



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 406 OF 1994

(CONSOLIDATED WITH SUCC.CAUSE NO.969 OF 2011)

IN THE MATTER OF THE ESTATE OF KARIUKI GICHUIRI (DECEASED)

JACKSONMAINA GITUNGA.....PROTESTOR

JOSEPH MAINA NJECHO.....PROTESTOR

VERSUS

ROBERT MURIUKI MWERETHA.....RESPONDENT

EUNICE WAMBUI MWERETHA.....RESPONDENT

RULING

FACTS

1. The estate relates to the late Kariuki Gichuiiri(deceased) who died on the 12th April, 1994; the identifiable properties and assets comprising the estate of the deceased are as follows;

- i. Karatina Town/Block 1/89
- ii. Konyu/Baricho/1579
- iii. Cash at Barclays Bank Ltd Karatina Branch– A/c No. *****
- iv. Nyeri District Co-op Union – shares – A/c No. *****

2. In 1994 Geoffrey Njecho Kariuki (**‘Geoffrey’**)(deceased) and Charles Maina Gitunga as the sons of the deceased petitioned for Letters of Administration with the copy of the Written Will dated 10/12/1993 annexed thereto in Succession Cause 406 of 1994; a **Grant of Letters of Administration Intestate** was issued on 4/11/2002 to Geoffrey, Charles and Robert as joint administrators but it was revoked by an order of the court as the Petition had not been gazetted; Robert took over Succession Cause 406 of 1994 and Geoffrey proceeded to file a fresh intestate petition in Succession Cause No.969 of 2011 over the same estate; the two (2) succession causes were later consolidated as both petitions were in respect to the same estate of the deceased;

3. Following the demise of two of the original petitioners namely Geoffrey and Charles and pursuant to an application for substitution Jackson Maina Gitunga(**‘Jackson’**) and Joseph Maina Njecho(**‘Joseph’**) were allowed to be substituted in their place; thereafter after consolidation of the causes Jackson, Joseph, Eunice Wambui Mweretha(**‘Eunice’**) and Robert Muriuki Mweretha (**‘Robert’**) were on the 3/07/2014 all appointed as joint administrators to the estate of the deceased; and the parties were directed to apply for the confirmation of the grant;

4. An application for the Confirmation of the Grant was filed by the respondents Robert and Eunice and their proposed mode of distribution was in accordance with the copy of the Written Will annexed to Succession Cause 406/1994; Jackson and Joseph on their part also filed another application for Confirmation of the Grant and their proposed mode of distribution disregarded the contents of the Written Will;

5. Directions were given on the 20/11/2014 that the respondents’ application dated the 10/07/2014 be deemed to be the Summons for

Confirmation of the Grant and the subsequent application dated 12/07/2014 filed by Jackson and Joseph deemed to be the Affidavit of Protest; the hearing of the matter to proceed by way of oral evidence; at the close of the hearing of the case both counsel were directed to file and exchange written submissions; hereunder is a summary of the parties rival claims;

PROTESTORS' CASE

6. Jackson Maina Njecho (**Jackson**) testified on behalf of the two (2) protestors; his evidence was that the deceased was their grandfather who died on the 12/04/1994 aged 86 years; and that he was survived by four (4) children named;

- i. Geoffrey Njecho Kariuki
- ii. Charles Gitunga Kariuki
- iii. Margaret Mumbi
- iv. Grace Wanjeri Mweretha

7. The Succession Cause 406 /1994 and Succession Cause 969 of 2011 were both initiated by Geoffrey and Charles; Jackson and Joseph were substituted to replace the deceased's sons that is Geoffrey and Charles who had both passed on; he acknowledged that Robert and Eunice who are also co-administrators were children of Grace Wanjeri Mweretha who is a daughter of the deceased and that she was still alive; and that the administrators were his cousins and also grandchildren of the deceased;

8. His evidence was that one of the properties mentioned as being part of the deceased's estate referred to as Block No.1/89 situate in Karatina Town was registered in the name of his grandfather; but the deceased had business partners who jointly owned the property and who had also jointly developed it; these partners are listed in the Petition as the "**other dependants**";

9. The deceased had another parcel of land Konyu/Baricho/1579; that prior to his demise his grandfather resided on this property and had his own independent residence which was situate in one extreme corner; the other occupants who resided thereon were his late uncle (Geoffrey) who had his house in the opposite end and his father (Charles) had a house next to the deceased; that the protestor (Jackson) had also been resident therein since 1993; currently their mothers namely Bilha Muthoni and Nancy Wamuyu reside on the parcel of land;

10. His grandfather was diabetic and suffered from prostate cancer and his sons were still alive by then, and together with their wives and the grandchildren they were all involved in the taking care of the deceased who had limited mobility due to his disease;

11. Jackson stated that he had come across the **WILL** dated 10/12/1993 immediately upon the demise of his grandfather; the Will was said to have been read out at the Chief's camp but only his father and his uncle Geoffrey were said to be present; the Will was thumb-printed by the deceased and witnessed by Waigwa Gatere and Karani Machine and both are persons known to him; his contention was that the contents of the Will were not a true reflection of the situation on the ground nor did it express the will of his grandfather;

12. He was aware of the application for confirmation that had been filed by Robert and Eunice; and that their mode of distribution therein was made in accordance with the Written Will purportedly made by their grandfather; wherein the deceased's properties had purportedly been bequeathed to Robert and Eunice; and he reiterated that the contents of the Will did not express the will of his grandfather;

13. The Will purports to bequeath Plot No.1/89 to Robert whereas the property was owned by other partners who were named by Geoffrey in the succession cause as dependants; this parcel ought to be shared equally amongst the six (6) partners whom had been named in the application for confirmation; and the protestor proposed that the 1/6 portion belonging to the deceased be shared equally between Bilha Muthoni Njecho, Nancy Wamuyu Gitunga and Grace Wanjeri Mweretha; who are the widowed daughter in laws of the deceased and the daughter respectively;

14. The land given to Eunice was where his father and uncle Geoffrey had built and it was his grandfathers' express wish that the land be divided equally between the two brothers; his proposed mode of distribution was that it be shared into three (x3) equal portions among the three remaining dependants whom he named as Bilha, Nancy and Grace; and that Robert and Eunice should get their mother's portion;

15. The protestor proposed that the monies held at Barclays Bank and the shares in Nyeri District Co-op be shared equally between Bilha, Nancy and Grace.

16. In conclusion the protestor urged the court to dismiss the application made by Robert and Eunice who should rightfully claim from their mother.

RESPONDENT'S CASE

17. In response the respondent Robert stated that he knew the deceased who was his grandfather; he also knew Geoffrey and Charles and both were his uncles; that his mother Grace was a daughter to the deceased and a sister to Geoffrey and Charles;

18. He was also aware of the two (2) succession causes filed by his uncles and the two had been consolidated; he was privy to the contents of the WILL as his uncles invited him to be present when the Will was read at the Chief's Office at Karidundu in the year 1994;

19. At the reading of the Will his Uncle Charles was present and his sister Eunice and his mother Grace were present; Jackson Maina

Gitunga not the one who testified herein was present and a son of Charles known as Njecho Gitunga; there were other family members present as well; no issues were raised during the reading and that he was satisfied with his grandfather's distribution;

20. After the reading of the Will Charles took possession of the original document; in 1994 his uncles proceeded to court and filed a Petition; in 2011 they also filed another one without disclosure of the WILL as they wanted to exclude him from the distribution; this second case was brought to his attention by his counsel; the two cases were then consolidated and together with his sister Eunice they filed for the Grant to be confirmed in accordance with the deceased's Will;

21. The land in Baricho/1579 had been gifted to his sister and measured One (1) acre; she was the one who had resided with their grandfather in the same compound but different houses and that she was the one who had taken care of their grandfather who passed on at the age of 86years;

22. His uncles had been gifted five (5) acres each by his grandfather during his lifetime; he was not aware of the alleged partners of his grandfather and he had filed a protest against their inclusion; and was not aware that his grandfather had a dispute with these alleged partners over Karatina Town/ Block 1/89; he was also not aware of Case No 52 of 1992; his testimony was that the rent collected from the property was shared with his uncles and not with the so called partners;

23. He proposed that the monies in the bank be given to the son of Charles MainaGitunga (deceased); this son was a co-protestor herein; and the Nyeri Co-op shares be distributed to Eunice;

24. He testified to having seen the WILL and that it had been executed by his grandfather by way of affixing of a thumb-print; the witnesses had also affixed their thumb-prints;

25. The prayed that their application be allowed and that the property be distributed in accordance with the WILL.

ISSUES FOR DETERMINATION

26. After hearing and reading the rival written submissions this court has framed the following issues for determination;

- i. The validity of the document dated the 10/12/1993 purported to be the WILL of the deceased;
- ii. Distribution of the Deceased's estate

ANALYSIS

The validity of the document dated the 10/12/1993 purported to be the WILL of the deceased;

27. This court has had occasion to peruse at length the court records of Succession Cause 406/1994 and Succession Cause 969/2011 so as to fully understand the nature of the two succession causes;

28. A general overview is that both succession causes were initiated by Geoffrey and Charles; in Succession Cause 406/2004 Geoffrey and Charles were the Petitioners whereas Robert was the objector; a Grant of Letters of Administration Intestate was issued on the 4/11/2002 to Geoffrey, Charles and Robert as joint administrators but it was revoked by an order of court as the Petition had not been gazetted;

29. Robert then took over and caused the Petition to be gazetted and this was done vide Kenya Gazette Notice No.5252 of the 20/06/2008; and a Grant of Letters of Administration Intestate was issued to Robert on the 25/08/2008; Robert was appointed as the sole administrator of the deceased's estate; whereas Geoffrey proceeded to lodge a caveat and became the Caveator;

30. In 2011 Geoffrey proceeded to file another fresh Succession Cause No 969/2011 and he was issued on the 16/04/2013 with a Grant of Letters of Administration Intestate; and in this succession cause Robert and his sister Eunice lodged an Affidavit of Protest dated 17/10/2013 against the application for the Confirmation of the Grant and became the Protestors;

31. Geoffrey and his brother Charles passed on before any of the Grants were confirmed; the battle lines then shifted to their sons, nephew and a niece who are all grandchildren of the deceased; on the 19/11/2013 an order was granted consolidating the two (2) succession causes as both causes related to the same deceased person's estate; and due to the demise of Geoffrey and pursuant to an application for substitution Jackson MainaGitunga ('**Jackson**') and Joseph Maina Njecho ('**Joseph**') stepped in as their substitutes; and by consent of the parties on the 3/07/2014 Jackson, Joseph and Robert and Eunice Wambui Mweretha ('**Eunice**') were all appointed as joint administrators to the estate of the deceased; and the parties were directed to apply for the confirmation of the grant;

32. Robert and his sister in their application for Confirmation of the Grant basically place their proposed mode of distribution in accordance with the **WILL** of the deceased dated the 10/12/1993;

33. Jackson and Joseph on their part urged this court to disregard the contents of the Will as the requirements of the law as stipulated under Section 51 of the Law of Succession Act had not been fulfilled by the applicants;

34. Section 51(3) reads as follows;

“3. Where it is alleged in an application that the deceased left a valid will— (a) if it was written, the original will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either—

i. an authenticated copy thereof shall be so annexed; or

ii. the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;

(b) if it was oral, the names and addresses of all alleged witnesses shall be stated in the application.”

35. Their contention was that the above provisions are couched in mandatory terms and that Robert and Eunice being the propounders of the Will had the legal burden of satisfying the specified legal requirements before the protestors were called upon to disprove the **WILL**;

36. Indeed, it is noted the applicants had not annexed to their application either the Original Will or an authenticated copy; the law provides that where the Will has been destroyed, lost or for any other reason it cannot be produced then it is incumbent upon the applicant(s) to either avail an authenticated copy or to state the names and addresses of the persons to help them prove the contents of the Will;

37. The explanation given by Robert was that his uncle Charles collected the Will from the bank where it had been kept for safe keeping; and that it was presented at the Chief's office when the Will was read out to the beneficiaries; thereafter Charles kept the Original document; he acknowledged that the Original Will was not in his possession; and one can understand that due to the existing bad blood none of the uncles would have given the applicants custody or usage of the same; but that notwithstanding in the absence of the original will or the authenticated copy it was incumbent upon the applicants to state and avail the names and addresses of the persons to prove the contents of the **WILL** in their application; no reasons were advanced by Robert as to why such details of the attesting witnesses and or the Chief were not availed or summoned before the court to prove the contents of the Will;

38. This court reiterates that it has had occasion to peruse the court records related to the succession causes and together with the evidence adduced there were numerous anomalies detected that **'rouse the suspicions of the court'** as to the validity of the Will;

39. The first anomaly relates to the process of appointment of Robert as the sole administrator; when the Grant issued on the 4/11/2002 to the Geoffrey, Charles and Robert was revoked Robert took over the process of getting the petition gazetted; nowhere does the record reflect that he notified or sought the consents of the persons who ranked in order of priority as envisaged by Section 66 of the Law of Succession Act; the upshot is that Robert never obtained the consents of his uncles, his mother or even his sister as required by Rule 26 of the Probate and Administration Rules; and if the parties had been unwilling to co-operate there was the option of a Citation; the court record is devoid of the such notices, consents and or citations;

40. The record reflects that the deceased had not appointed an executor to the Will that the applicants seek to rely on; therefore Robert ought to have moved the court to be appointed as the executor and again this would have entailed the obtaining of consents from the family members who rank in order of priority and Eunice as well; Robert nevertheless took over the management of Succession Cause 406/1994 and proceeded to have the Petition gazetted; the flaw herein that may have escaped his eyes is that the Notice published in the Kenya Gazette Notice No. 5252 of 20/06/2008 alludes to **'a petition for a grant of letters of administration 'intestate' (emphasis mine) to the estate of the deceased'**;

41. Robert was then issued with a Grant on the 25/08/2008 and this Grant is headed **"Grant of Letters of Administration Intestate"**; the court opines that he ought to have obtained a grant titled **'Grant of Letters of Administration with Will Annexed'**;

42. In Succession Cause 976/2011 his uncle Geoffrey was issued with a similar Grant that was also headed **"Grant of Letters of Administration Intestate"**; the final flaw arose when the parties herein moved the court to have the two succession causes consolidated and then consented to have themselves all appointed as joint administrators; as no attempts were ever made to amend or rectify the Grant issued to Robert on the 25/08/2008 this court can safely conclude that both Grants herein are in effect **"Grants of Letters of Administration Intestate"**;

43. Taking all the above circumstances into consideration these indeed **"excites suspicions and raises doubts"** in the court's mind as to whether the deceased died testate; the onus therefore of removing such doubts and suspicion was upon the applicants to adduce evidence to disprove such notions; as it stands there is no evidence to demonstrate that the Will was ever probated and it cannot therefore be a subject for confirmation at this stage; further the applicants it is noted did not comply with the mandatory provisions of the law and therefore the evidence adduced by the applicant was devoid of any corroboration so as to prove the contents of the Will;

44. For those reasons this court is satisfied that the applicants failed to prove the validity of the document dated the 10/12/1993 purported to be the Will of the deceased to the desired threshold; and finds that the deceased died intestate.

Distribution of the Deceased's estate

45. Having satisfied itself that the deceased died intestate this court is tasked with the distribution of the deceased's estate; at the time of his demise he was survived by four (4) children named;

v. Geoffrey Njecho Kariuki

vi. Charles Maina Gitunga

vii. Margaret Mumbi (deceased)

viii. Grace WanjeriMweretha

46. It is not disputed that there was no surviving spouse; Geoffrey and his brother Charles are both now deceased and left their widows named Bilha and Nancy who can be described as the daughters in law of the deceased; there is only one surviving daughter of the deceased by the name Grace who is also the mother of the applicants;

47. The applicants and the protestors are all grand-children of the deceased and it is trite law that the grandchildren cannot inherit directly from the deceased unless they can demonstrate that they were maintained by the deceased; in this instance the protestors' mothers are all still alive and therefore any purported inheritance by these grandchildren vests through their respective mothers; as for Robert his evidence was that he was brought up and maintained by the deceased and this evidence was not disproved by the protestors; therefore, in the circumstances this court finds that Bilha, Nancy and Grace are the direct and rightful beneficiaries; but Grace it is stated remarried and left her two (2) children with their grandfather to be raised by him; therefore Grace's share in the estate of the deceased will be distributed to the Robert and Eunice;

48. There is no dispute as to the property that comprises the estate of the deceased; the applicable law on distribution is found at Section 38 of the Act;

49. Section 38 reads as follows;

“38. Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

50. The protestors' proposed mode of distribution is found to be fair and reasonable and also found to be in accordance with the said provisions of the law that the properties be divided in equal shares amongst the children of the deceased;

51. The property known as Parcel No. Konyu/Baricho/1579 shall be shared in equal shares between;

- i. Bilha Muthoni Njecho - the widow of Geoffrey Njecho
- ii. Nancy Wamuyu Gitunga – the widow of Charles Gitunga Kariuki
- iii. Eunice Wambui Mweretha– grand-daughter of the deceased.

52. The deceased had only a 16.6% share in Karatina Town/Block 1/89 and this undivided share to be distributed solely to Robert Muriuki Mweretha – as Geoffrey and Charles already have their own portions in this property;

53. The remaining portion ofKaratina Town/Block 1/89 to be distributed equally amongst the five (5) other partners as set out hereunder; and each shall get a 16.6% undivided share;

- i. Bilha Muthoni Njecho - the widow of Geoffrey Njecho Kariuki
- ii. Nancy WamuyuGitunga – the widow of Charles Gitunga Kariuki
- iii. Muraguri Mwangi – on behalf of the estate of Mwangi Muraguri
- iv. Muthoni Kimari – on behalf of the estate of Kimari Nyingi
- v. Kariithi Githaiga – on behalf of the estate of Githaiga Kamwenji

54. The Cash at Barclays Bank Ltd Karatina Branch – A/c No. ***** to be distributed to Jackson Maina Gitungathe son of Charles Maina Gitunga (deceased); and the shares in Nyeri District Co-op Union – shares – A/c No. ***** to be distributedto Eunice Wambui Mweretha;

FINDINGS AND DETERMINATION

55. For the afore-going reasons this court makes the following findings and determinations;

- i. The validity of the document dated the 10/12/1993 purported to be the Will of the deceased was not proved to the desired threshold;
- ii. The Protest is found to be meritorious and is hereby allowed;

iii. The estate of the deceased shall be distributed in the terms as set out in paragraphs 51, 52, and 53 hereinabove; and the Grant is hereby confirmed accordingly;

iv. Parties at liberty to apply;

v. Each party shall bear their own costs.

It is so ordered.

Dated, Signed and Delivered at Nyeri this 2nd day of April, 2020.

HON. A. MSHILA

JUDGE