



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CAUSE NO. 103 OF 2019

IN THE MATTER OF THE ESTATE OF THE LATE KARANJA KINYUA (DECEASED)

RULING

BACKGROUND

1. I find it necessary to set out the background of this succession before proceeding to consider the application for confirmation of the Grant. In considering that background, I will summarise the details because this succession was the subject of a hearing before *Justice W. Musyoka* and there after the learned Judge delivered his Judgment on 29th September, 2017. The learned Judge went into great depth of the background of this matter in that judgment.

2. The deceased in this cause ***Karanja Kinyua deceased*** died at the age of 82 years, on 26th September, 1986.

3. ***Hannah Njeri Kamura***, deceased (hereinafter Hannah deceased) petitioned for Grant of letters of administration intestate and in so doing listed herself and her children with the deceased, as beneficiaries. A Grant dated 9th February, 1989 was issued to Hannah deceased. That Grant was confirmed on 13th November, 1989 and the estate's properties, L.R. OLKALAU/NDEMI/764 (hereinafter Ndemi property) and shares of Gatono Farmers Company Limited (hereinafter Gatono shares), were distributed to Hannah deceased whole.

4. By his judgment of 29th September, 2017, *Justice W. Musyoka* determined an application filed by *Mary Wambui Karanja* (hereinafter Mary) whereby she sought revocation of the Grant issued to Hannah deceased. The revocation was granted on the court finding that Mary was the second wife of the deceased and she and her children were concealed from this succession. The learned Judge, after revoking the grant issued to Hannah deceased ordered another Grant to be issued in the joint names of *Peter Njihia Karanja* (hereinafter Njihia), representing the first house of Hannah deceased, and Mary representing the second house. Mary filed summons for rectification of Grant, issued by *Justice W. Musyoka* and confirmation of the same. That application received protest from *Njihia*. This Ruling relates to Mary's application and the affidavit of protest of *Njihia*.

ANALYSIS

5. Mary by her application has proposed the Estate be distributed with first house getting the *Gatono* shares and the second house Ndemi property.

6. *Njihia* does not object to the prayer for rectification of the Grant, issued to him and Mary, to reflect the correct date of death of the deceased. He however objects to the mode of distribution proposed by Mary. He termed distribution as "unfair, inequitable biased in favour of the deceased's second house."

7. *Njihia* proposed that Ndemi property be distributed with the first house getting 20 acres, the second house getting 8 acres and the *Gatono* shares going to specific beneficiaries in the first house. Those specific beneficiaries are *James Munyua Karanja* and *George Ithibu Karuma*.

8. *Njihia's* proposal is based on the alleged contribution made by the first house in the acquisition of the Ndemi Property. *Njihia* also deponed that his mother Hannah deceased paid for that Ndemi property and that therefore, the property does not form part of the assets of this estate. *Njihia's* contentions in respect to Ndemi property were determined by *Justice W. Musyoka* though the learned Judge's judgment and to demonstrate this, I reproduce part of paragraph 30 of that judgment as follows:-

"When the Late administrator (Hannah deceased) moved this Court for representation, she listed the Ndemi Property as an asset in the estate. She was a surviving widow of the deceased. It would be presumed that she knew better. If it had been own property at that time she would not have listed the same as an asset in his estate. The respondent (Njihia) did not call for officers from settlement Fund Trustee to shed light on how his late mother was registered as proprietor after the demise of the deceased. All the payments receipts placed before me indicate that she (Hannah deceased) paid the requisite fees after the demise of the

deceased. My view of the matter is that the Ndemi Property belongs to the deceased, it was allotted to him in 1982.”

9. The learned Judge also made a finding that Gatono shares were assets of this Estate.

10. It follows that since I cannot sit as an appellate court to the decision made by *Justice W. Musyoka*, a Judge exercising co-ordinate jurisdiction as this Court, I cannot accept the arguments raised by Njihia which are contrary to the said Judge's finding. The argument raised by Njihia on the genesis of Ndemi property and how it was acquired or whether the deceased transferred in his life time his shares to Njihia brothers is rejected.

11. What however remains for determination is Njihia's argument that the mode of distribution suggested by Mary is unfair and biased.

12. What is important to bear in mind is that the learned Justice W. Musyoka made a finding whereby he presumed that Mary was the wife of the deceased. The learned Judge found that Mary had four children before co-habiting with the deceased and had two children with the deceased. The Judge also found that Mary co-habited with the deceased at Gatono property before joining him, in 1984, at Ndemi farm where the deceased had relocated. Deceased passed away in 1986.

13. The deceased was therefore married to Hannah deceased and Mary. **Section 40** of the **Law of Succession Act Cap. 160** gives the starting point of my consideration of distribution of this estate. That section 40 provides:-

“40. Where intestate was polygamous -

(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 the net intestate estate shall, in the first instance, 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.

14. In my view, **Section 40 of Cap 160** does not necessarily mean that the court is bound to divide the estate equally amongst the different houses where the deceased is polygamous. The court retains discretion in distributing such an estate. This was first stated to be the position of the Law by the Court of Appeal in the case of *Eldoret Civil Appeal No. 60 of 2002 MARY RONO VS. JANE RONO & WILLIAM RONO (2005) eKLR*. *Justice Ngaa Jairus* considered the above decision in the case of *SOPHIA WANGECHI MUGO VS. GEOFFREY WAMBUGU MUGO & ANOTHER (2016) eKLR* and stated thus:-

“While agreeing with the leading judgment of Waki, J.A., Justice Omolo J.A. discounted any notion that the estate should have been distributed amongst the beneficiaries in equal shares because, in the learned judge's view, there is no such requirement under the Act. The learned judge said:-

‘I had the advantage of reading in draft form the judgment prepared by Waki, J.A., and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned judge to be laying down any principle of law that the Law of Succession Act, Cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr Gicheru. I can find no such provision in the Act.’ ...

My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has discretion to take into account the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.

Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in a case of young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.

In effect, the learned judges embraced the principal of fairness and equity in distribution of a deceased's estate between or amongst persons beneficially entitled thereto. While the number of children in a particular house is an important factor in the determination of the share to be allocated to each house, it is not the only factor; neither is it the controlling factor.” (emphasis mine)

15. I am mindful that *Justice W. Musyoka* made a finding that the children of Mary born outside her union with the deceased were children for purpose of this succession as per **Section 3(2) of Cap. 160**.

16. In exercising this Court's discretion in ordering the distribution of this Estate, I have taken into account the children of both houses are all adults. I have also considered that Hannah deceased, the wife of the first home having married the deceased earlier had made wifely contribution to enable the deceased acquire the properties he had at his death. Mary, it would seem lived with deceased for short period at Gatono and when the deceased acquired Ndemi property and relocated there in 1984 Mary joined him. The deceased died two years after relocating to Ndemi property. Mary's marriage life with the deceased is far shorter and cannot be compared to that of Hannah deceased. In my view, the second home cannot be given equal or more property than the first house. I believe the members of the second house are conscious of this because *Paul Njoroge Karanja*, Mary's son with the deceased, stated that his claim (presumably the claim of 2nd house) is for Ndemi property which the second house had occupied only half of it. The members of the second house who testified before *Justice W. Musyoka* did not indicate a desire to inherit Gatono property.

DISPOSITION

17. With the above in mind, I make the following orders:-

(a) The Grant issued on 29th September, 2017 is hereby rectified to reflect that the deceased died on 26th September, 1986.

(b) That Grant is hereby confirmed as follows:-

TITLE NUMBER NYANDARUA/NDEMI/764

First House

- (i) Peter Njihia Karanja - 4 acres
- (ii) Serah Nduku Muiruri - 1 acre
- (iii) Monica Wanjiku Kabui - 1 acre
- (iv) Lydia Wairimu Kagwima - 2 acres
- (v) Boniface Karanja Njoroge - 2 acres
- (vi) Samuel Ndungu Wanjiku - 2 acres
- (vii) Patrick Githinji Mugo - 2 acres
- (viii) Anthony Karuma Munyua - 2 acres
- (ix) Samuel Nganga Karuma - 2 acres
- (x) George Ithibu Karuma - 2 acres

Second House

- (i) Mary Wambui Karanja - 1½ acres
- (ii) Ndirangu Karanja - 1 acre
- (iii) Jane Wanjiru Karanja - 1 acre
- (iv) Michael Chege Karanja - 1 acre
- (v) Paul Njoroge Karanja - 1 acre
- (vi) George Maina Karanja - 1 acre
- (vii) Lydiah Wairimu Karanja - 1 acre
- (viii) Evan Ndungu Karanja - 1 acre
- (ix) Teresiah Wangui Karanja - 1 acre

Family burial area on Title Number Nyandarua/Ndemi/764

- (i) Shall be jointly registered in the names of Peter Njihia Karanja and Mary Wambui Karanja - ½ acre

20 Shares in Gatono Farmers Company Limited

James Munyua Karanja and George Ithibu Karuma - jointly

18. There shall be no order as to costs.

19. Orders accordingly.

RULING DATED AND DELIVERED AT KIAMBU THIS 7TH DAY OF OCTOBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Ndege

For Peter Njihia : Mr. Wachira

For Mary Wambui Karanja : Mr. Mureithi holding brief for Mr. Ngata Kamau

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE