



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 289 OF 2015

(IN THE MATTER OF THE ESTATE OF JOSEPH MACHARIA KIHU(DECEASED)

MARY NJOKI WACHIRA.....PETITIONER/APPLICANT

-VERSUS-

1. MARGARET WANJIRU WACHIRA

2. CATHERINE WANGUI MWANGI

3. ELIZABETH WANJIKU GITHINJI

4. MELIANA WAMBUI WACHIRA.....PROTESTORS

JUDGMENT

This judgment is delivered in rather unfamiliar and unprecedented circumstances. The entire world has been hit by a respiratory disease known as COVID-19 or corona virus. It is viral in nature spreading mainly through human contact although, lately, it has been suggested that it could be airborne as well. So far, it has no known cure but its spread can be contained if human contact or interactions can be restricted. Measures have been taken the world over towards this end in what is now popularly referred to as 'social distancing'. It is for this reason that this judgment is, with the consent of the parties, sent to their email addresses.

The applicant and the protestors are respectively the wife and the children of the late Joseph Wachira Kihiu who died on 2 November 2006. The deceased hailed from Mwiyo location, Nyeri county and was domiciled in the Republic of Kenya.

The bone of contention between the applicant and her daughters revolves around the scheme of distribution of the deceased's estate as proposed by the applicant in the summons for confirmation of grant dated 19 April 2016. In this scheme, the applicant has proposed to share out the deceased's estate comprising a land parcel known as Title No. Nyeri/Uasinjiro/117, measuring approximately 18 hectares between herself and her three sons. She has omitted from this scheme the rest of the deceased's ten children who survived him; it is apparent that all those omitted, including the protestors, are the deceased's daughters.

It is for this reason that the protestors filed an affidavit of protest in which they have sworn that they are entitled to a share of the deceased's estate as much as their male siblings. This was their simple case when they testified at the hearing of their protest.

Despite having been served with the protest and the hearing notice, the applicant did not attend court and neither did she offer any evidence.

The law on distribution of an intestate estate where a deceased is survived by a spouse and children is found in section 35 of the Law of Succession Act, cap. 160; that section reads as follows:

35. (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.

This provision of the law is, more or less, self-explanatory; without belaboring the point, the interest of a surviving spouse in an intestate estate in circumstances the applicant finds herself in is well defined. She is entitled first, to the personal and household effects of the deceased absolutely and, secondly, she retains a life interest in the net intestate estate subject, of course, to her remarriage, if she chooses to remarry,

More often than not, whenever one spouse dies, the surviving spouse would ordinarily agree with her or his children on a scheme of distribution of the intestate estate which, in their view, is acceptable to all of them; in such a case, a grant would be confirmed and the estate distributed in accordance with the agreed scheme notwithstanding its terms may, in one way or the other, vary from the letter of section 35 of the Act. The court will not stand in the way of an agreement amongst the deceased's survivors if, at the end of the day, the agreed scheme is consistent with the ultimate objective of section 35 of the Act.

Where there is a disagreement, as in the present case, the court has no alternative but to strictly apply section 35 and order that the entire net intestate estate devolve upon the deceased's surviving spouse but subject to life interest.

As long as her life interest subsists, the applicant will be at liberty to exercise her power of appointment by way of gift to her children subject to section 35(2) of the Act. And if there be any apprehension that the power of appointment is being unreasonably exercised or withheld, then any of the deceased's children who deems himself or herself aggrieved will be at liberty to move the court under section 35(3) for appointment of his or her share. For clarity, it is necessary that I reproduce these two subsections here:

(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.

(3) 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.

In the final analysis, I hold that there is merit in the protestors' protest and it is hereby upheld only to the extent that the proposed scheme of distribution of the deceased's estate is rejected. Accordingly, the deceased's estate shall devolve upon the applicant subject to life interest.

Parties shall bear their respective costs. It is so ordered.

Dated, signed and delivered this 9th day of April, 2020

Ngaah Jairus

JUDGE