



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause 330 of 1996

IN THE MATTER OF THE ESTATE OF NDERITU KORAGE – DCD

JAMES GIKARIA PROTESTER

VERSUS

DAVID KAMONDO PETITIONER

J U D G M E N T

Ndiritu Korage (hereinafter referred to as the deceased) died on the 16th March 1995. He had two wives and was survived by one of the wives Lydia Kirigo Ndiritu. The deceased was also survived by his children from the first wife who are David Kamondo Ndiritu (the petitioner herein) and his two sisters, and children from the second wife who are James Gikaria Ndiritu (Protester) his brother Daniel Waithanje Ndiritu and two sisters.

The Petitioner brought his petition for grant of letters of administration to the estate of the deceased on 17th December 1996. Following objections raised, the parties appeared before the court on the 23rd February 1998 and the following order was made: -

“The following persons have authority from the family to be issued with letters of administration 1. Lydia Kirigo

2. David Kamondo Ndiritu.”

Pursuant to that order letters of administration intestate were issued to the Petitioner and Lydia Kirigo Ndiritu jointly.

Subsequently on the 14th August 1998 the Petitioner applied for confirmation of the grant. The Co-administrator Lydia Kirigo Ndiritu filed an affidavit on 25th August 1998 objecting to the proposed confirmation. The application for confirmation of the grant was listed for hearing on several occasions but did not take off. In the meantime, the co-administrator died on 10th May 2001. On the application of the Petitioner, an order was made on 28th September 2001 substituting the co-administrator with the Protester and Daniel Waithanje Ndiritu.

On 24th February 2004, an order was made by consent of the parties that:

“the grant of letters of administration intestate be issued in the joint names of the Petitioner David

Kamondo Nderitu and the Objector James Gikaria Nderitu who will subsequently apply for confirmation of that grant.”

Although not stated, in effect this Order superceded the previous order as the grant issued to the Petitioner and Lydia Kirigo had become inoperative as a result of her death.

Subsequently the Petitioner filed a summons dated 19th March 2004 for confirmation of the grant and distribution of the deceased's estate amongst his 3 sons. It is this summons which provoked the protest from James Gikaria Nderitu, which protest is the subject of this ruling. The Protestor contends that the distribution proposed has excluded Peter Ndiritu Kirigo who is also a beneficiary of the estate. The Protester also maintains that the deceased had distributed his estate before he died and therefore the distribution should be done according to those wishes.

It was the Protester's evidence that prior to his death, the deceased summoned members of his family and in the presence of his nephew Simon Karuku Munua (P.W.4) and a few other persons told his family how he wanted his land to be distributed which was as follows: LR Mahiga/Ugachiku/421 was to be shared equally between the deceased's sons and the deceased's great grandson each getting 0.37 Ha. L.R. No. Mahiga/Kamoko/745 which was 0.24 Ha. was to go to the deceased's surviving widow, plot No. 2 Kagere was to go to Daniel Waithanji, plot No. 8 Kagere was to go to Peter Nderitu, Plot No. 16 Kagere to David Kamondo, Plot No. 24 Ndunyu to James Gikaria and Plot at Makindi to David Kamondo. It was the Protesters evidence that the deceased's sons and grandson have each occupied their respective portions.

The Petitioner for his part denied that there was any family meetings or that the deceased distributed his properties or indicated his wishes as to how he wanted his properties distributed. Charles Nginyo Gikaria (D.W.2) who belongs to the same clan as the deceased and who testified that he was the one who took the deceased to the hospital denied that there was any meeting of the family or clan elders during which the deceased distributed his properties. Similarly Joseph Mwangi Gichane (D.W.3) also denied any knowledge about the deceased having distributed his properties.

The Petitioner maintained that since the deceased had two wives his properties should be distributed out equally between the two houses. This is what He effected in the identification and distribution of the deceased's estate.

The issues that arise in the determination of this protest is whether the deceased had expressed his wishes regarding the distribution of his properties prior to his death, if so whether those wishes qualify to be an oral will and whether the same are binding. If not who are the lawful Beneficiaries of the estate of the deceased and how should the properties be distributed.

It is evident that the administration of the deceased's estate is governed by the provisions of the law of succession Act Cap. 160 as he died on 16th March 1995 after the commencement of that Act. Under that Act the deceased could dispose off his properties through an oral will. In order to be valid such an oral will must have been made in the presence of two or more competent witnesses and the deceased must have died within a period of three months from the date of making the oral will.

In this case it was alleged that the deceased expressed his wishes as to how he wanted his properties distributed and that this was done in the presence of family members including the Protester and his sister Dorothy Wangari Kariuki and Simon Karuku Munua a nephew to the deceased. Although the witnesses were agreed on what the deceased is alleged to have said, the witnesses were not agreed on when these wishes were expressed. The Petitioner stated that it was in early 1995, whilst Peter Ndiritu Kirigo stated that it was in 1996 and then corrected it to between 1994 and 1995. Dorothy Wangari Kariuki was certain that it was on the 11th day of September 1994, whilst Simon Karuku Munua was equally certain that it was on 9th November 1994. In the light of all the contradiction on the date it has not been established that if the deceased made an oral will then the deceased died within 3 months from the date of making the oral will.

It is also noteworthy that apart from the immediate family members the only independent witnesses to the will was Simon Karuku Munua who was not a clan elder but a nephew to the deceased. The witness has not satisfied this court that He had any close association with the deceased that would make deceased involve him in such an exercise. The Protester claimed that he wrote down what the deceased stated regarding the distribution of his estate but this was not produced in evidence. In all the circumstances I am not satisfied that the deceased expressed any wishes regarding the distribution of his estate and even assuming that he did so, the same would not qualify as an oral will as the deceased did not die within 3 months from the time he made the will.

This means that the estate of the deceased can only be distributed in accordance with section 40 and section 35 of the law of succession Act. I have considered whether Peter Ndeirtu Kirigo is a lawful Beneficiary of the estate of the deceased. It is not disputed that he is not a son of the deceased but is a great grandson of the deceased. Although it was alleged that he was brought up in the deceased's home, there was nothing to substantiate this allegation. Moreover it was conceded that Peter Ndiritu's mother was married to his biological father and that he has his own land. I find that Peter Ndiritu Kirigo being a great grandson is not a lawful Beneficiary of the deceased's estate nor is he a dependant within the meaning of section 29 of the Law of Succession Act.

It would appear that the Protester is only dissatisfied with the distribution proposed by the Petitioner because he realizes that distribution according to "houses" will result in the Petitioner getting a bigger share as the Petitioner is the only son in his mother's house whilst the Protester and his brother are two. That however is the equity provided by the Law of Succession Act. I am satisfied that the distribution proposed by the Petitioner is in accordance with section 40 and 35 of the Law of Succession Act. I do accordingly overrule the protest and confirm the Letters of administration issued to the Petitioner and the Protester in accordance with the distribution proposed in paragraph 5 of the Petitioner's affidavit in support of the application.

Dated signed and delivered this 31st day of October 2006.

H. M. OKWENGU

JUDGE