



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

SUCCESSION CAUSE NO.91 OF 2017

IN THE MATTER OF THE ESTATE OF WANJIKU GACHAU KANYUKII (DECEASED)

PAUL KIMONDO GACHAU.....APPLICANT/PETITIONER

-VERSUS-

JOHN KANYUKII GACHAU.....1ST PROTESTOR/RESPONDENT

DAVID MBIYU KANYUKII.....2ND PROTESTOR/RESPONDENT

J U D M E N T

This matter relates to the estate of **Wanjiku Gachau Kanyukii** who died intestate on 24/6/2011. Grant of Letters of Administration were issued to **Paul Kimondo Gachau, John Kanyukii Gachau** and **David Mbiyu Kanyukii** on 27/2/2014.

On 12/5/2016, the petitioners filed the summons for confirmation of grant dated 31/12/2015 and the schedule on the mode of distribution was contained at paragraph 6 of the applicant's affidavit and signed a consent filed on the same day. **Paul Kimondo**, the 1st Petitioner filed a further affidavit dated 22/10/2016. **Jane Njeri Mukui** also swore an affidavit in support of the confirmation of grant, dated 14/2/2016.

The deceased was survived by her 10 children namely:

- (1) *John Kanyuki Gachau – 2nd petitioner - son*
- (2) *Paul Kimondo “ - 1st petitioner - son*
- (3) *Lucy Muthoni “ - Daughter*
- (4) *David Ngugi Gachau - Son*
- (5) *Florence Wangari Macharia - Daughter*
- (6) *Rebecca Warigia Gachau - Daughter*
- (7) *George Ng'ang'a Gachau - Son*
- (8) *Jane Njeri Mukui - Daughter*
- (9) *Peter Kiarie Gachau - Son*
- (10) *Beth Kagure Gachau - Daughter*

Before the summons was heard on 20/8/2016, **David Ngugi Gachau**, one of the beneficiaries filed an affidavit of protest to the grant. In the protest, he denied having signed the consent, filed with the summons and denied that there was a meeting held on 28/2/2012 to distribute the deceased's estate and that there was disagreement on the mode of distribution; that some items have been left out of the list of properties e.g. the slaughter house; that the mode of distribution of Plot 508 given to the daughters of the deceased; that land measuring 5.5 acres should be shared equally amongst the beneficiaries.

He agreed to CDSC account being shared equally amongst the beneficiaries and that Jane Njeri and George Ng'ang'a to account for milk deliveries; that Paul Kimondo and Jane Njeri to render account for receipts from the slaughter house upto August, 2013; that Jane Njeri and Peter Kiarie to render accounts for the rent from the timber houses and that all rents from the slaughter house and timber houses be collected by Mirangine Investment Agency.

The 2nd protestor **John Kanyuki (2nd petitioner)** filed a replying affidavit in which he deposed that their father had 2 wives and upon his death, they filed Succession Cause No.111/2010 (JKG 1) and the same was amicably resolved (JKG.2); that the issue before court relates to their mother's estate which they have failed to amicably resolve; that his father owned L.R.Nyandarua/Nyairoko/432 which he subdivided during his lifetime to create Plots 436, 432, 438, 439, 441 and 442 which he bequeathed to his sons and one daughter Lucy Muthoni who was unmarried and his mother, as gifts inter vivos; that the mother got Plot 508 and there was no objection raised by the deceased's daughters; that David Mbiyu Kanyuki is a brother to their deceased father and not entitled to inherit from their mother. He denied that the timber houses were given to the deceased's daughters at the meeting of 29/8/2011. He agreed with the 1st protestor on the distribution of the estate in equal shares amongst all the deceased's children.

On 29/8/2016, the parties appeared before J. Ndungu in Nakuru and took directions that the matter do proceed by way of viva voce evidence.

The 1st protestor is **David Ngugi (PW1)** listed 7 properties belonging to the deceased:

- (1) Plot 504; 33 acres;*
- (2) 7 timber houses for rent on Plot 508 – with income of Kshs.7,000/= per month;*
- (3) Slaughter house at Charariga with income of about Kshs.30,000/= per month;*
- (4) 9 cattle and 27 sheep;*
- (5) Permanent house in homestead;*
- (6) Money in Equity Bank;*
- (7) Shares in Centilum Investment.*

His proposal is as per his affidavit in protest. He added that 5 acres of Plot 508 is prime land which should be shared equally amongst all of the beneficiaries and the same apply to the balance of 27 acres. He reiterated that his father had distributed his property through a will written by Gakuhi Chege Advocate and there was no challenge to it and that the sisters did not object. He urged that the proceeds from the slaughter house were given to Florence when she returned home from her marriage. As regards the homestead, PW1 said that the deceased had wished that her children be meeting there but they have failed to agree and so the one who gets that portion should have the house and same to the portion where timber houses are.

He objected to the homestead remaining in joint ownership of the administrators and their mother. **David Mbiyu, PW2** also stated that during the lifetime of the parents, the daughters also benefited from small plots as per the confirmed grant and so did the sons and at the time of confirmation of grant of the fathers estate, the daughters of deceased did not object.

PW2 David Mbiyu is an uncle to the petitioner and a protestor. He is one of the administrators of the deceased's estate. He confirmed that his brother Samuel Gachau left a will in which he distributed his estate and the will was with G. Chege Advocate. He was not aware of the exact distribution but confirmed that, in court there was no objection to the distribution; that a dispute arose when the mother of the children died and they met on 28/2/2012 and on another date but they did not agree; that later, Jane took to him a paper to sign and he did. He stated that he did not want to be registered as trustee with the other administrators of the deceased's estate. He supported the protestor's view that the deceased property be shared equally amongst the deceased's children.

Paul Kimondo Gachau (DW1) testified on behalf of all the other 7 beneficiaries who agreed with the 1st petitioner's proposal on distribution of the estate. He gave a history of their deceased's father's estate; that Samuel Gachau owned Parcel NO.322 Nyairoko Scheme measuring 17.97HA and was a sub-division of Parcel 126. The title was closed on 25/5/2001 and combined to create 432 (D.Exh.No.1). Samuel Gachau then subdivided the land with the intention of giving the land to his family members which he did but left some land with his wife because some people did not have identity cards or Pin numbers. The subdivisions were given to his sons and Lucy Muthoni but Plot 508 went to the wife, the deceased. DW1 produced the green cards in respect of the resultant parcels given to each son, Lucy Muthoni and the mother P.Ex.No.1 – 10. He said that the mother was supposed to transfer the land to the four daughters but she did not; that the father called a meeting in 2003 and indicated that those not provided for would be provided for by the mother. He said that it was recorded at minute 3 and the original minutes are with the 2nd protestor, John Kanyuki and James Kariuki of the other house, secretaries at the meeting; that after their mother died, PW2 chaired some meetings on how they would share their mother's property and they agreed:

- (1) That the 5 sons get 2 units each of the 10 units of the permanent commercial buildings;*
- (2) Daughters to get 7 timber houses on Plot 508.*

He said that at the meeting of 28/2/2013, the protestors failed to attend and those present resolved to file this cause and agreed that the daughters of the deceased get 6 acres each and Lucy was to get a further ¼ acres to make 6 acres out of Plot 508; that 5.5 acres, a commercial Plot which is part of Plot 508 should be shared by the brothers; a slaughter house on Plot 508 was to go to the daughters of deceased.

DW1 also said that there are 3 Plots of 50 x 100 near the homestead which belonged to other people during the life of Samuel Gachau, that is, for the late Mbugua Kameme, late Nderitu Karubi and a 3rd un-occupied Plot to be issued with titles.

He urged the court to consider what the father had given to his children when distributing his estate and abide by the proposal in the summons for confirmation of grant and consider the fact that out of the 10 siblings, only 2 are opposed to the distribution.

I have considered all the evidence tendered by both the 1st petitioner and other beneficiaries and the two protestors. Only counsel for the protestors Ms. Njoki Mureithi filed written submissions as agreed. Ms. Ndegwa did not file any submissions as of 12/12/2019 and the matter was reserved for Judgment.

The issues for determination were outlined by Ms. Murithi as follows:

(1) Who are the beneficiaries of the deceased's estate;

(2) What forms the deceased's estate;

(3) How should the estate be distributed;

(4) Who bears the costs of this cause.

Section 29 of Law of Succession Act defines who a dependant is. It reads:

"For the purposes of this Part, "dependant" means:-

(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) Such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;"

It is not in dispute that the deceased left behind 10 children. They are as listed in the summons:

(a) John Kanyuki Gachau

(b) Paul Kimondo Gachau

(c) Lucy Muthoni Gachau

(d) David Ngugi Gachau

(e) Florence Wangari Macharia

(f) Rebecca Warigia Gachau

(g) George Ng'ang'a Gachau

(h) Jane Njeri Mukui

(i) Peter Kiarie Gachau

(j) Beth Kagure Gachau

Those listed above are the deceased's dependants.

The 2nd issue to consider is what comprises the deceased's estate.

From the evidence adduced by both sides to the dispute, the deceased's estate comprises the following:

1. L.R.Nyandarua/Nyairoko/508;

2. A slaughter house;

3. A commercial Plot;

4. *Semi-Permanent rental houses;*

5. *A/C.No.0710191583180 at Equity Bank;*

6. *SDCS A/C.No.B22/B/000000717138873;*

7. *9 cows;*

8. *Twenty nine sheep;*

9. *Six milk cows.*

The main asset that forms the estate in dispute is Plot.LR.508 which measures about 13116 HA which translates to about 32.41 acres. From the certificate of search that was filed with the petition dated 13/4/2013, the parcel was registered in the name of Wanjiku Gachau Kanyuki on 7/10/2005 and a title issued on 17/10/2005. The title was absolute.

It is the petitioner's case that this land had been part of Samuel Gachau Kanyukii's property (their father) who owned parcel 373 Nyairoko – 17.97 HA a subdivision of 126 but was closed on 25/5/2005 to create Plot 432 D.Ex.1. which he subdivided to distribute to his family; that the subdivision created Plots 438, 439, 440, 441, 442, from 432 while 436 created 508, 509 and 510. The green cards of the various Plots were produced in evidence as D.Ex.No.2 – 10. Plot 508 was given to the deceased by her husband and according to the 1st petitioner, she was to hold the land in trust for those who did not benefit from the father's estate and these are the daughters of the deceased, Florence Wangeci, Rebecca Wangia, Jane Njeri Mathu and Beth Kagure. The reason given by DW1 is that those who were not given land by the father did not have identity cards or Pin numbers. However, pressed in cross examination, it seems only Beth was still in school by then and had no identify card because she was a minor. However, DW1 admitted that Peter Kiarie whom Beth came after was given land and it was registered in his name. It means that the other siblings were older than Peter and were adults and the reason given for not being given land in 2005 by Samuel Gachau does not hold.

As correctly submitted by the protestors, and admitted in evidence, Samuel Gachau disposed of his property through a will pursuant to Section 5 of the Law of Succession Act. He had 2 houses, one in Nyeri and another in Nyandarua and he shared his estate between the two houses as evidenced in the will. There is no dispute between the two houses. The dispute is amongst the children of the Nyahururu house over the property left by their mother.

Samuel Gachau distributed his property to his sons and only one daughter – Lucy Muthoni who was then not married. The sons David Ngugi, Tom Kanyuki, George Ng'ang'a, Paul Kimondo and Peter Ichara each got 6 acres while Lucy Muthoni got only 4.14 acres. These were gifts inter vivos made to the above named beneficiaries. The married girls were left out and I believe the said Samuel must have been a staunch believer in cultural practices that a married daughter was not entitled to inherit from the father's estate which practice was contrary to the provisions of the Constitution and Law of Succession Act.

Ms. Murithi relied on the decision of ***Re: Estate of the Late Gachau Manthi Nzoka (deceased) 2015 eKLR*** where J. Nyamweya described what gift inter vivos means when she said:

“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos) and gifts made in contemplation of death (gifts mortis causa). Section 31 of the Law of Succession Act provides as follows with respect to gifts made in contemplation of death:

A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if:-

(a) the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and

(b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and

(c) there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and

(d) a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive that illness or danger; and

(e) the person making that gift dies from any cause without having survived that same illness or danger; and

(f) the intended beneficiary survives the person who made the gift to him:

Provided that:-

(i) no gift made in contemplation of death shall be valid if the death is caused by suicide;

(ii) the person making the gift may, at any time before his death, lawfully request its return.”

It follows from the above provisions that the gifts made to Samuel Gachau sons's and Lucy Muthoni were given during their father's life time. As seen from the green cards D.Exh 3 – 10. The transfer to the sons was made during Samuel Gachau's lifetime. From the evidence on record, all the deceased's 10 children were present during Succession Cause 111/2010 which relates to Samuel Gachau (deceased) but none of them objected to the manner in which the said Samuel had distributed his estate leaving out the daughters from benefiting.

Under Section 26 of the Law of Succession Act, where a dependant of a deceased feels that he/she has not been adequately provided for in a will, the court can make reasonable provision for the said dependant.

Section 42 of the Law of Succession Act also provides that previous benefits will be taken into account during distribution if the deceased died intestate or left a will. It means that if the daughters of Samuel were aggrieved by the distribution he made, they could have challenged it at that stage and the court would have considered the issue. Since the daughters did not object, they cannot be heard to turn round at this stage and claim part of their father's estate through their mother's estate.

The question at hand is whether the deceased held the land parcel 508 in trust for the daughters. There is not a shred of evidence to suggest that Samuel Gachau gave Plot 508 to the deceased to hold in trust for these beneficiaries who had not received land from Samuel. To confirm the fact that the four daughters of the deceased were not interested in the father's estate, apart from the 6 acres given to the sons, Samuel Gachau also gave each child a smaller Plot of which the daughters benefited as well as the sons:

- 1. Jane Njeri got Plot.Nyendarua/Nyoboko/327-100 x 100**
- 2. Rebecca Warugu “ /341 - 50 x 100**
- 3. Florence Wangari “ /328 -100 x 100**
- 4. Lucy Muthoni “ /326 - 50 x 100**
- 5. Beth Kagure “ /343 - 50 x 100**

This is reflected in the certificate of confirmation in relation to Samuel Gachau's Estate. The same has never been challenged. The distribution was closed at that stage. Had Samuel Gachau intended to give his daughters land, he would have done so as he did to the others during his lifetime.

It must be clarified therefore and there should be no mix up between Samuel Gachau's estate and his wife's estate (Wanjiku Gachau). Plot 508 belongs to Wanjiku Gachau and her estate must be distributed independent of her husband's estate.

So, how should the deceased's estate be distributed?

There are disagreements between the deceased's children over the said estate. It is evident that the protestors have taken a very different view from their 8 other siblings. So that the two protestors have refused to attend meetings aimed at trying to reach an amicable settlement. The courts also encourage out of court settlements in order to sustain harmony and peace in the family relationship. It also means that the court will impose its own views on the parties when the best solution would have been from the parties.

The distribution of the estate will be governed by Section 38 of the Law of Succession Act.

The deceased died intestate and was survived by his 10 children. Having failed to agree, the best that this court can do is try to distribute the estate equally amongst the 10 children. The law that will guide the distribution is Section 38 of the Law of Succession Act which provides as follows:

“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.”

This section echoes the provisions of Article 27 of the Constitution which forbids any form of discrimination. Article 27 provides as follows:

“27(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law;

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms;

(3) Women and men have the right to equal treatment, including the right to equal opportunities, economic, cultural and social believes.”

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

It means that all the deceased's children are equal before the law and should be treated equally including distribution of the estate, whether male or female, married or unmarried.

Ms. Muriithi submitted that the spirit of Part V of the Law of Succession Act is equal distribution of the estate amongst the beneficiaries. I do agree with the said submission. The word used in Section 35(5) and 38 is equally. The provisions are couched in mandatory terms that: ***"The property shall.....be equally divided amongst the surviving children."*** In my view, though equal distribution is envisaged, there may be instances where there may be in-equality in the equal distribution principle. This matter has been discussed by various courts and a court may depart from the equality principle of equality in distribution will cause an injustice. The Court of Appeal was clear on this aspect in ***Rono v Rono (2005) 1 EA 363*** where J. Omolo said in interpreting Section 40(1) of the Act said:

"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 provisions in the Act that each child must receive the same or equal portions. That would clearly work an injustice particularly in a case of a young child who is still to be maintained, educated and generally seen through life. If such a child whether a girl or boy were to get an equal inheritance with a nother 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."

The above decision was cited and applied in ***Succession Cause No.123/1999 Re-Estate of Kariuki Kiburu, Rahab Njeri Kariuki v Joyce Wangari Kariuki & 2 others*** where the court said:

"The learned Judges essentially espoused the principal of fairness and equality in distribution of a deceased's estate between or amongst persons, benefically entitled to such an estate in a polygamous set up...."

In essence, the courts were emphasizing that in executing its discretion in distribution, the court has to act fairly.

Although the court above dealt with distribution under Section 40(1), I believe the same principles would apply even if it involves distribution amongst children of the same house.

Bearing the above in mind, and the fact that the beneficiaries are all adults, I proceed to consider the distribution of the various properties of the deceased. The prime property forming the deceased's estate is Plot 508 which comprises about 32.4 acres. Of the 32.4 acres, it was also not disputed that 5.5 acres of it is prime land and is next to a commercial centre. The proposal by the petitioner is that the same be shared equally amongst all the deceased's children. The protestors were of the same mind.

The balances of Plot 508 means about 27 acres when the petitioner had proposed that each of the 4 daughters, Florence, Rebecca, Jane and Beth get 6 acres totaling 24 acres and 2.5 acres demarcated for the homestead was also to devolve to the said daughters. The protestor suggests that the homestead measuring 2.5 acres and which has the deceased's house be shared equally amongst the 10 of them.

"DW1's proposal that the 2.5 acres homestead be registered in the name of the administrators including their uncle PW2 is untenable. PW2 is not willing and for that reason, I have alluded to above."

DW1 told the court that the deceased had intended that the homestead remain intact, where the children would be having meetings. However, since the beneficiaries have fallen out and it is unlikely that they will be having joint meetings, I will add the 2.5 acres will be added to the rest of the 24 acres to make 26.5 acres as one land to be shared out amongst all the deceased's children.

The slaughterhouse had not been mentioned in the schedule for distribution by PW1. The first protestor urged the court to order that DW1, Jane Njeri do account for monies received from the slaughterhouse since 2007 to 2013 and thereafter. In reply to that, Jane Njeri and DW1 stated that the said monies were being received by Beth Kagure who had returned home after disagreement with her husband but later went away and that Florence collects the rents with the consent of family members for the upkeep of the home, for example, on livestock. That was not disputed.

DW1 confirmed that their sisters have been benefiting from the slaughterhouse which stands on 50 x 100 Plot. That evidence was not controverted. The deceased died in 2011. If the beneficiaries had not been in agreement, the protestors should have moved the court for accounts earlier instead of waiting for confirmation of grant to make the application. Besides, John i is one of the administrators who have several duties including accounting on how the estate has been managed. He cannot just stand by and allege that he was sidelined. An administrator has powers and responsibilities under Section 82 and 83 of Law of Succession Act. Section 83 provides as follows:

"Personal representatives shall have the following duties:-

(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his debts;

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) subject to [section 55](#), to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”

If anything was going wrong, the administrator had a duty to move the court to question. The administrators including John Kanyukii should be held to account. I am inclined to believe that the parties had earlier agreed and disagreements only arose later and I find no reason to order for accounts.

DW1 had proposed that the 7 timber rental houses situated on the 5.5 acres be given to the daughters but the protestors urge that the 50 x 100 ft space occupied by the 7 rooms be removed from the plot and proceeds be shared equally. It is apparent that the sons have been receiving the rents from the said Plots.

Having given due consideration to all the evidence on record and proposals by both sides, I will distribute the estate as follows:

- (1) Beneficiaries of the deceased's estate are the deceased's ten (10) children;
- (2) A portion of 5.5 acres of the land, to be shared equally amongst the 10 children;
- (3) The portion of 2.5 acres forming the homestead to be merged with the 24 acres to make 26.5 acres;
- (4) That the 26.5 acres of the said land will be shared equally amongst the 10 children of the deceased save that the one who gets the portion where the permanent house is situated will get less by ¼ acre;
- (5) The Plot of 50 x 100 fit where the timber houses stand be made part of the 26.5 acres and the one who gets that portion to get less by ¼ acre;
- (6) The slaughter house proceeds to be shared equally amongst the beneficiaries;
- (7) Account No.[xxxx] Equity Bank K Ltd – proceeds be shared equally amongst all beneficiaries;
- (8) CDSC Bank NO.[xxxx] be shared equally amongst all beneficiaries;
- (9) The 9 cows, 29 sheep and 6 milk cows be sold and proceeds be shared equally amongst the beneficiaries.
- (10) This being a family dispute, each party bears their own costs.

Dated, Signed and Delivered at NYAHURURU this 19th day of May, 2020.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. G. Chege for the 1st petitioner/applicant

Mr. Njoki Muriithi for protestors

Eric Court Assistant