



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 3154 of 2003

IN THE ESTATE OF JAMES WAITHAKA KINYANJUI (DECEASED)

JAMES ANTHONY KINYANJUI

ESTHER WAHU KINYANJUI.....OBJECTORS

JUDGMENT

This is a summons for confirmation of grant of letters of administration dated 23rd December 2004. Letters of administration to the estate of the late JAMES WAITHAKA KINYANJUI who died on 16th January 2003 were issued to NANCY NYAMBURA GIKAMA and JAMES ANTHONY KINYANJUI on 17th May 2004.

However, the administrators and beneficiaries did not appear to agree on the actual beneficiaries/survivors and the mode of distribution. Therefore, when the summons for confirmation of grant of letters of administration was filed, only one of the administrators NANCY NYAMBURA GIKAMA made a proposal in the affidavit in support of the summons for confirmation of grant, for the proposed mode of distribution. That affidavit was sworn on 23rd December 2004 and it listed the survivors of the deceased as NANCY NYAMBURA GIKAMA (wife), JAMES ANTHONY KINYANJUI (manager) and MAUREEN WANJIKU KINYANJUI (daughter). The proposed mode of distribution related to one property L.R. No. DAGORETTI/RIRUTA/S.172 – and it was proposed that the life interest on the plot should be to NANCY NYAMBURA GIKAMA together with all income from the rental houses for life.

To this summons for confirmation of grant, there were protests. Specifically, two affidavits of protest sworn on 10th February 2005 by JAMES ANTHONY KINYANJUI and another affidavit sworn on the same date by ESTHER WAHU KINYANJUI were filed. The two affidavits of protest opposed the summons for confirmation of grant on common grounds, that –

- (i) The deceased was survived by the following beneficiaries -
 - (a) Esther Wahu Kinyanjui – wife
 - (b) Nancy Nyambura Gikama - co-wife
 - (c) James Anthony Kinyanjui – son
 - (d) Maureen Wanjiku Kinyanjui – daughter

- (ii) The shares of persons entitled to the said estate had not been ascertained or determined.
- (iii) There is an application dated 5/2/2005 pending in court.
- (iv) The deceased herein was survived by two spouses and two children and distribution hereof should, in any event be as provided for by section 40 of the Succession Act, i.e. equally among the beneficiaries.

NANCY NYAMBURA GIKAMA filed a replying affidavit to the application dated 5th February 2005. That replying affidavit was sworn on 6/4/2005. However, that application dated 5/2/2005, which inter alia, sought recovery of Kshs.1,806,309/= by the applicants JAMES ANTHONY KINYANJUI and ESTHER WAHU KINYANJUI from the administrators of the estate, appears to have been subsequently withdrawn.

On an earlier dates, 17/5/2004, the court ordered that there be a joint account opened, into which, rental income would be deposited. The account was opened in the Joint names of NANCY NYAMBURA GIKAMA and JAMES ANTHONY KINYANJUI at Cooperative Bank, Kawangware Branch as account Number 01100881140000. Therefore technically, the rent banked in that account from the rental income of the estate, became part of the assets of the estate.

On 18/9/2006 I directed the counsel representing the contesting sides to file written submissions and they did. Counsel for Nancy Nyambura Gikama were Gitau Mwara & Company advocates and counsel for the objectors James Anthony Kinyanjui and Esther Wahu Kinyanjui were Njuguna & Partners.

In his written submissions, Mr. Gitau for Nancy Nyambura Gikama gave a history of the dispute on the mode of distribution. He stated that on 25/10/2005 it was agreed by consent that Esther Wahu Kinyanjui be included as a dependant. His proposal on the mode of distribution was that the distribution of the estate should be in accordance with section 35 and 36 of the Law of Succession Act. He contended that under those two sections of the law, where a deceased person dies leaving surviving spouses and children, the surviving spouses shall be entitled to income for life from the property. He therefore proposed the following mode of distribution –

Ø The plot L.R. No. DAGORETTI/RIRUTA/S. 172 (1/4 acre plot) should be divided in 2 equal portions as follows -

- Portion A to be demarcated to include Nancy Nyambura Gikama's house and all those rental rooms/bar within her portion to belong to Nancy Nyambura Gikama.
- Portion B will belong to Esther Wahu Kinyanjui.

Each of the two widows to enjoy the rental incomes within their respective portions for their life. It will be only after their demise that the two children will assume ownership and proceeds of the rent.

Ø The rental income currently is the account with Cooperative Bank of about Kshs.377,000/= to be divided equally between the two surviving spouses.

The submissions of Mr. Njuguna for the two objectors highlights the assets, as well as the liabilities. His contention was that where a deceased person dies intestate leaving widows and children the distribution of the estate was governed by section 40 of the Law of Succession Act. He proposed the following mode of distribution –

1. Liability of Kshs.87,826/= for land rates be paid from the amount to the credit of bank account No. 0110081140000 Cooperative Bank which had an amount of Kshs.391,061.
2. Of the remaining amount in the bank account Kshs.200,000/= be paid to Esther Wahu (to equate the advancement already made amongst the beneficiaries) and the balance be distributed equally among the 4

beneficiaries

3. On the plot L.R. No. Degoretti/Riruta/S.172 he proposed that it be distributed per paragraph 13 of the affidavit of protest sworn by James Anthony Kinyanjui on 10/5/2005, that is –

Esther Wahu 0.25 share – Life interest

Nancy Nyambura Gikama – 0.25 share - Life interest

Maureen Wanjiku - 0.25 share - absolute

James Anthony Kinyanjui - 0.25 share - absolute

I have considered the two positions on the proposed mode of distribution. There does not appear to be a dispute on the list of beneficiaries. What is to be distributed is only the net estate. Therefore known outstanding debts have to be paid. Annexed to the submissions of counsel for the protestors is a copy of a handwritten note from Nairobi City Council which shows that the property S. 172 has an amount of Kshs.87,826.25 of outstanding rates as at 27/1/2006. I accept this and order that that amount be paid from the amount in the bank account at Cooperative Bank.

The mode of distribution in the estate herein is governed by Section 40 of the Law of Succession Act (Cap. 160), as there are two surviving spouses and children. The said section provides –

“40 (1) 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.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38”.

From the above provisions of the law, it means that each child will get an equal share, and the surviving spouse(s) will also get the same equal share as each child. Indeed on 25/11/2005 the two children James Anthony Kinyanjui and Maureen Wanjiku Kinyanjui and one widow Nancy Nyambura Gikama were each authorized by the court to be paid Kshs.200,000/= from the bank account. The second widow Esther Wahu was not paid anything. She is entitled to an equal share of the money as well. Therefore she will be paid Kshs.200,000/= from the net amount in the bank account.

The land also will have to be divided equally among the four beneficiaries. Section 35 and 37 of the Law of Succession Act gives a life interest to a surviving spouse who cannot sell such land in which he or she has a life interest, except with the consent of the court.

From the above observations, I find that the proposed mode of distribution made by counsel for the objectors JAMES ANTHONY KINYANJUI and ESTHER WAHU KINYANJUI is more in line with the law. I therefore confirm the letters of administration herein and order distribution of the assets as follows –

1. Kshs.391,061 (approximately) in a/c No. 0110081140000 at Cooperative Bank of Kenya

Ngware Branch –

(i) Kshs.87,826.25 be applied to settle Nairobi City Council land rates accrued up to 2006.

(ii) Kshs.200,000/= be paid to ESTHER WAHU KINYA

(iii) NJUI (to equate the amount already paid to each of the other three beneficiaries)

(iv) The balance be distributed among the four beneficiaries equally.

2. L.R. No. Dogoretti/Riruta/S.172 - to be divided as follows –

Esther Wahu Kinyanjui – ¼ share - life interest.

Nancy Nyambura Gikama ¼ share – life interest

Maureen Wanjiku Kinyanjui ¼ share - absolute

James Anthony Kinyanjui ¼ share - absolute.

As the estate land asset appears to have both residential and business premises, the beneficiaries will have to agree, on the ground, on which particular share of the land each will take or in default, any beneficiary will have liberty to apply to court for a decision.

I order that the costs of the proceedings herein will be in the cause.

Dated and delivered at Nairobi this 31st day of October 2006.

George Dulu

Ag. Judge