



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Succession 271 of 2002

IN THE MATTER OF THE ESTATE OF JOHN MUNYI KATHAMBARA.....DECEASED

EUNICE WANJUKI JOHNPETITIONER

VERSUS

HUGO NJERU JOHN.....OBJECTOR

JUDGMENT

A grant of letters of administration intestate was granted to:-

1. Eunice Wanjiku John
2. Hugo Njeru John on 26/10/2004

By application dated 20/5/2005 Hugo Njeru John applied alone for confirmation of grant. On 28/11/2005 one Atanasio filed a protest against confirmation on the ground that he was the one who buried his father and that Eunice Wanjiku John is not the real wife of the deceased and should not be given a piece of the deceased land. And also that he had filed succession in **Resident Magistrate's Court No. 115/85** but his brother filed another in High Court in Embu.

Another protest against confirmation was filed by Eunice Wanjuki John Co-administrator. She said she is not satisfied by distribution of the assets of deceased. From the evidence of the Protestor Atnasio Ndwiga, there is sufficient evidence that 2nd protestor Eunice was a wife of the deceased the time of death Eunice was living in a plot given by the deceased and both Eunice and deceased had had children who are now surviving. On cross-examination he admitted that deceased was living together with Eunice and had children with her. The allegations of the first protestor Atanasio on the marriage of Eunice to her father have not been supported by any evidence.

I therefore find the same were not proved. On the issue of the Petitioner Hugo also there is no evidence that he was not biological son of deceased. All the children of Eunice were treated like children of the deceased. This protestor was making mere allegation without proof.

It is said that some of the surviving children were given land by the deceased during his lifetime. The succession Act clearly states that the survivors who received gifts from their deceased parent in his lifetime shall account for them. Section 42 provides that where 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 property has been appointed under provisions of section 26 or section 35 the property shall be taken into account in

determining the share of net intestate finally accruing to the child, grandchild or house.

After considering the evidence before the court it is my finding that the deceased did appoint his land to some of his children and got them registered as proprietors;

1. Plot No. Gaturi/Kevote/T.105 measuring 1 Ha was on 12/11/64 registered in the name of deceased John Munyi but on 2/7/1986 it was registered in the name of Atanasio Nyaga and certificate of title was issued to him. This plot should continue to be in possession of Atanasio Nyaga the protestor since he has been occupation for long time. Plot No. Gaturi/Nembure/2823 now registered in the name of Eusebia Wamugo on succession is admittedly the property of deceased in this case which was given to Bangarasio the deceased son of the deceased, John Munyi, and it is now in the widow's hands. Plot number **Gaturi/Nembure/1980** was originally registered in the name the deceased herein but on 28.4.94 it was registered in the name of Hugo Njeru John.

According to the affidavit in support of petition the assets of the deceased herein at the time of his death are listed as:-

1. Gaturi/Nembure/1574 measuring 10.07 acres
2. Gaturi/Kevote/T.27
3. Plot No. 7 Kevote market.

The list of surviving beneficiaries is as set out in the affidavit of Eunice Wanjuki John.

1. Hugo Njeru
2. Bangarasio John (deceased)
3. Atanasio Nyaga
4. Jane Muthanje
5. Monica Kina Mbogo
6. Hellen Njura Daniel
7. Veronica Kirigi
8. Jane Muthoni
9. James Nyaga
10. Joseph Njagi
11. Justa Kirigi
12. Lucy Muthoni
13. Cathrine Gichuku
14. Julietta Njoki.

This list has not been disputed except where Atanasio disputes the paternity of Hugo John. This objection is not proved and therefore all children are entitled to inherit the assets of deceased. The inheritance therefore, taking into account the shares appointed by the deceased in his lifetime, is as

follows:-

Land parcel No. Gaturi/Nembure/1574 shall be shared –

- (a) James Nyaga - 3 acres
- (b) Joseph Njagi - 3.07 acres
- (c) Jane Muthanje - ½ acre
- (d) Justa Kirigi - ½ acre
- (e) Lucy Muthoni - ½ acre
- (f) Cathrine Gichuku - ½ acre
- (h) Julietta Njoki - ½ acre
- (g) Eunice Wanjuki - 1.50 acres for her life interest upon termination by death or remarriage to revert to the surviving children 0.07 acres shall go to Joseph Njagi who will not take the T.105 Kevote as it is already inherited by Athanasio Nyaga Gaturi/Kevote.T.27 shall be inherited by James Nyaga and plot No. 7 Kevote market shall also be inherited by Samuel Nyaga Njagi.

It is my view that the above distribution is fair to all beneficiaries. There is a point raised by Atanasio that he had obtained a grant in respect of the same estate in **Residents Magistrate's Succession Case No. 115 of 1985 at Embu** which he has exhibited dated 13/3/1987. However that grant was not confirmed after expiration of 3 months. No action was taken to confirm the grant or otherwise to administer the Estate. Therefore by the month of July 2001 the grant had become useless and in-operative. This is the time the present administrators applied for the present grant. All procedures appears to have been complied with and it is clear the protestor Atanasio Nyaga did not disclose he was holding another grant until very late when he file a protest against confirmation.

I find therefore that the grant issued to him is now annulled in exercise of powers granted to court under Section 76 (d). The upshot is that the grant in this estate is confirmed with distribution as I have set above. I order certificate to issue.

This being a family matters each party shall bear their own costs.

Orders accordingly.

Dated this 4th May, 2007.

J. N. KHAMINWA

JUDGE

4.5.2007

Ruling read in presence of Hugo John Njeru and

Eunice and Atanasio protestor in open court.

J. N. KHAMINWA

JUDGE