



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause 610 of 2005

[IN THE MATTER OF THE ESTATE OF KANJA NGURE KINYUNGU .. DECEASED]

AND

HIRAM NDUNGU KANJA PETITIONER

JUDGMENT

Deceased who died on 16th July 2005 at the ripe age of 101 in his life time was married to two wives. The first wife was Janet Wanjiru Kanja who died in 2003, or thereabouts. The second wife who is alive is called Jedidah Wanjiru Kanja. The first wife's offsprings who are concerned in this estate are Priscillah Nyokabi Kanja and Hiram Ndungu Kanja. It is Hiram who petitioned hereof for letters administration intestate. The second wife had the following offsprings for the purpose of this estate, that is; Duncan Karimi Kanja, David Muondou Kanja, Charles Wanjau Kanja, Stanley Ndiritu Kanja and Robert Nguyo Kanja. The application for confirmation of grant filed by Hiram was protested to by Duncan Karimi. In the application for confirmation of grant Hiram sought that he and his sister Priscillah do inherit parcel No. **TETU/ICHAGACHIRU/941 and 942**. The offsprings of the second house it was prayed that they, five of them, do inherit **TETU/ICHAGACHIRU/944 and 945**. Parcel No. **TETU/ICHAGACHIRU/943** was suggested to be shared between the offsprings of the 1st wife and 2nd wife. Duncan in his protest sought that the properties be shared as follows:-

- (i) TETU/ICHAGACHIRU/941 to Stanley Ndiritu Kanja
- (ii) TETU/ICHAGACHIRU/942 to Robert Nguyo Kanja
- (iii) TETU/ICHAGACHIRU/943 to Charles Wanjau Kanja
- (iv) TETU/ICHAGACHIRU/944 to David Muondou Kanja
- (v) TETU/ICHAGACHIRU/945 to Duncan Karimi Kanja

All the above plots are equal in measurement. The protest was heard by way of viva voce evidence. Duncan in support of the protest stated that their deceased father had the afore stated 5 plots which were a resultant of the sub division of TETU/ICHAGACHIRU/466. That sub division was under taken by deceased in 2004. Deceased applied for consent to transfer those plots as indicated in affidavit of protest but consent was not granted because of the objection raised by Priscillah Nyokabi. Before the deceased

could attend the second land board consent he passed away. Duncan stated that Hiram was not entitled to get any of the above 5 stated plots because he had been given parcel No. TETU/ICHAGACHIRU/632 which measures 0.86 hectares. Duncan referred to the many cases that had been filed by Hiram, his sister and their deceased mother, the first wife, against the deceased. The first case was filed by the deceased wife as 1st plaintiff and Hiram Ndungu as 2nd plaintiff against the deceased. They sought by that action that parcel No. 466 (which subsequently was sub divided into 5 plots) be divided equally between the two houses of deceased. In the meanwhile the 1st house had registered caution against that property and the court ordered for the removal of those cautions. Hiram filed another action together with Priscillah against the deceased in 2004. In that action Hiram and Priscillah sought interlocutory injunction to stop deceased from subdividing parcel No. 466. In the affidavit in support of the injunction application Hiram intimated that he had also filed a dispute against deceased at the Tetu Land Dispute Tribunal. The injunction application was dismissed. Hiram however obtained an order from the Tribunal ordering the registration of caution over parcel No. 466. Duncan stated that these cases were intended to interfere with deceased's desire to sub divide and register parcel No. 466 in the names as stated in the affidavit of protest. The applications of consent made by the deceased indicating that he wanted to transfer the 5 plots as shown above herein were produced in evidence. On cross examination Duncan stated that Hiram resides on parcel No. 941 and had 1,000 tea bushes. That Hiram however got parcel No. 632 registered in his name in 1981 which land was given by the deceased in his life time. He stated that parcel No. 632 was a subdivision of parcel No. 290. Parcel No. 290 belonged to deceased's brothers who disappeared after the emergency period. Consequently he stated that the clan decided to sub divide it into 3 portions. Hiram got parcel No. 632 one of those sub divisions. Later in evidence it was stated that the 3 portions were allocated to the first born sons of the three brothers amongst who the deceased was one. Duncan stated that the deceased later asked Hiram to exchange that parcel No. 632 with another but he refused. Due to his refusal deceased stated that Hiram would inherit no other land from him. Deceased also stated that deceased said that Priscillah should not inherit his land because she had sold the Gatarakwa land which belonged to the deceased. Further he said that Priscillah does not reside on parcel No. 466. Duncan denied that they were influencing their father to give them the 5 plots. He said that deceased did not have a problem with his mind despite his advanced age. PW 2 Shapton Karimi Mathenge was a beneficiary of the subdivision of parcel No. 290 by the clan. After its subdivision it was given to;

1. Duncan Mija Ngure deceased
2. Shapton Karimi and
3. Danson Gichohi Muriuki deceased

In respect of one deceased's portion Hiram Ndungu Kanja got parcel No. 632. This witness said:-

"Each son was being given his respective father's share each 'mzee' was giving land according to his desire."

PW 3 said he was not related to petitioner or respondent. He together 9 other people were called by deceased in 2004 to witness the survey of his plot 466 into 5 plots. That he divided the 5 plots because Hiram had another land. Hiram in evidence said that deceased in his life time owned:-

1. EUASO/NYIRO/SUGUROI BLOCK VIII
2. PARCEL TETU/ICHAGACHIRU/466
3. LAIKIPIA WEST PLOT NO. 6083

By the time of his death only parcel No. 466 was in deceased name. The other two had been sold but Hiram said he had not benefited from the proceeds of that sale. On parcel No. 466 he has built a kitchen, main house and a store. He cultivates that parcel No. 466 as well as parcel No. 632. The latter was given to him by the clan. He suggested parcel No. 466 be divided equally between the two houses of deceased. On being cross examined Hiram confirmed that parcel No. 466 ceased to exist on subdivision in 2005.

He also confirmed that he and his deceased mother had sued the deceased. Then Hiram stated:

“I knew deceased wanted to transfer the 5 portions of land of 466..... during the life time of deceased. I knew that he was giving property 466 as shown in that affidavit (affidavit of protest).”

He also confirmed that deceased was amongst the clan elders who decided to give him parcel No. 632. That the deceased in his life time financially assisted Priscillah purchase land at Gatarakwa. Priscillah sold that land and after that wanted a portion of parcel 466. Priscillah in evidence denied that deceased financially assisted her to buy land. She stated she is entitled to inherit from the estate of deceased. DW 3 an uncle of the family stated that the deceased’s property was to be divided equally between the two houses. Later in his life deceased resided at his second wife’s house and that was when he changed his mind about the inheritance of his estate. He was however unable to say when deceased gave directions on the inheritance. DW 3 on being cross examined did not seem to know much else about deceased family, even on issues that had been confirmed by the petitioner.

I have considered the evidence tendered before, I also had the opportunity to observe the witnesses when they gave evidence. On a balance of probability I find that the evidence of protestors is more credible. The protestor’s evidence is supported by deceased’s application for consent to transfer the 5 portions of land to the protestor’s siblings. In making that finding I am not making a finding that deceased made a will. No. But it is clear that deceased in his life time gave Hiram parcel No. 632 and Priscillah money which she used to purchase land at Gatarakwa. Hiram did accept that deceased was amongst the clan members who decided that he, amongst others, were to get a portion of parcel No. 290. Hiram also stated that deceased financially assisted Priscillah to buy land. That being so this court is entitled to hold that both of them previously benefited from the deceased’s estate. That benefit in the court’s view makes them dis-entitled to share in the deceased’s estate. S. 42 of the Law of Succession Act makes that provision. That section provides as follows:-

“42 (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) Property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35. that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

That being so this court finds that the mode contained in the affidavit of protest is the acceptable one. The judgment of this court therefore is in the following terms:-

1. The estate of deceased shall be distributed as follows:-

- (i) TETU/ICHAGACHIRU/941 to Stanley Ndiritu Kanja.***
- (ii) TETU/ICHAGACHIRU/942 to Robert Nguyo Kanja.***
- (iii) TETU/ICHAGACHIRU/943 to Charles Wanjau Kanja.***
- (iv) TETU/ICHAGACHIRU/944 to David Muondou Kanja.***
- (v) TETU/ICHAGACHIRU/945 to Duncan Karimi Kanja.***

2. The Deputy Registrar of this court is hereby authorized to sign all necessary documents to put into effect the judgment of this court.

3. There shall be no order as to costs.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 14th day of April 2009.

BY: M.S.A. MAKHANDIA

JUDGE