



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 60 OF 2019**

**DIANA NJOKI JOSIA.....APPELLANT**

**VERSUS**

**RHODA MUTHANJE NDWIGA.....1<sup>ST</sup> RESPONDENT**

**DENIS GITONGA NDWIGA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The appeal herein arises from the judgment delivered on 17<sup>th</sup> September, 2019 by Hon. S.K. Mutai, in the Chief Magistrate's Succession Cause No. 200 of 2017, at Embu.
2. In the said cause, the appellant herein petitioned the court for a grant of letters of administration to the estate of the late David Ndwiga who died on the 14<sup>th</sup> August 2011 domiciled in Kenya. The appellant who described herself as a wife of the deceased was issued with grant of letters of administration intestate, on the 23<sup>rd</sup> day of January, 2012.
3. On the 24<sup>th</sup> September, 2012, she filed summons for confirmation of the said grant wherein she set out the proposed mode of distribution of the estate of the deceased. However, before the application could be heard, an affidavit of protest was filed by one Rhoda Muthanje Ndwiga (1<sup>st</sup> respondent) on the 24<sup>th</sup> day of October, 2012 who has also described herself as a wife of the deceased and wherein she set out her preferred mode of distribution of the deceased's estate.
4. The protestor filed a supplementary affidavit in which she modified her proposed mode of distribution. The protestor died on 11<sup>th</sup> September, 2017 and her daughter namely Violet Muthoni Ndwiga, vide an application dated 28<sup>th</sup> May 2018, sought to be substituted in place of her mother and the said application was allowed by the court. She filed a further supplementary affidavit on the 19<sup>th</sup> day of September, 2018.
5. The protest proceeded by way of *viva voce* evidence during which the respondent testified as the only witness. On her part the appellant called one witness in addition to her evidence.
6. On the 17<sup>th</sup> September, 2019 the learned magistrate delivered her ruling and the appellant being dissatisfied with the same filed the appeal herein wherein she has listed ten (10) grounds of appeal in her memorandum of appeal dated the 8<sup>th</sup> day of October, 2019.
7. When the appeal came up for hearing, the court gave directions on filing of submissions. The appellant filed hers, on the 11<sup>th</sup> day of June, 2021 but on their part the respondents indicated that they did not intend to file any submissions.
8. The court has read and considered the submissions filed by the appellant. I have also re-evaluated the evidence adduced before the trial court as its expected of this court, being the first appellate court.
9. The court, upon perusal of the memorandum of appeal, has noted that the only bone of contention is the mode of distribution of the estate of the deceased. Both the appellant and the respondents are agreeable on the rightful beneficiaries to the estate of the deceased.
10. According to the petitioner/appellant, the following is the inventory of all the assets of the deceased as listed: -

1. Kagaari/Kanja/4997

2. Kagaari/Kanja/5000

3. Kagaari/Weru/5828

11. During the hearing of the protest, it emerged that the following were also assets consisting part of the deceased estate although the appellant has disputed the same.

- 1) *Motor Vehicle make Datsun Puckup Reg. KQF 763*
- 2) *Market Stall at Runyenjes*
- 3) *Tuongane Jujjenge Sacco A/C. NO. [...]*
- 4) *Embu Farmers Sacco Society Ltd (Nawiri Sacco) A/C Nos. MIST-[...] AN A/C NO. [...]*
- 5) *Savings with Ngwataniro Self Help Project*
- 6) *Equity Bank Account*
- 7) *Death Gratuity from Ministry of Local Government*

12. From the evidence, both the appellant and the respondent were married to the deceased and each had three (3) children from their marriage to the deceased. In the affidavits filed in court, they both recognize that they are both entitled to share the estate of the deceased only that they cannot agree on the mode of distribution.

13. According to the protestor who is the 1<sup>st</sup> respondent herein and who is now deceased, the estate of the deceased should be distributed as follows: -

1. *Kagaari/Kanja/4997 – herself but now that she is deceased, to be shared among her children Dennis Gitonga Ndwiga, Violet Muthoni Ndwiga and Sospeter Muchangi Ndwiga in equal shares.*
2. *Kagaari/Kanja/5000 – Dennis Gitonga Ndwiga – as the same was given to him by his grandfather.*
3. *Kagaari/Weru/5828 – Diana Njoki*
4. *Motor Vehicle Registration No. KQF 763 – Diana Njoki*
5. *Market Stall at Runyenjes – Violet Muthoni Ndwiga*
6. *Shares, death gratuity and savings be shared equally among all the beneficiaries*

14. In supporting her mode of distribution, it was her evidence that Kagaari/Kanja/4997 is her matrimonial home where she was living with her husband. She denied having separated with the deceased.

15. As for Kagaari/Kanja/5000 it was her evidence that the land was given to her son Dennis Gitonga by his grandfather.

16. On her part, the appellant testified that the deceased and herself bought land parcel No. Kagaari/Kanja/4997 in the year 1997 from her father-in-law and she produced a sale agreement to that effect. That after purchasing the said land they built a three bedroomed stone house with the deceased. Further that, she used to live on that land until the demise of the deceased when she left the farm because of security reasons after a commotion with the 1<sup>st</sup> respondent.

17. It was her further evidence that even Kagaari/Kanja/5000 was acquired by herself and the deceased. She denied the assertion by the 1<sup>st</sup> respondent that the land was given to Dennis Gitonga by her father-in-law. In summary, she proposed the following mode of distribution

- 1) *Kagaari/Kanja/4997 – Diana Njoki*
- 2) *Kagaari/Kanja/5000 – Diana Njoki*
- 3) *Kagaari/Weru/5828 – Dennis, Sospeter and Rhoda Muthanje*
- 4) *Motor vehicle KQF 763 – was sold by the deceased before he died*
- 5) *Market stall at Runyenjes – Diana Njoki*
- 6) *Tuongane Tujjenge Sacco (shares) – Diana Njoki*
- 7) *Nawiri Sacco (shares) – Diana Njoki*

8) *Ngwataniro Self Help Project – Diana Njoki*

9) *Savings at Equity – Diana Njoki*

10) *Death gratuity – Diana Njoki*

18. The court has considered the two modes of distribution as proposed by the appellant and the first respondent. In her evidence, the appellant stated that land parcel Nos. Kagaari/ Kanja/4997 and Kagaari/Kanja/5000 were purchased by herself and the deceased. She produced sale agreements to that effect and the translated versions of the same.

19. Looking at them I make the following observations;

*i. The sale agreements do not have the land reference numbers to which they relate.*

*ii. The two agreements are between the deceased (David Ndwiga) and Koru Gatua. I have perused a copy of the Green Card for parcel No. 4997. It shows that the land was initially registered in the name of Koru Gatua but was on the 30<sup>th</sup> May, 1997 transferred into the name of the deceased herein.*

20. Even assuming that the deceased and the appellant bought the same from the deceased father, the same is not jointly registered in the name of the appellant and the deceased. If she contributed in purchasing the same, she did not produce such evidence before the court.

21. On the issue of the stall at Runyenjes, the appellant’s contention is that she took a loan from chama to build the stall. Though she stated that she was a business lady and bank statements were produced to that effect, there was not concrete evidence to support her assertion that she built the stall. The same thing applies to Ngwataniro Selp Help Project in which she stated that she contributed money in the account held by the deceased. The documents that she produced shows that she took a loan from Runyenjes Tumaini Women Self Help Group which boosted her business. She also took another loan from unidentified source which she used to buy home electronics. The court is therefore not convinced that she contributed as she alleges.

22. In the end, I find that land parcels No. 4997, 5000 and 5828 are available for distribution to the beneficiaries of the deceased as neither the appellant nor the 1<sup>st</sup> respondent managed to convince the court that they contributed to the purchase of the same. However, the evidence available from the appellant’s witness is to the effect that the 1<sup>st</sup> respondent was living with the deceased on land parcel No. 4997 and upon marrying the appellant, the deceased and the appellant continued living in the same house that the deceased was living with the 1<sup>st</sup> respondent before they separated. This therefore means that the 1<sup>st</sup> respondent was truthful when she testified that land reference No. 4997 was her matrimonial home. There is also evidence that she is currently living there.

23. Having re-evaluated the evidence as hereinabove, I find that the mode of distribution as ordered by the trial court is fair and reasonable and I uphold the same.

24. In the premises, the appeal is hereby dismissed.

25. This being a succession cause involving family members of the deceased, the only fair order to make on costs is that each party shall bear its own costs of the appeal.

26. It is so ordered.

**Delivered, dated and signed at Embu this 14<sup>th</sup> day of July, 2021.**

**L. NJUGUNA**

**JUDGE**

.....**for Appellant**

.....**for Respondents**