



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.106 OF 2012**

**IN THE MATTER OF THE ESTATE OF WARI BARANJA (DECEASED)**

**TITO WARI.....PETITIONER**

**VERSUS**

**JAMES KARIUKI NJOKONIA & OTHERS.....PROTESTORS**

**JUDGMENT**

1. Letters of Administration in relation to the estate of the deceased herein was granted to the petitioner on 19.04.2012 and thereafter confirmed on 18.04.2013. However, the protestor filed summons for revocation of the said grant which application was allowed in a ruling delivered on 11.04.2017 by Hon. Bwonwonga, J.
2. On 25.07.2018, the protestor filed summons general seeking for court to confirm the grant that had initially been issued dated 19.04.2012 which the petitioner vehemently opposed urging the court to dismiss since the grant stood revoked vide court orders dated 11.04. 2017. The court vide a ruling dated 06.03.2018 dismissed the application and thereafter encouraged the parties to consider recording a consent for joint administration of the estate.
3. On 28.11.2019, by consent the parties agreed to have the petitioner and the protestor as joint administrators of the estate and thereafter the court ordered that application for confirmation of grant be filed within 30 days and that any party not in agreement was free to file protest affidavit within 14 days after being served. Consequently, on 28.11.2019, joint letters of administration intestate was issued to both the petitioner and protestor.
4. In compliance with the said orders, the petitioner filed summons for confirmation of grant dated 02.03.2020 and he made his proposal in regard to the mode of distribution of the estate of the deceased and which was indicated to be comprising of LR No. Ngandori /Kiriari/730. The summons was opposed by the protestor and instead, he proposed his own mode of distribution of the estate.
5. The court gave directions on filing of submissions and in compliance with the said orders, the parties herein filed their respective submissions wherein the petitioner submitted that the estate comprised of LR No. NGANDORI /KIRIARI/730 which measures only 6 acres. That he should get 4 acres and the protestors to get the remaining 2 acres and further that, the deceased herein had land parcel LR No. NGANDORI /NGOVIO/779 measuring 3 acres which is currently occupied by the protestors elder brother Mbogo Njekonia; that the petitioner was also entitled to that land but he got nothing. He further submitted that the deceased herein had 9 acres of land of which 3 acres are occupied by the protestor's brother and 6 acres now being contested upon. He urged the court to consider the mediation meeting held on 13.03.2019 and the resolutions therefrom.
6. In a nutshell, the protestors submitted that the petitioner is their uncle while the protestor/s are grandchildren to the deceased herein; he was opposed to the mode of distribution by the petitioner and instead proposed that the said land parcel be shared equally amongst the disputants herein.
7. I have considered the summons, affidavit of protest herein, the reply thereto and the rival submissions. The main issue for determination is the acceptable mode of distribution of the estate between the parties. I therefore proceed to determine the same.
8. It is not disputed that the protestor represents the grandchildren while the petitioner is the son of the deceased herein. Further, it is not disputed that the deceased had two children being the petitioner and one Njekonia Mbogo - now deceased- who is the father of the protestor herein. From the records, it is clear that one Njekonia Mbogo predeceased his father (deceased herein).
9. The deceased having died intestate, it means therefore that his estate and distribution thereof is subject to the rules of intestacy. Generally, the law contemplates that a person can either distribute his estate by way of a will or in absence of a will, the estate is subjected to the rules of intestacy. From the reading of Sections 35, 36, 38 and 40 of the Succession Act, the rules should apply where the deceased has passed on and left behind survivors. What this means, therefore, is that where a child of a deceased person has predeceased the deceased,

then such a child cannot be said to be a beneficiary. The rightful beneficiary ought to be the spouse of the deceased child (who should hold the given estate in trust for the children of the deceased child) or where the deceased child is not survived by a spouse but has children, the right person as the beneficiary of the deceased's estate ought to be the grandchild of the deceased.

10. In regard to the court orders that the parties herein consider recording consent for joint administration of the estate and a further mediation held by the chief before three elders, the parties herein were in attendance. It is quite evident that an agreement was reached on the mode of distribution of the estate herein and all the parties signed against their names save for one James Kariuki Njekonia, the protestor herein.

11. The determination of the manner in which the estate will be distributed will depend on the answer to the question whether the deceased had distributed some of his properties to some of his beneficiaries *inter vivos*? If indeed the deceased had bequeathed some of his assets to some of his beneficiaries by way of gift *inter vivos*, the court should take into account that fact.

12. Section 42 of the Law of Succession

**42. Where -**

***(a) an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate, that property shall be taken into account in determining the share of the net intestate estate finally, accruing to the child/grandchild or house.***

13. In the case of Samuel Maina Mwangi & 2 Others v Muthoni Kagiri [2013] eKLR the Court of Appeal held in a case where the deceased had given the appellants (his sons) gifts *inter vivos* by way of first registration that: -

***We are of the considered view that the said registrations in favour of the 1st and 2nd appellants were tantamount to gifts given by the deceased during his lifetime.....Therefore, the trial court was correct in holding that the parcels of land that were given to the appellant would be taken into account in distribution of the deceased's estate.***

14. In the same breadth, the petitioner attached a green card issued from the Land Registrar's Office in Embu showing that one Wilson Mbogo was the registered owner of Land Parcel No. NGANDORI/NGOVIO/779. This document buttresses the submission made by the petitioner that the father of the protestor herein had previously been given land measuring 3 acres prior to his death which is currently owned by the eldest brother of the protestor herein. That in the end, the protestor's family has inherited a total of 5 acres whilst the petitioner acquires 4 acres.

15. I am guided by the two documents (the letter from the area chief and the green card) which seems to confirm the contents of the other). It is equally of importance to note that the contents of these documents were never controverted nor disproved. In my considered view, I am convinced that the mode of distribution proposed by the petitioner is fair way to dispose the estate of the deceased herein bearing in mind that the protestor's family had been bequeathed Land Parcel No. NGANDORI/NGOVIO/779 prior to the deceased's death.

16. For the foregoing reasons, I find that the summons for confirmation of the grant dated the 2<sup>nd</sup> day of March, 2020 has merits and I do hereby allow the same.

17. The petitioner is awarded the costs of the application.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF NOVEMBER, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent