



In re Estate of the Late Margaret Waithera Kabunyi (Deceased) (Succession Cause 1050 of 2005) [2024] KEHC 11113 (KLR) (Family) (19 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11113 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1050 OF 2005
HK CHEMITEI, J
SEPTEMBER 19, 2024
IN THE MATTER OF THE ESTATE OF THE LATE
MARGARET WAITHERA KABUNYI (DECEASED)

BETWEEN

MARGARET KABUNYI 1ST APPLICANT
SIMON KABUNYI 2ND APPLICANT
NANCY NJERI KABUNYI 3RD APPLICANT
LUCY NYOKABI KABUNYI 4TH APPLICANT
KEZIAH WANGUI KABUNYI 5TH APPLICANT

AND

KEZIAH WANGUI KIMOTHO 1ST RESPONDENT
MARY JANE WANJIKU 2ND RESPONDENT

JUDGMENT

1. The Applicants Chamber summons application dated 22nd June 2021 seeks the following orders:-
 - (a) That the court be pleased to declare the Applicants as the deceased dependants.
 - (b) That the court be pleased to grant the Applicants a specific share of the deceased's estate and in particular Limuru/Kamirihu/86 (now Limuru/Kamirihu/1986/1987 and 1988) where they reside till and far as directed by the deceased.
2. The application is based on the affidavit of Margaret Kabunyi as well as the evidence on record of Simon Kabunyi.



3. The application was opposed by the 1st Respondent vide her replying affidavit sworn on 4th October 2021.
4. The matter proceeded by way of viva voce evidence. Apparently it was only the 1st and second Applicant who testified. The 1st Respondent chose to rely on the affidavit dated 4th October 2021.
5. The court directed the parties to file written submissions but it was only the applicant who complied.
6. The issues herein nevertheless are clear and straight forward. The deceased was the mother to the 1st and 2nd Respondent. The 2nd Respondent was the mother to the Applicants and therefore grandchildren to the deceased.
7. Evidence was led by the Applicants to show that despite the 2nd Respondent being their mother she was never there for them as she went away and left the deceased to take care of them. That it was the deceased who took care of them in terms of schooling, food, shelter and any other needs they expected from a parent.
8. It was also shown that the 2nd Respondent would come occasionally and leave for a long period of time. That she only came later when the deceased had passed on.
9. As regards her property the Applicants testified that the deceased subdivided land parcels numbers Limuru/Kamirihu /86 into three portions and shared it out among the Applicants. She remained with a portion which contained her house and which the 2nd Respondent resides in.
10. They testified that the 1st Respondent was married and had her family and that she had other properties which the deceased bequeathed to her late husband, one Kimotho and which the Applicants had no interest in.
11. It was their case therefore that they were legitimate dependants of the deceased and they should be allowed to inherit what their grandmother had allotted them. That it would be unfair to have the 1st Respondent interfere with the arrangements by the deceased as they were also not interested in the 12 acres the deceased had given to the 1st Respondent's husband.
12. The 2nd Respondent did not file any response nor give any evidence in this cause. In effect therefore she was in agreement with the Applicants.
13. The replying affidavit by the 1st Respondent dated 4th October 2021 in a nutshell does not answer the issues raised by the Applicants in my view. The same simply blames that Applicants for bringing a new application yet the same was compromised by a consent order.
14. The consent order identified the Applicants as the beneficiaries to the estate and thus the current application is a duplication. That the same has been brought to delay the distribution of the estate and meant to deny her the enjoyment of the estate.
15. She prayed that the application be disallowed.

Analysis and determination.

16. Having perused the proceedings herein I find that the issue of whether the Applicants are beneficiaries to the estate of their late grandmother is not contested. They have demonstrated through oral and affidavit evidence on record that the deceased took care of them for the period they were young until her death. The only issue is whether they should be given the portion of the estate which she had gifted them inter vivos.



17. It is not disputed that the deceased subdivided land parcel Limuru/ Kamirihu/86 into three portions as indicated above. It is also not in dispute that the Applicants have each identified their respective portions as directed by the deceased.
18. The 2nd Respondent to the extent that she did not dispute this position in effect means that she was comfortable with her mother's arrangement. She was in fact occupying the portion in which the deceased house is situate.
19. As regards the 1st Respondent there was no evidence that she was residing in the said parcel of land. Her portion which was given partially to her late husband by the deceased in Subukia which was measuring three acres and the rest of the properties left by the deceased whether shares or land has not been contested by the Applicants. Their interest is only the portion left to them by the deceased.
20. I find that this is a case where the deceased exercised the provisions of Section 42 of the [Law of Succession Act](#) which provides that:-
 - “ Previous benefits to be brought into account
Where—
 - (a) 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
 - (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35,that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”
21. The above portion of the law secures and protects the wishes of the deceased made during her lifetime and thus inhibits any further interference by any other party after her demise.
22. The deceased herein clearly divided her land into three portions and gifted them to the Applicants. There was nothing which prevented her from gifting the 2nd Respondent herein. On the contrary she gifted the 1st Respondent's late husband her share elsewhere in the Limuru Pyrethrum Growers Cooperative Society Limited (White Rock Farm Subukia). The Applicants have expressed that they have no interest in it.
23. Consequently, I find the evidence as led by the Applicants uncontroverted even during cross examination. They have proved that the deceased made arrangements so that they each knew where to live, farm or carry out any other activity.
24. The 2nd Respondent their mother was as well gifted by the deceased despite being away for many years and leaving the deceased to take care of her five children who as the evidence showed learned much later that she was not their Aunt but their real mother and the deceased their grandmother.
25. In the premises judgement is entered as hereunder:-
 - (a) The application herein dated 22nd June 2021 is allowed as prayed and the application for confirmation of grant be made in line with the prayers in the said application.
 - (b) Costs shall be in the cause.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2024.



H K CHEMITEI.
JUDGE

