



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 122 of 2001

IN MATTER OF THE ESTATE OF FREDRICK ARCHBOLD NJENGA (DECEASED)

JUDGMENT

The late Fredrick Archibald Njenga (hereinafter referred to as the deceased) passed away on 8th March 2000. Four of his sisters namely Peris Wambui Mwangi, Charity Waithira Stephen, Lilian Wairimu Muhamed and Rarchael Nyambura Gathoni (hereinafter called “the petitioners”,) petitioned, and were issued with the Letters of Administration on 18th May 2001.

It would appear from the records that a step brother of the petitioner Juma Githaria acting on his own behalf and that of his other brothers and sisters sought for an order of revocation of the grant.

By a ruling delivered by Hon. Aluoch J. on 22nd October 2002, the court declined to grant the application for revocation as the four (4) petitioners who are the sisters of the deceased have priority in terms of Section 39 (1) (c) than the applicant. The court however directed the petitioners to sit with the rest of the family, and work out a mode of distribution with a view of having the grant confirmed.

It would seem that no agreement was reached as the petitioner filed the summons for confirmation dated 20th February 2003 and sought for the confirmation of the grant and the estate of the deceased be vested upon the three administrators as one of the administrators Rachel Nyambura Githaria passed away in the cause of the proceedings.

The estate of the deceased is stipulated order paragraph 6 of the 1st petitioner’s affidavit as follows:

1. Title No. Kiambaa/Thimbigua 1393
2. Title No. Kiambaa/Waguthu/454
3. Title No. Karuri/T 434
4. Kwale Irungu Fuel Area 122
5. Kiamba/Karuri/T418 – ¼ share
6. Tigoni/Tigoni/3939

7. Tigoni/Tigoni/3940
8. Bank Account No. 03109338 NBK and

Liabilities amounting to Kshs.270,000/=. The following persons who are the step brothers and step sister of the petitioner protested to the confirmation of the grant.

- 1) Juma Githara
- 2) Fredrick Njau Githara
- 3) Gibson Njau Githara
- 4) Richard Ngatha Githara
- 5) Leila Muthoni Gathara

During the hearing of the protest and application for confirmation Fredrick Njenga gave evidence in support of the protest and relied on the evidence of PW 2 Njenga Wanganga his cousin.

The protester gave a detailed historical account of their family and the deceased assets which I intend to summarize as the entire record of the evidence can be extracted from the proceedings. The protester is the son of the late Stephen Githara and Margaret Wanjiku. The protester's father was married to two wives his stepmother, the mother of the deceased was Ezabela Kabia. She is also the mother of the petitioners and she passed away in 1990.

The house of the petitioner, the house of Margaret Wanjiku is survived by the protesters, while the house of Ezabela Kabia was survived by the petitioners and the deceased.

According to the protester, the deceased never bought any property, he lived in town all his life until his final days and all the properties listed above belonged to his late father and stepmother.

Title number Kiambaa/Waguthu/454 was originally registered in the name of Isabella Kabia in 1959 and it was later transferred to the deceased in 1970. The protester produced the extract of title over this property.

According to the protester the title known as Kiambaa/Thindigwa/1393 was originally in the name of the protester's father who later transferred it to Githaria Nyawira and then to the deceased.

According to the protester these were their ancestral lands which were registered in the name of their step mother when their late father was in detention, and the transfers that were effected in favour of the deceased were fraudulently effected. In this respect the protester has been involved in court cases at Kiambu and the High Court.

According to the evidence by the protesters witness, he confirmed that the property known as Kiambu/Thimbigua was their clan land and that the clan was never informed when this title was transferred to the deceased. As regards title number Kiambaa Waguthu/454 this property belonged to Isabella Kabia and her children and Kiamba Karuri/T418 and 434 is where the protesters have put up their homes.

The petitioners did not give any oral evidence in support of their application as their advocates did not attend court. However directions were given that both the protest and the application for confirmation be determined by way of oral evidence as well as the affidavits on record.

I have carefully gone through the affidavit in support of the application for confirmation and indeed I have gone through all the pleadings filed herein.

It is clear from the above, that the task of this court is to determine the following three issues;

- 1) who are the beneficiaries of the deceased and what are the deceased assets
- 2) Are the protesters entitled to the deceased estate
- 3) Can the protesters claim that the property was held in trust be adjudicated in these proceedings.

The deceased was unmarried and was not survived by children. I have therefore referred to the provisions of Section 39 (1) of the Law of Succession that provides:

“where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority –

- a) **father: or if dead**
- b) **mother; of if dead**
- c) **brothers and sisters and any child or children of the deceased brothers and sisters in equal shares; or if none**
- d) **half brothers and half sisters and any child or children of deceased half brothers and half sisters in equal shares.....”**

As far as the provisions of this section are concerned, the petitioners are ranked higher in priority and the protesters are ranked after the petitioners children.

In view of this express provision of the law my hands are tied and I find that the petitioners are the ones entitled to the deceased estate. I regret that as much as I would sympathize with the protesters, the law must be followed and orders cannot be issued based on sympathy.

The protester alleged that the petitioners have not disclosed some properties of the deceased. The protester did not produce any material or evidence, title documents or any document to support his allegation. Accordingly I confirm the assets stipulated under paragraph 6 of the supporting affidavit as the deceased estate. In any event if the administrator left out some deceased properties, it will be difficulty to administer them if they are not in the confirmed grant.

The above analysis has dealt with issue No. 1 and 2 and therefore turn to the protester’s claim that the properties were clan properties which were registered in the name of their step mother and the deceased in trust for his family. That may or may not be so, but with respect, this claim cannot be pursued in these proceedings by way of protest. First of all there was the estate of the deceased mother and now the deceased estate. Rule 41 (3) of the P & A Rules clearly directs that if a question arises as to the identity, share or estate of any person claiming to be a beneficially interested, that question is determined in a proceeding filed under Order XXXVI rule 1 of the Civil Procedure Rules. The protester did not file an application as set out above, they merely protested and in this regard I am satisfied that a claim under trust cannot be adjudicated in the manner proposed by the protesters.

In the sum total the protest is hereby dismissed and the grant is confirmed as prayed.

This being a family matter each party should bear their own costs.

It is so ordered.

Judgment read and signed on 18th day of March 2005.

MARTHA KOOME

JUDGE