



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO. 429 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE MUGUNA NJAGI (DECEASED)

JOSPHAT GITARI MWIANDI.....PETITIONER

VERSUS

KANGA NKOROI....PROTESTOR/CO-ADMINISTRATOR

R U L I N G

1. What is pending before this court is a protest filed by Nkanga Nkoroi who is one of the administrators (to be referred to as the protestor). The matter relates to the estate of Muguna Njagi (deceased).

Background

2. The brief background of this matter is that the deceased died intestate and is said to be survived by four children, that is, two daughters and two sons. Their names are as follows:-

- Agnes Cinaduru Nkoroi
- Kanga Nkoroi
- Josphat Gitari Muiandi

The deceased died on 4/4/1984 and behind land parcel No. Karingani/Muiru/275 measuring 0.45 Ha which comprises the estate of the deceased. A grant of letters of administration which was issued to Josphat Gitari Muiandi was revoked by this court on 4/2/2020 and subsequently a fresh grant was issued to the two brothers Josphat Gitari and Kanga Nkoroi. They were directed to agree on the mode of distribution of the estate and if not, any of them could proceed and file a summons for confirmation of grant and the other would then file an affidavit of protest.

3. The administrators failed to agree on the mode of distribution and as a result Josphat Gitari Muiandi filed a summons for confirmation of grant and proposed that the estate of the deceased be distributed solely to him. This prompted the Co-administrator Kanga Nkoroi to file an affidavit of protest which is the one now pending determination.

4. The protest was disposed of by way of written submissions and the court considered the evidence as deposed in the affidavits.

Protest:

5. The protestor deposes that the deceased was married to one Cianthuni Nkoroi (now deceased) and he was the first born. The said Cianthuni Nkoroi separated with the deceased and went to live at Kiambu. It was during that period of separation that Cianthuni Nkoroi gave birth to a son by name Josphat Gitari Muiandi and begot other children Margaret Gakatha and Agnes Ganduru who are not beneficiaries of the estate of the deceased. The protestor states that he was not informed about the succession and was not involved.

6. It is the protestor's case that the deceased did not bequeath land parcel No. Karingani/Muiru/275 to Cianthuni Nkoroi but was left to him by the deceased who also gave him the title deed of the land and is where he has lived for over seventy (70) years. It is the contention by the protestor that his Co-administrator has never lived on the land and now intends to disinherit him. His prayer is that the estate of the deceased be distributed wholly to him.

Respondent's Case

7. He contends that he is one of the sons of the deceased and is entitled to his entire estate as the protestor was allocated land parcel No. Karingamo/Muiru/1516 during land demarcation. That the deceased bequeathed land parcel No. Karingani/Muiru/275 to Cianthuni Nkoroi and himself and is the land he cultivates and he has planted coffee. That his mother is buried on the land. He contends that he lives in his own land which is parcel No. Karingani/Mariani/3065 which he bought from Jadiel Kathuni. He further depones the deceased's intention was that he inherits the land forming his estate with his sisters but they have given consent that he inherits the estate exclusively. It is his contention that the protestor wants to deny him his inheritance.

8. The respondent also relied on the affidavits of Margaret Ciakuthii and Salesio Rugendo Kararwa.

Submissions:

9. No submissions were filed by the protestor. For the respondent's submissions were filed by Njeru Ithiga and Company Advocates. The only issue raised by the respondent is distribution of the estate of the deceased. He submits that the protestor was given land parcel No. Karingani/Muiru/1516 by deceased during his lifetime that it is only the respondent who did not get a share of the deceased's property during his lifetime. He submits that the mode of distribution which has proposed at paragraph 5 of the affidavit in support of the summons for confirmation of grant is fair and equitable.

10. I have considered all the evidence adduced in the affidavit and the submissions by the respondent. The only issue which arises for determination is distribution of the estate.

The law:

11. The deceased died on 4/4/1984. Under **Section 2(1) of the Law of Succession Act**, the law applicable to these proceedings is the **Law of Succession Act (Cap 160 Laws of Kenya)**. The Section provides.

“(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

The commencement date of the Act is 1/7/1982 and places the proceedings in this cause under the Act. The succession of estates of deceased person dying after the commencement of the Act shall proceed as provided under the Act.

12. The court when dealing with matters under the Act is supposed to make provision for the dependants of the deceased. **Section 26 of the Law of Succession Act** gives court discretion to make provision for the dependant. The Act defines a dependant. This is meant to ensure that only rightful heirs and dependants of the deceased get a share of the estate.

13. It is the duty of this court to identify the rightful beneficiary and their rightful share of the estate. The **Law of Succession Act** (to be referred to as the Act) defines a dependant.

Section 29 of the Act provides:-

“(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

The protestor and the respondent are therefore supposed to prove that they are dependants of the deceased as defined under the Section. Is the respondent a dependant. That the question I set out to answer.

In this case the protestor has deponed that the respondent and her sisters are not children of the deceased and are therefore not entitled to a share of his estate. The respondent has claimed that the deceased is his father. The protestor has deponed that the respondent was born during the period that the deceased and his late wife were living in separation. Although the respondent was served with the affidavit of protest, he did not in his replying affidavit respond to this allegation that the deceased was not his biological father. He did not respond to the averment that he did not grow up in the home of the deceased as his mother left the matrimonial home with her son, (the respondent) never to return to the home of the deceased. See paragraph 4 of the affidavit of protest. The respondent has not rebutted the assertion by the protestor that he is not a son of the deceased.

14. This is reinforced by the fact that when the respondent's mother filed this succession cause way back in the year 2012, she did not include the respondent as one of the beneficiaries entitled to the estate of the deceased. Indeed even the Chief did not consider the respondent as a dependant of the deceased, see Chief's letter dated 14/7/2011 filed in court on 12/4/2012.

15. The respondent has never lived on the estate of the deceased.

16. Though he claims that he cultivates the land, a fact which is denied by the protestor, it remains a mere allegation which was not substantiated. He has admitted at paragraph 4 of the Replying Affidavit that he lives on his own land parcel No. Karingani/Mariani/3068. Surprisingly he has not averred that he lives on his own parcel after vacating the estate of the deceased. This confirms the contention by the protestor that the respondent is not a son of the deceased and was not living on the estate prior to the death of the deceased or at all. In a replying affidavit sworn by the respondent to oppose the revocation of grant, the respondent had averred that he would avail evidence to prove that he is a biological son of the deceased. Regrettably he has not availed such evidence. This court must therefore make an inference that if he availed such evidence like identity card or other mode of identification, it would have been detrimental to his case.

17. The respondent has capitalized on the fact that the protestor was given a parcel of land by the deceased in his lifetime (I will come to this later). The respondent is even stating that the deceased gave land to Sabastian Mbaka Nthiga. My view is that if indeed the deceased gave land to the protestor, and this again is not proved he could not have failed to give the respondent land if he was his son.

18. The respondent, obtained a grant of letters of administration fraudulently by concealing a material fact that the protestor was a son of the deceased who was living on the estate.. The record shows that he distributed the estate to Dennis Muchiri Gitari and Martin Kariuki Gitari who are his sons. This shows that he was aware that he was not entitled to the estate or was literally out to disinherit the protestor. See proceedings of 19/12/2016 before **Justice Mabeya** where the respondent misled the court that all the family members were in court. Luckily the grant was revoked by consent.

19. The facts show that the respondent is not a dependant of the deceased. Proof of dependency is a condition precedent to the exercise of Courts discretion which is conferred under **Section 29 (b) of the Act**. The respondent was not a biological son of the deceased and was not maintained by him during his lifetime. The law requires that where there is an objection that a person is not a son of the deceased, evidence to proof that he is indeed a son must be availed. A mere allegation that one is a son is not sufficient, proof with tangible evidence must be availed. There are various ways for one to prove that he is a son. The respondent has not availed any evidence to prove that he is a biological son of the deceased. I believe that is the reason why the proceedings were filed in secret without involving the protestor.

20. As for the protestor there is no dispute that he is the biological son of the deceased who has lived on the land with his family for a period of over seventy years. The proceedings will bear me out that when on 4/2/2020 the grant was revoked by consent, the court was informed that there was no dispute that the protestor is the biological son of the deceased. The protestor is therefore a dependant of the deceased as provided under **Section 29(1) of the Act (supra)**. He is entitled to the estate without proof of maintenance or dependency. **Section 29 of the Act** is clear that where the deceased is survived by a spouse and children the other relatives are not entitled to a share in the intestate estate, the spouse and children are re entitled to the estate to the exclusion of all other relative. In this cause the only undisputed child of the deceased is the protestor and is entitled to the estate of the deceased to the exclusion of all others.

21. I have considered the contention by the respondent that the protestor was given land by the deceased in his lifetime being land parcel No. Karingani/Muiru/1516. This is far from the truth as the title deed as shown on exhibit **JGM 3** was issued on 28/11/2014. Long after the deceased had passed away. There is nothing to show that it even belonged to the deceased. It is registered in the name of the protestor. The Act defines the estate of a deceased person under **Section 3 (1)**. It states. **“Estate” means the free property of a deceased person.**” Title No. Karingani/Muiru/1516 is the property of the protestor and cannot form part of the estate of the deceased.

In conclusion:

In view of the analysis given above I have come to the conclusion that the respondent Josphat Gitari Mwiandi has not proved dependency to the estate of the deceased. The protestor Kanga Nkoroi who is the biological son of the deceased and has lived on the estate for over seventy years todate is the rightful beneficiary of the estate of the deceased to the exclusion of all others.

I order as follows:

1. The protest has merits and is allowed.
2. The respondent Josphat Gitari Mwiandi is removed as one the administrators of the estate of the deceased.
3. The grant issued on 5/2/2020 is confirmed in the following terms:-
Land Parcel No. Karingani/Muiru/275 shall be and is hereby distributed to Nkanga Nkoroi.
4. On costs, the respondent shall bear the costs as from 30/11/2016 when he joined in these proceedings.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 13TH DAY OF MAY 2021

L.W GITARI

JUDGE

13/5/2021

The ruling has been read out in open court

L.W. GITARI

JUDGE

13/5/2021