17th November, 1998. He cannot therefore inherit the whole share.

In the premises, I find that the applicant herein is entitled to a ½ share of the only asset available for distribution i.e. PANGANI PLOT NO.164 NAKURU MUNICIPALITY. Pending the sub-division and registration of the individual shares, I hereby order that the proceeds of the rental houses said to be situated therein to be shared equally henceforth.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nakuru this 26th day of February, 2009.

M. G. MUGO

JUDGE