



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

SUCCESSION CAUSE NO.734 OF 2009

IN THE MATTER OF LATE NGUI KIKUYU NTHENGE – DECEASED

RAPAHHEL NDETI NGUI

GERALD NGUNGU NGUI

KIKUYU NGUI).....ADMINISTRATORS/PETITIONERS

AND

BENEDICT NZOMO NGUI3RD ADMINISTRATOR/PROTESTOR

R U L I N G

1. The Petitioners herein filed summons for confirmation of grant dated 12/11/2018 and presented a schedule of distribution of the estate of the late Ngui Kikuyu Nthenge who died intestate on 3/07/2006. However the 3rd administrator Benedict Nzomo Ngui filed an affidavit of protest sworn on 11/12/2018 to the Summons for confirmation of grant.

2. The Protestor vide his affidavit seemed to differ with his fellow administrators when he averred that the deceased had gifted him 8.5 acres out of the family land Parcel **No. Kithimani/Kithimani "A"/1810** and now seeks to be allocated the said acreage while the rest of the family members including the three widows to each get a share of 3.81 acres. He went ahead to propose that land parcel No. **Machakos/Matuu/100** and a commercial plot No. 7 Kiosyoni market should be registered in the names of the first wife Munini Ngui absolutely while shares in Kyanzavi Farmers Company Limited and Mwaki Kambi ya Ndeke and Mavoloni Company Limited as well as money held at Kenya Commercial Bank Matuu Branch A/C No. 089-166079940 to be shared equally between the three widows.

3. The 1st, 2nd and 4th Administrators had proposed to distribute the estate as follows:-

L.R. Kithimani/Kithimani "A"/1810

Munini Ngui13.1 Ha

Benedict Nzomo Ngui1.34 Ha

Christine Mukui Ngui6.55 Ha

Cecilia Mbithe Ngui6.55 Ha

Kikuyu Ngui0.57 Ha

L.R Machakos/Matuu/100

Munini NguiAbsolutely

5 shares at Kyanzavi farmers Company Limited

Munini Ngui2 shares

Christine Mukui Ngui1.5 shares

Cecilia Mbithe Ngui 1.5 shares

2 shares at Mwaki Kambi Ndeke society:

Munini Ngui1 share

Munini Ngui

Christine Mukui Ngui1 share (jointly)

Cecilia Mbithe Ngui

3 Shares Mavoloni

Munini Ngui1 share

Christine Mukui Ngui1 share

Cecilia Mbithe Ngui1 share

Commercial Plot No. 7 Kiosyoni market

Munini Nguiabsolutely

Money in KCB Matuu Branch A/C No. 089 – 166079940

Munini Ngui

Christine Mukui Nguito be shared jointly

Cecilia Mbithe Ngui

A consent duly signed by the family members save for the Protestor was filed alongside the summons for confirmation of grant.

4. As parties were unable to reach an agreement, directions were taken to the effect that the protest herein be canvassed by way of oral evidence (viva voce).

5. The Protestor stated that he is the eldest son of the deceased having been born in 1959. He sought reliance on his affidavit and witness statement. He stated that the deceased had three (3) wives who are still alive and that he had been given 8.5 acres of the family land by the deceased in 1980 from the parcel **No. Kithimani/Kithimani“A”/1810** and which should be considered during the distribution of the assets. He proposed that the remainder of the family land should be shared among the children of the deceased.

On cross – examination, he stated that he had worked for the deceased from 1979 to 1982 earning a salary of Kshs.1000/= per month and that he was given the land *in lieu* of salary. He further added that his sisters Kalondu and Mwelu were present when the deceased gifted him the land and that the same was later reduced into writing but which he did not avail it to the court.

6. Scholastica Kalondu stated that she was from the first house where the Protestor is the eldest son of the deceased. She relied on her witness statement in which she supported the Protestors proposed mode of distribution. On cross- examination, she denied being present when the alleged gift was made by the deceased. She stated that there were family meetings in which the issue of the gift was reduced into writing but she did not have the document in court. She further admitted that the deceased did not say that he had given the Protestor 8.5 acres of land. She finally agreed with the proposed mode of distribution by the 1st, 2nd and 4th Administrators.

7. Mwelu Ngui sought to adopt her statement filed on 29/05/2019 and which she confirmed having been present when the deceased gifted a portion of the family land to the Protestor in 1980. On cross- examination, she confirmed that the deceased did not indicate that he was giving the protestor 8.5 acres of land. She also confirmed that the deceased did not sub-divide the land and also did not direct that the land be shared equally among the children. She also confirmed that she had not filed a protest.

8. The petitioners called the 4th Administrator and the 1st and 3rd wives of the deceased as witnesses who relied on their statements and those of the 2nd wife of the deceased. It was the testimony of Kikuyu Ngui that in 1997 the deceased called for a family meeting where he directed that the protestor be given a portion of land which was later established to measure 1.34 Ha and not 8.5 acres as claimed by the protestor. On cross-examination, he stated that the deceased’s wish was that the properties be shared between the three households so that each wife was to distribute to their children under their respective households.

9. Christine Mukui Ngui is the third wife of the deceased. She relied on her statement and those of her co-wives whose gist is that all the widows of the deceased are in agreement with the proposal by the 1st, 2nd and 4th Administrators. She stated that the deceased held a meeting in 1997 whereby he gave a portion of land measuring 30 feet by 50 feet and not 8.5 acres as alleged by the Protestor. On cross –

examination, she maintained that the protestor is entitled to a portion measuring 50 feet by 30 feet as directed by the deceased in addition to his share from the first household. She further added that she was present when the Protestor was gifted the small portion by the deceased in 1997 and which was later established to measure about 1.34 ha (3.11 acres).

10. Munini Ngui is the first wife of the deceased and the mother of the Protestor. She relied on her witness statement dated 19/09/2019. She stated that she is aged about 80 years old and confirmed that the Protestor is her first born child. She stated that she could not recall the issue of 30 feet by 50 feet portion of land given by the deceased to the protestor.

11. Learned counsels filed written submissions. The Protestor's submissions are dated 4/11/2019 while those for the Petitioners/Respondents are dated 30/11/2019.

12. I have considered the rival affidavits as well as the evidence presented herein. I have also considered the submissions of the learned counsels. It is not in dispute that the deceased herein died intestate and that he had not distributed his properties prior to his death. It is also not in dispute that the deceased had three wives and fifteen children all making a total of 18 units. It is also not in dispute that the deceased had about seven properties as disclosed by both the petitioners and the protestor. That being the position, I find the following issues necessary for determination namely:-

(i) Whether the deceased gave the Protestor 8.5 acres of land comprised in **L.R. No. Kithimani/Kithimani "A"/1810** as a gift inter vivos.

(ii) Which is the appropriate mode of distribution of the deceased's net intestate estate?

13. As regards the first issue, I note that the Protestor has pitched tent on his claim that his late father bequeathed him 8.5 acres of land from the family's land parcel **Number Kithimani/Kithimani "A"/1810** and that he wants the same factored in the distribution of the estate. A gift is defined as a voluntary transfer of personal or real property without consideration and involves parting with property without any pecuniary consideration. The deceased herein is alleged to have made a gift to the Protestor several years before he passed on. Whereas the protestor claims that the gift was made in 1980, the petitioner/Respondents maintain that it was made in 1997 in the presence of key family members. Indeed the schedule of distribution by the Petitioners/Respondents has captured the said gift in the form of 1.34 Ha to the protestor. The deceased did not actualize the gift as he merely made a promise to the Protestor and that the gifted property was not registered in name of the Protestor before the demise of the donor. In Halsbury's laws of England 4th Edition Volume 20(1) at paragraph 67 incomplete gifts are stated as follows:-

"When a gift rests merely in promise, whether written or oral or in unfulfilled intention, it is incomplete and imperfect and the court will not compel the intending donor or those claiming under him to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do".

From the evidence of both protestor and his fellow administrators and witnesses it came out clearly that the deceased had indeed made a gift to the protestor who was his eldest child and who had assisted him in establishing the family land at Kithimani. However there is a dispute on the year the gift was made and the actual acreage of land. Whereas the Protestor maintains that the gift was made in 1980 and that the acreage is 8.5 acres, the Respondents maintain that the gift was made in 1997 and that the size of the land was 50 feet by 30 feet each comprising of either black or red soils. The Protestor claimed that he was instructed to dig a trench as a boundary but the Respondents and witnesses denied existence of such a trench. In fact the protestor's own mother Munini Ngui testified and denied the protestors assertions. The Protestor claimed that the family meeting was reduced into writing but could not produce them in court. Again his two sisters Kalondu and Mwelu did not impress me as truthful witnesses as they admitted on cross-examination that they did not attend such a meeting and further seemed to agree with the proposed mode of distribution by the other administrators. I am persuaded by the testimonies of the respondents that the deceased had made a gift to the protestor which comprised of land measuring 50 feet by 30 feet that was later established to be 1.34 Ha and which has been provided for in the schedule of distribution by the Petitioners/Respondents. The protestor came out as unsure of the acreage gifted since he stated that he was given 8.5 acres while he currently cultivates around 10 acres of land. It also emerged from the evidence that the deceased did not indicate the exact acreage of land gifted to the protestor and hence the 8.5 acres are a creation of the protestor. The evidence of the Respondents and witnesses has cast doubt upon the protestor's claim to 8.5 acres. In the final analysis, I found that the deceased had made a gift to the Protestor in the form of a piece of land measuring 50 feet by 30 feet on red and black soils which have now been established to be 1.34 hectares.

14. As regards the second issue, the Protestor has proposed that he gets 8.5 acres while the rest of the family members receive 3.81 acres out of the family land **No. Kithimani/Kithimani "A"/1810**. He is also in agreement with the Respondents over the distribution of the other assets. The Respondents on the other hand are of the view that according to the houses save only for the 1.34 Ha comprising the gift to the Protestor and 0.57 Ha to the 4th Administrator. It is noted that the deceased was polygamous as he had married three (3) wives. The three (3) widows are still alive with all their children who are now adults. The first wife Munini Ngui has 7 children while the second wife Cecilia Mbithe Ngui has 4 children and the third wife Christine Mukui Ngui has 4 children all making a total of 18 units. The Protestor maintains that each member should be given his or her shares as they are all adults. However, I note that all the family members including the three widows have duly agreed and signed a consent to the summons for confirmation of grant as well as the proposed distribution by the Respondents. It is only the Protestor who is of a contrary opinion. Even the Protestor's witnesses duly signed the consent to the distribution and since they did not file affidavits of protests it is only the protestor against the whole family of the deceased. It appears that the Protestor is a lone ranger as the rest of the family agree with the Respondents proposals on the distribution of the estate. Since the deceased was polygamous and died intestate, then Section 40(1) of the Law of Succession Act applies. It provides as follows:-

"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 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.”

15. From the evidence of the Respondents and their witnesses, it is clear that the whole family of the deceased except the protestor have reached an agreement on the mode of distribution. The protestor wants the estate to be shared equally among the children after factoring his gift. However, none of the beneficiaries despite being adults in their own right agree with him. In fact the rest of the beneficiaries are in agreement that the estate be distributed according to the houses from which they will receive their individual shares. If a certain family has agreed to distribute the estate of their deceased benefactor, the court cannot go against such an arrangement. In the case of **Rono –v- Rono [2006] IKLR** it was held that Section 40 of the Law of Succession did not take away the discretion of the court to distribute the estate fairly. Again there is no hard and fast rule that the distribution of a deceased’s estate among beneficiaries must be equal. In the present case the three widows and the three administrators plus the beneficiaries have agreed that the first house be given a larger portion on the ground that it participated in the establishment of the properties before the coming in of the 2nd and 3rd houses. Indeed the 2nd and 3rd wives of the deceased plus their children are in agreement with the proposal and are content with what has been proposed for them. Likewise all the three widows have agreed that the Protestor be given 1.34 Ha out of the family land being a gift given to him by the deceased in 1997. The beneficiaries are also in agreement that the Protestor be given an extra 1.34 Ha being a gift given to him by the deceased in addition to another share from the first household. Even though the Protestor has claimed that the 8.5 acres was in lieu of his salary for having worked for the deceased, it transpired from the evidence and witness statements that the protestor used to be paid his salaries by the joint owners of the tractor he used to operate. It seems the protestor is out to get a large share by virtue of being the first born. Granted that he helped his parents before the rest of the siblings were born, he should not use it to disinherit his siblings. Being the first born he is deemed to have had a headstart in life unlike the rest of the siblings. Indeed the protestor is registered as proprietor of **LR. No. Kithimani/Kithimani”A”/1169** where he currently resides and which was not given to him by the deceased as it was acquired by his own sweat. He should therefore be magnanimous by agreeing to have the estate distributed as proposed by his fellow administrators. It is none other than his own mother who is opposed to the proposal fronted by him. I believe that the Protestors’ mother being the first wife and who held the family together upto this stage means well when she agrees with the schedule of distribution by the Respondents. Looking at all the circumstances of this case, I find the Respondent’s proposal on distribution is fair and ought to be accepted.

16. The upshot of the above observations is that the Protestor’s protest lacks merit. The same is dismissed. The grant dated 24/10/2011 is hereby confirmed in terms proposed vide the Summons dated 12/11/2018. As parties are family members there will be no order as to costs.

Orders accordingly.

Dated and delivered at Machakos this 20th day of January, 2020.

D. K. Kemei

Judge