



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Succession Cause 266 of 1994

IN THE MATTER OF THE ESTATE OF KIHAGI WAMAI – DCD

AND

PAUL MURIUKI KIHAGI PETITIONER/APPLICANT

VERSUS

WILSON KIHAGI WAMAI PROTESTER

RULING

This cause relate to the estate of the late Kihagi Wamae (deceased) who died on the 27th December 1984 survived by his two wives Ngima Kihagi and Nyawira Kihagi and his children, one son and 2 daughters from Ngima Kihagi and 6 sons and 4 daughters from Nyawira Kihagi.

Paul Muriuki Kihagi (hereinafter referred to as the Petitioner) who is a son to Nyawira Kihagi was issued with letters of administration intestate in respect of the estate on the 6th July 1998. He has now applied through summons for confirmation of grant dated 24th September 2004, to have the grant issued to him confirmed. The Petitioner is proposing that the estate of the deceased which comprises land known as Ruguru/Gachika/682 be distributed equally amongst the deceased's 7 sons.

Wilson Wamai Kihagi (hereinafter referred to as the Protester) who is the only son to the deceased's first wife Ngima Kihagi is protesting to the confirmation of the grant as he is not in agreement with the proposed distribution. He maintains that the estate should be shared into two according to the deceased's two houses in accordance with Kikuyu customs and practices. It was agreed by consent of the parties that evidence adduced on behalf of the Petitioner and the protester on the 9th February 2004 be used in determining this protest together with the affidavits and submissions of the advocates.

It was the protester's evidence that the deceased died a polygamous man not having left any will and therefore his estate should in accordance with Kikuyu customs be distributed equally between his two houses. He maintained that the children of the deceased have been cultivating the land of the deceased according to how their mother's were previously cultivating. He conceded that all his sisters and step-sisters were married. The protester also conceded that a family meeting was held on 10th July 1994 and it was agreed that the Petitioner applies for letters of administration but denied that it was agreed that the land be distributed equally between the 7 sons.

Under cross-examination the protester testified that the Petitioner was given another piece of land by the deceased, so was the Petitioner's brother Stephen Gitonga. He testified that although he was also given land by the deceased in Ngarwa it had to be sold to repay a loan the deceased owed. He also maintained that he was given his grandmother's portion of the land.

David Kamwiru Kihagi a brother to the Petitioner testified on behalf of the Petitioner. He maintained that the deceased did not have any other property apart from Ruguru/Gachika/682. He testified that his two brothers bought their own land and were not given any land by the deceased as alleged by the protester.

The witness testified that the deceased had shown each of the sons where they were to occupy. He produced a sketch showing that distribution. He also produced minutes of an agreement arrived at on 10th July 1994 during a family meeting held after the death of the deceased when it was agreed that the deceased had sub-divided the land on 3rd February 1984 and informed his brother David Kamuiru Wamae that the land should be subdivided accordingly, so that each son could have his own title.

The agreement was signed by all the deceased's sons in the presence of their uncle David Kamuiru and the Assistant Chief. The Petitioner therefore urged the court to distribute the estate in accordance with the wishes of the deceased. It was conceded that the Protester had put up 3 permanent houses on a portion which was not the one meant for him. The Petitioner and his brothers however were willing to accommodate the protester so that he gets the portion where his houses were, provided the land was shared out equally. The witness denied that there was any land belonging to their grandmother which was given to the protester.

Ms Mwai who appeared for the Protester submitted that the deceased having died intestate and having been married to two wives, the Kikuyu customs on inheritance apply to his estate and the estate should therefore be shared equally between the two houses of the deceased.

Mr. Chege who appeared for the petitioner submitted that the protester had not proved as provided under rule 64 of the Probate and Administration Rules the kikuyu customs on inheritance which he wanted applied.

Mr. Chege submitted that the law applicable was section 40 (1) of the Law of Succession Act which provides for the distribution to be done according to the number of children in each house. He submitted that this was in accordance with the deceased's wishes as he had shown each child where they were to occupy and develop.

It is apparent that the deceased died on the 27th December 1984 and that he did not leave any written will. Although the deceased is alleged to have indicated his wishes as to how he wanted his land distributed. However, no evidence was adduced to prove that the wishes alleged to have been expressed qualified to be a valid oral will. I find that the deceased died intestate. His estate must therefore be administered in accordance with the Law of Succession Act (Cap. 160) as the deceased died after this Act came into effect.

Section 40 (1) of the Law of Succession Act which was cited by Mr. Chege provides clearly how an intestate estate of a polygamous deceased is to be distributed. The section states as follows:

“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 net intestate estate shall in the first instant 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.” In this case since both the deceased's wives are now deceased the estate of the deceased should in accordance with section 38 of the Law of Succession Act be distributed equally among the children.

I find that the Kikuyu custom on inheritance has no application to the estate of the deceased. I do therefore overrule the protest and order that the estate of the deceased be distributed equally amongst his 7 sons as proposed by the Petitioner which proposal is in accordance with the Law of Succession Act.

Those shall be the orders of this court.

Dated signed and delivered this 7th day of December 2005.

H. M. OKWENGU

JUDGE