



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

MISC. SUCCESSION CAUSE NO. 39 OF 2018

IN THE MATTER OF THE ESTATE OF EPHAPHARAS NJAGI JASON KARANJA (DECEASED)

NEWTON KAARIA NJAGI.....PROTESTOR/APPLICANT

VERSUS

JULIA IGOKI NJAGI.....ADMINISTRATRIX/RESPONDENT

JUDGMENT

Introduction

1. This cause relates to the estate of the late Ephapharas Njagi Jason Karanja who died intestate on 29/09/2007. The widow, Julia Igoki Njagi, was appointed the administratrix of the deceased's estate on 11/05/2009 and on 03/11/2010, the said grant was confirmed and later rectified on 30/10/2013.
2. Consequently, on 15/05/2019, the court revoked and annulled the initial grant that was issued on 11/05/2009 on the ground that the proceedings leading to the issuance of the grant were defective in substance and on account of concealment of something material by the administratrix. A fresh grant was issued to the administratrix. Before this court is the administratrix's application dated 28/04/2019 and filed on 30/04/2019 seeking confirmation of the grant issued to the administratrix on 15/05/2019.
3. By an affidavit of protest filed on 15/07/2020, the protestor contends that the applicant has included a list of beneficiaries who are not children or dependents of the deceased within the meaning of Section 29 of the Law of Succession Act. The Protestor also challenges what constitutes the estate of the deceased.

Protestors' Submissions

4. The Protestor contends that the deceased left behind the following known estate:

- a. MWIMBI/CHOGORIA/1217 – 0.202Ha
- b. MWIMBI/CHOGORIA/1620 – 0.284Ha
- c. MUTHAMBI/L.KARIMBA/269 – 2.01Ha
- d. MWIMBI/CHOGORIA/1649 – 0.0462Ha
- e. MWIMBI/CHOGORIA/1650 – 0.0462Ha
- f. MWIMBI/CHOGORIA/1652 – 0.0435Ha
- g. MWIMBI/CHOGORIA/1654 – 0.0435Ha
- h. MWIMBI/CHOGORIA/1666 – 0.5860Ha

5. In 2014, land parcel number MWIMBI/CHOGORIA/1666 was sold to different purchasers after being subdivided into land parcels number MWIMBI/CHOGORIA/5978, 5979, 5980, 5981, 5982, 5983, 5984, 5985, 5986, 5987, 5988, 5989, 5990, 5991 and 5992. The

Protestor submitted that the purchasers of land parcel Mwimbi/Murugi/1666 did not depend on the deceased prior to his death and as such are not entitled to benefit from the subject estate.

6. According to the protestor, the deceased's estate should be distributed as follows:

- a. Mwimbi/Chogoria/1620 measuring 0.284Ha
 - i. Newton Kaaria – Whole
- b. Mwimbi/Chogoria/1217 measuring 0.202Ha
 - i. Gibson Kinyua – Whole
- c. Muthambi L. Karimba/269 measuring 2.01 Ha
 - i. Widow and all the children in equal shares of 0.287 Ha each
- d. Commercial plots
 - i. Mwimbi/Chogoria/1649 measuring 0.0462 Ha
 - a) Fridah Kagani – 0.0231 Ha
 - b) Rosalyn Njeri – 0.0231 Ha
 - ii. Mwimbi/Chogoria/1650 measuring 0.0462 Ha
 - a) Lucy Kawira – 0.0231 Ha
 - b) Kellen Wanja – 0.0231 Ha
 - iii. Mwimbi/Chogoria/1652 measuring 0.0435 Ha
 - a) Julia Igoki Njagi – Whole
 - iv. Mwimbi/Chogoria/1654 measuring 0.0435 Ha
 - a) Newton Kaaria – 0.0217 Ha
 - b) Gibson Kinyua - 0.0217 Ha
 - v. Mwimbi/Chogoria/1666 measuring 0.5860 Ha
 - a) Widow and all the children in equal shares of 0.084 Ha each

Administratrix's Submissions

7. According to the Administratrix, the following are purchasers for value of land parcel no. MWIMBI/CHOGORIA/1666 which forms part of the deceased's estate:

- i. Lysbeth Gatiria Mbae
- ii. Selmatech International
- iii. Royford Mbae Mwiandi
- iv. Gitumbi East African Pentecostal Church
- v. Alika Njeru Kiambi Murithi
- vi. Wilfred Riungu Ireri
- vii. Wilson Marangu M'Rithaa

viii. Evans Kabii Joses

ix. Ann Gatwiri Mbae

x. Mercy Kangai

xi. Rowland Kimathi Kanga

Issues for Determination

8. From the submissions by the parties, the following are the main issues arising for determination by this court:

- a) Who are the dependants of the deceased?
- b) What constitutes the estate of the deceased?
- c) What mode of distribution should be applied to the estate of deceased?

Analysis of Issues

a) **Who are the dependents of the deceased?**

9. Section 51(2)(g) of the Law of Succession Act provides as follows with regard to applications for grant:

“(2) Every application shall include information as to—

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased”

10. Section 51(2) (g) requires the petitioner for *grant of letters of administration* intestate to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The administratrix herein disclosed herself and the six children of the deceased. He did not leave out any of them. In view of that, it is my view that there was compliance with Section 51(2) (g). It is not in dispute that the deceased left behind dependants.

11. Section 29 of the Law of Succession Act defines dependants. it states –

“For the purposes of this Part, “dependant” means—

(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.”

12. In this case, the deceased was survived by one widow, sons and daughter’s. These are therefore the lawful dependants of the deceased:

- a. Julia Igoki Njagi - Widow
- b. Gibson Kinyua Njagi - Son
- c. Lucy Kawira Njagi - Daughter
- d. Fridah Kageni Njagi - Daughter
- e. Newton Kaaria Njagi - Son
- f. Kellen Wanja Wakaba - Daughter
- g. Rosalyn Njeri Njagi - Daughter

b) What constitutes the estate of the deceased?

13. Section 3 of the Law of Succession Act defines ‘estate’ to mean the free property of a deceased person.

14. The issues in contention between the parties herein as regards what constitutes the estate of the deceased can be framed as follows:

i. Whether the land parcels Mwimbi/Chogoria/1217; Mwimbi/Chogoria/1620 and Muthambi/Lower Karimba/269 constitute matrimonial property of the deceased and the administratrix.

ii. Whether the land parcel MWIMBI/CHOGORIA/ 1666, 269, 1649, 1650, 1652 and 1654 were held jointly or in common.

Whether there were properties that constituted matrimonial property of the deceased and the administratrix

15. Section 6 of the **Matrimonial Property Act, 2013** defines matrimonial property to include:

a. the matrimonial home or homes;

b. household goods and effects in the matrimonial home or homes; or

c. any other immovable or movable property jointly owned and acquired during the subsistence of the marriage.

16. Section 2 of the **Matrimonial Property Act** define ‘matrimonial home’ as:

“any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property.”

17. Section 14 (a) of the **Matrimonial Properties Act** which provide that:

“Where matrimonial property is acquired during marriage—

(a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.”

18. Relying on the above statutory provisions, the administratrix contends that the properties contained in Succession Cause No. 149 of 2008 (Chuka) constituted matrimonial property of the deceased and the administratrix. The said properties include the land parcels known as:

a. Mwimbi/Chogoria/1217;

b. Mwimbi/Chogoria/1620; and

c. Muthambi/Lower Karimba/269

19. It is crucial to note the words **“rebuttable presumption”** from the provision of **Section 14 (a)** of the **Matrimonial Properties Act**. The blacks law dictionary defines rebuttable presumption as follows: -

“An inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.”

20. In the initial application for a grant of representation (in **Succession Cause No. 149 of 2008 - Chuka**), the administratrix listed the three properties mentioned above as the assets comprising the deceased’s estate. From the copies of green cards on record, Mwimbi/Chogoria/1620 and Muthambi/Lower Karimba/269 were assets of the deceased and which became vested in the administratrix in November 2013, only after she became the grant holder following proceedings in Succession Cause No. 149 of 2008 – Chuka. With regard to Mwimbi/Chogoria/1620, the copy of the green card provided shows that the land belonged to the deceased.

21. In my view, the three properties formed part of the deceased’s estate at the time of his death and only became vested in the administratrix by virtue of Section 79 of the Law of Succession Act which provides that:

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

Whether the land parcels MWIMBI/CHOGORIA/ 1666, 1649, 1650, 1652 and 1654 were held jointly or in common

22. The mother title of land parcels no. Mwimbi/Chogoria/ 1666, 269, 1649, 1650, 1652 and 1654 is Mwimbi/Chogoria/239 as per the copies of green cards on record. Mwimbi/Chogoria/239 is an ancestral land and was first registered on 09/12/1967 in the name of Jazon Karanja (deceased). On 04/12/1992, the said land was inherited by Jazon Karanja’s sons: Hiram Mutegi Jason, Jotham Njeru Karanja (deceased), and

Ephaphras Njagi Jason (the deceased herein).

23. In 1972, when the land parcel Mwimbi/Chogoria/239 was registered in the names of Hiram, Jothan and the deceased, the **Registered Land Act, Cap 300, (RLA)** was the operative law. **Section 101 (1)** of the **Registered Land Act** provided as follows:-

“101. (1) An instrument made in favour of two or more persons, and the registration giving effect to it, shall show-

(a) whether those persons are joint proprietors or proprietors in common; and

(b) where they are proprietors in common, the share of each proprietor.”

24. The High Court in **Moses Bii v Kericho District Land Registrar & another [2015] eKLR** opined as follows:

“The contemplation of the above law is that in every situation where the proprietors are more than one, the register will reflect whether their registration is joint or in common. The RLA did not envisage a situation where you have several proprietors, without it being disclosed in the register, whether they are joint proprietors or proprietors in common.

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In a nutshell, where proprietorship is joint, the persons do not have any separate shares in the land, and therefore if one proprietor dies, his interest automatically vests upon the surviving proprietor.

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In our case, as I stated before, the register does not show whether the proprietorship was joint or in common. I also mentioned that the RLA did not contemplate a scenario where the register does not indicate whether land is held jointly or in common, and did not provide for the course to follow, where there are several proprietors but no indication as to whether they hold the land jointly or in common. What then should happen in such a situation?

My view is that if the register does not reflect whether land is held jointly or in common, the fallback position should be to presume that the land is held in common. Joint proprietorship, where the same has not been explicitly indicated, should only be presumed in the clearest of circumstances, where there can be no shred of doubt that the contemplation of the parties was to have the property held jointly.”

25. The current law, which is contained in the **Land Registration Act, Act No. 3 of 2012** (which repealed the RLA and which came into effect on 2 May 2012) in fact frowns deeply on joint proprietorship. It effectively bans them unless the proprietors are spouses or unless by order of court. The operative section is **Section 91 (8)** is drawn as follows:-

“Section 91(8): On and after the effective date, except with leave of a court, the only joint tenancy that shall be capable of being created shall be between spouses, and any joint tenancy other than that between spouses that is purported to be created without the leave of a court shall take effect as a tenancy in common.”

26. In the present case, the register also does not reflect whether land parcel Mwimbi/Chogoria/239 was held jointly or in common. I am therefore of the view that the same was held in common. This position is fortified by the fact that the green cards of the subdivisions have captured the names of the three brothers, that is, Hiram Mutegi Jason, Jotham Njeru Karanja (deceased), and Ephaphras Njagi Jason (the deceased herein).

27. I am therefore of the view that Mwimbi/Chogoria/ 1666, 1649, 1650, 1652 and 1654, which are subdivisions from Mwimbi/Chogoria/239, form part of the deceased estate. This is the same position that was taken by Honourable R. K. Limo (J) in his decision of 15/05/2019 where he found that the administrator had excluded the property known as Mwimbi/Chogoria/239 which appeared to have been held in common by the deceased and his two brothers, Jotham Njeru Karanja and Hiram Mutegi Jason. The deceased owned part of Mwimbi/Chogoria/239 which after sub-division, translated to parcels no. 1649, 1650, 1652, 1654 and 1666.

28. It is not disputed that land parcel number MWIMBI/CHOGORIA/1666 was subdivided into 15 divisions (parcels 5978-5992) in 2014. In the aforesaid ruling, the court found that the effect of the non-disclosure by the administratrix meant that *“...she dealt with assets comprising the estate without the authority from a court of law notwithstanding the fact that she was the appointed administratrix.”* In the end, the court revoked and annulled the initial grant stating that the subsequent sub-divisions and transfers done on the basis of that grant were thereby suspended.

29. I am therefore of the view, that the effect of the revocation of the initial grant and the suspension of the subsequent divisions is that the land parcel MWIMBI/CHOGORIA/1666 reverted back to the name of the deceased for distribution amongst the beneficiaries.

30. The deceased died intestate. The authority to handle the property of a dead person emanates only from a grant of representation. Any

person who handles such property without a grant acts without authority and outside of the law, which amounts to intermeddling, which is an offence under **Section 45** of the Law of Succession Act which provides that:

“45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

31. It is therefore my view that the persons listed as purchasers of the deceased’s estate in the administratrix’s affidavit in support of the present application are not entitled to a share of the deceased’s estate. They purchased the different parcels of land after the death of deceased and from the administratrix before the properties had vested in her. At the different dates of purchases, the administratrix had no power to sell the properties. She had nothing to sell, and she therefore could not pass good title to the listed purchasers. She did fall afoul of Section 45 of the Law of Succession Act and this means that the deceased’s estate is not indebted to the said purchasers.

c) What should be the mode of distribution?

32. Having dealt with the matter of the deceased’s assets and the survivors, the next step should be distribution, for the proviso to Section 71(2) of the Law of Succession Act requires that the shares of each of the survivors be ascertained.

33. From the analysis above, it is my view that the mode of distribution of the deceased’s estate as proposed by the administratrix should not be confirmed as the same include a list of purchasers who are neither survivors or creditors of the subject estate. Equally, it is my view that the proposal by the protestor should not be confirmed as it suggests that Mwimbi/Chogoria/1620 and Mwimbi/Chogoria/1217 be apportioned to Newton Kaaria and Gibson Kinyua respectively as per the grant dated 30/10/2013 yet the said grant has since been revoked. In addition, the proposal by the protestor will result in an unequal division of the deceased’s estate amongst the beneficiaries.

Conclusion

34. Taking the above in account, equity demands that the net intestate estate should be distributed equally amongst the beneficiaries.

35. Sections 35 and 37 of the Law of Succession Act provides as follows:

“ 35. Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.(4) Where an application is made under subsection (3), the court may award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to-

(a) the nature and amount of the deceased’s property; (b) any past, present or future capital or income from any source of the applicant and of the surviving spouse; (c) the existing and future means and needs of the applicant and the surviving spouse;

(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will; (e) the conduct of the applicant in relation to the deceased and to the surviving spouse;

(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will, if any; and

(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section. (5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

37. A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the consent of all co-trustees and all children of full age, or with the consent of the court shall, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:

Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court."

36. In the circumstances, the estate of the deceased shall be distributed as follows:

a. Mwimbi/Chogoria/1620 measuring 0.284Ha

i. Widow and all the children in equal shares of 0.041 Ha each

b. Mwimbi/Chogoria/1217 measuring 0.202Ha

i. Widow and all the children in equal shares of 0.029 Ha each

c. Muthambi L. Karimba/269 measuring 2.01 Ha

i. Widow and all the children in equal shares of 0.287 Ha each

d. Mwimbi/Chogoria/1649 measuring 0.0462 Ha

i. Widow and all the children in equal shares of 0.006 Ha each

e. Mwimbi/Chogoria/1650 measuring 0.0462 Ha

i. Widow and all the children in equal shares of 0.006 Ha each

f. Mwimbi/Chogoria/1652 measuring 0.0435 Ha

i. Widow and all the children in equal shares of 0.006 Ha each

g. Mwimbi/Chogoria/1654 measuring 0.0435 Ha

i. Widow and all the children in equal shares of 0.006 Ha each

h. Mwimbi/Chogoria/1666 measuring 0.5860 Ha

a) Widow and all the children in equal shares of 0.084 Ha each.

The widow of the deceased shall hold the portions distributed to her in life interest as provided under **Section 35 of the Law of Succession Act**

37. I make no orders as to costs.

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

L.W GITARI

JUDGE