



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE 51 OF 2005

IN THE MATTER OF THE ESTATE OF BENSON NJAGA MUGO – Deceased

GRACE WANGUI NJAGA.....PETITIONER

Versus

WOTHAYA NJAGA.....PROTESTOR

RULING

Benson Njaga Mugo, passed away on 18th day of March, 2004. This court gave the grant of letters of administration intestate in respect of the estate of **Benson Njaga Mugo**, deceased on 22nd August, 2005 to **Grace Wangui Njaga**. By a summons for confirmation of grant dated 30th March, 2006, **Grace Wangui Njaga**, hereinafter referred to as the petitioner applied for the grant to be confirmed. In the aforesaid application the petitioner sought to have the deceased estate distributed as follows:

- (i) Land parcel No.Githi/Muthambi/84 to be shared equally between Grace Wangui Njaga, Rose Wanjiru Njaga and Wothaya Njaga.**
- (ii) Narumoru/Narumoru/Kieni East Block 1/174 to be given to grace Wangui Njaga.**
- (iii) Narumoru/Narumoru/Kieni East Block 1/147 to be given to Wothaya Njaga.**
- (iv) Plot No.54 Mihuti Market to be shared equally between Grace Wangui Njaga, Rose Wanjira Njaga and Wothaya Njaga.**

When served with the application, **Wothaya Njaga**, hereinafter referred to as the objector, filed an affidavit of protest under rule 40 (6) of the Probate and Administration Rules. She averred that she was not contend with the mode of distribution proposed by the petitioner. She also claimed that the petitioner had sought to exclude her as one of the beneficiaries surviving the deceased. She claimed that the petitioner introduced strangers to share the deceased estate thus diminishing her entitlement. In her replying affidavit sworn on 17th October, 2008, the petitioner urged this court to dismiss the protest and confirm the grant. The petitioner urged this court to note that the objector did not name the alleged strangers nor did she propose any mode of distribution. The facts raised in the replying affidavit provoked the objector to file a further affidavit in support of her protest. In the later affidavit, the objector stated that the petitioner had failed to include the parcel of land known as **Narumoru/Narumoru/Block**

1/Kieni East/786 as part of the deceased's estate. The objector then proposed to have the estate distributed as follows:

- (i) **Githi/Muthambi/84 to be shared as follows:**
 - (a) *¾ acre to Erastus Mugo Nyaga*
 - (b) *The remaining to be shared equally between the petitioner and the objection.*
- (ii) **Narumoru/Narumoru/Kieni East/Block 1/174 to be given to Grace Wangui Njaga.**
- (iii) **Narumoru/Narumoru/Kieni East/Block 1/147 to Wothaya Njaga.**
- (iv) **Plot 54 Mihuti market to be shared equally between the petitioner and the objector.**
- (v) **Narumoru/Narumoru/Block 1/Kieni East 786 to be given to David Kariuki.**
- (vi) **Plot in Narumoru/Narumoru/Kieni East.**

In her rejoinder, the petitioner stated that she was unable to include the parcel of land known as **Narumoru/Narumoru/Block 1/Kieni East/786** as part of the deceased estate because **David Kariuki** failed to release the title documents to her. The petitioner proposed that the parcel of land known as **Githi/Muthambi/84** be distributed in two equal portions to the petitioner and the objector. She proposed that **Erastus Njaga** being the son of the objector should share part of the portion given to his mother. The petitioner further proposed for **Narumoru/Narumoru/Kieni East/Block 1/174** to be given to **Grace Wangui Njaga** alone whereas **Narumoru/Narumoru/Kieni East/Block 1/147** be given to **Wothaya Njaga**. She proposed plot No.54 Mihuti Market to be shared equally between **Rose Wanjira Njaga**, **Grace Wangui Njaga** and **wothaya Njaga**. She also proposed that **Narumoru/Narumoru/Kieni East/Block 1/786** be given to **Kariuki Njaga** whereas the plot at **Narumoru/Narumoru/Kieni East** be given to **Samuel Mwangi Njaga**. When the dispute came up for hearing the petitioner and the objector each testified and summoned the evidence of two independent witnesses. They each reiterated the averments contained in their affidavits. Both the objector and the petitioner agree that the elders arbitrated over the dispute and had even settled the mode of distribution. The petitioner is of the view that the mode of distribution she proposed is in accordance with the schedule of distribution agreed upon by the elders, but the objector believes the contrary was done.

I have considered the affidavit evidence and the viva voce evidence tendered by the protagonists. The objector alleged that the petitioner did not include all the property of the estate in her application for distribution. The evidence tendered shows the following property were disclosed by the petitioner:

- (i) **Githi/Muthambi/84**
- (ii) **Narumoru/Narumoru/Kieni East Block 1/174**
- (iii) **Narumoru/Narumoru/East Block 1/147**
- (iv) **Plot No.54 Mihuti Market.**

It is now apparent that the following property were not disclosed by the petitioner as part of the estate assets:

- (i) **Narumoru/Narumoru/Block 1/Kieni East/786**
- (ii) **Plot at Narumoru/Narumoru/Kieni East**

It is also apparent that the petitioner had in her application for confirmation of grant proposed for the

parcel of land known as **Githi/Muthambi/84** to be shared equally between **Grace Wangui Njaga, Wothaya Njaga** and **Rose Wanjira Njaga**. She has now changed her proposal and has proposed that the property be shared equally between herself and the objector. She has basically excluded **Rose Wanjira Njaga**. After a careful consideration of both the affidavit and oral evidence I am convinced that the protest has merit. I hereby decline to confirm the grant until the issues relating to the identities and shares of all persons beneficially entitled is determined. That is a mandatory requirement under the proviso to the provisions of section 71 of the Law of Succession Act. The determination of issues relating to the rights on interest of any person claiming inter alia to be creditor, devisee, legatee, heir or cestui que trust, accounts by executors etc and on the determination of any question arising directly out of the administration of the estate on trust can be determined under Order XXXVI Rule 1 of the Civil Procedure Rules. Consequently I hereby postpone the confirmation of grant until the parties herein settled the outstanding issues as hereinabove directed. Pursuant to the provisions of rule 41 (3) of the Probate and Administration Rules, shares due to each beneficiary is determined under Order XXXVI rule 1 of the Civil Procedure Rules. I hereby direct the parties to take out the aforesaid proceedings under rule 41 (3) of the Probate and Administration Rules within 45 days from the date hereof. In default, the grant shall stand revoked. Each party to bear her own costs.

Dated and delivered at Nyeri this...13th day of October 2009.

J.K. SERGON

JUDGE