REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Succession Cause 169 of 1990

IN THE MATTER OF THE ESTATE OF KARANJA GATHATWA – DECEASED

JUDGMENT

On 21st July 1993 the following consent order was recorded:

"By consent the grant made to Florence Waithera Karanja made on 21/5/92 is hereby revoked and a fresh grant to be issued to (1) Nicholas Ngige Ole Kabiro representing the house of Njeri Karanja and Peter Ndungu representing the house of Florence Waithera Karanja.

(2) The issue of distribution of Estate to go to hearing and the issues to be decided are what is the extend of the deceased's estate and in particular whether 90 acres at Kanunga Group Ranch and 5 acres at Kikope Ranch and $1^1/_2$ acres in Ndunyu Njeru Nyakinyua Gilgil is part of the deceased's estate.

(ii) Who are the beneficiaries of the estate.

(iii) What is each house entitled to take from the estate.

(iii) Costs in the cause."

On 30th May 2006 Nicholas Ngige Ole Kabiro filed the summons for confirmation. In his petition, he sought for orders that the deceased's only property namely Nyandarua/Mukingi/162 be shared equally between the deceased's two houses. The mode of distribution and the assets that form part of the estate of the deceased are disputed. What is not in dispute are the beneficiaries of the deceased. It is clear from the records that the deceased was survived by two houses. The first house comprising of the following;

(i) Ngige Ole Kabiro,

(ii) Mbugua Ole Kasu,

(iii) Kabura

(iv) Mangu

While the second house comprises of the following;

(i) Florence Waithera (widow),

(ii) Peter Ndungu,

(iii) Kimani Karanja,

(iv) Mary Nduta Karanja,

(v) Njoki Karanja

(vi) Joseph Mbugua Karanja.

The deceased in this case passed away on 9th November 1989 therefore his estate should be administered according to the provisions of Section 40 of the Law of Succession which provides as follows:

"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 intestate estate 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."

What is also not in dispute is that the property known as Nyandarua Mukungi/162 belonged to the deceased. The second house alleges that the deceased was entitled to land at Kanuga and kikpey; while the first house disputes that the deceased had shares at Kanunga Group Ranch where he was entitled to 67 acres within the Kanunga Group Ranch. The first house also denies that the deceased was entitled to a plot at Kikopey area.

The ownership of the two properties at Kanunga and Kikopey were not proved, in any event the proceeding under the law of succession is not the best forum to prove what belongs to the deceased especially where the issue is disputed. The administrators of the deceased estate are supposed to file suit and recover the deceased properties. This court finds that the issue of the two plots is a matter that the administrators can pursue and if they establish that the two assets belonged to the deceased, the two properties can be included in the grant and be shared among the beneficiaries in equal shares. For the time being, there is no material before this court that can persuade the court to make an order that deceased had property at Kanunga Group Ranch and at Kikopey Ranch.

The grant of letters of administration is hereby confirmed. The deceased's estate is to be shared among the deceased's survivors comprising of four beneficiaries from the first house and six beneficiaries from the second house. The land be divided accordingly and each administrator to hold the portions in trust of their respective households in equal shares. Once the ownership of the land at Kanunga group ranch and Kikopey is established that it belongs to the deceased, the portions of land belonging to the deceased will be shared among the beneficiaries equally.

Mr. Kahiga representing the first house argued that the first wife of the deceased should be taken into account, unfortunately she is also deceased, and at the time the estate is being distributed. The operational word under Section 40 is the wife of the deceased surviving him. If the first wife was alive she would have been considered as a unit but since she passed away, she cannot be considered as a unit for purposes of distribution. This being a family matter each party shall bear their costs of this litigation.

Judgment read and signed on 29th day of July 2008

M. KOOME

JUDGE