



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**SUCCESSION CAUSE NO. 162 OF 2013**

**(Formerly Embu Succ Cause No. 127 of 2001)**

**IN THE MATTER OF THE ESTATE OF NJOKA NJAGI .....(DECEASED)**

**FRANCIS MWAI MUCHIRA ..... RESPONDENT**

**V E R S U S**

**NJAGI NJOKA .....PETITIONER**

**JUDGMENT**

1. This matter relates to the estate of Njoka Njagi. It was originally filed in High Court Embu as Succession Cause No. 162/13. The deceased Njoka Njagi died intestate on 20/8/1976. A grant of Letters of Administration was issued to the Petitioner on 14/2/20017 and confirmed on 14/5/2008 and later rectified on 15/3/2011 in Gichugu S.R.M's Court Succ Cause No. 14/2005.

2. A summons for Revocation of grant was filed by Francis Mwai Muchira claiming that he was a defendant of the deceased and had all along lived on a portion of ½ an acre out of Land parcel No. Baragwi/Guama/506. He also raised the issue of jurisdiction of the Sub-ordinate court to handle the matter as the value of the estate was Kshs 500,000/- while under **Section 48(1) of the Laws of Succession Act** was Kshs 100,000/-. The applicant also applied for a prohibitory order to stop any dealings on the land pending the hearing and determination of the application for revocation of grant. A prohibitory order was issued on 27/6/2011.

3. On 2/2/2012, in a Ruling delivered by Lady Justice H. I. Ong'undi, the grant was revoked. The court further directed that the grant be issued in the name of Njagi Njoka and an application for confirmation of grant be filed as required by the law with parties being informed.

4. The applicant moved to this court and filed a summons for Confirmation of grant dated 8/6/2012. He listed the estate of the deceased as land parcel No. Baragwe/Guama/506 and proposed the mode of distribution as follows:-

- a. Mugo Njagi ..... ) 1 Acre
- b. Njagi Njoka ..... )0.40 Acre
- c. Cecily Wambura Maria.....)0.40 Acre
- d. Newton Munyi.....)0.40 Acre
- e. Jenefa Wambui Njomo.....)0.40 Acre
- f. Kagai Njoka.....)0.40 Acre
- g. Philipina Wanjira.....)0.40 Acre

5. This prompted an affidavit of protest by Francis Mwai and Kagai Njoka In an affidavit sworn by Kagai Njoka on 5/10/2012 he depones that the deceased Njagi Njoka is his father and that the first protestor was a dependant of the deceased. That the deceased had given him a portion of ½ acre out of his land where he has settled todate. He proposes that Francis Mwai Muchira gets ½ an acre out of the deceased's estate. The rest be shared equally amongst the beneficiaries mentioned at Paragraph Five (5) of the affidavit of Njagi Njoka sworn on 8/6/2012 which I have quoted above.

6. A second affidavit of protest was filed by Francis Mwai Muchira who claims that he was a dependant of the deceased while he was alive and he occupied a portion of One acre which he is claiming. He opposed the mode of distribution proposed by the petitioner.

7. The parties adduced evidence and also filed final submissions.

For the 1<sup>st</sup> protestor submissions were filed by Mr. Maina Kagio. He submits that the issues for determination are:-

**a. Whether the 1<sup>st</sup> protestor is a dependant of the deceased.**

**b. Whether it is fair to exclude him in the distribution of the estate.**

8. He submits that the deceased had taken him as his child and settled him on a portion of ½ Acre on his land. He submits that the 2<sup>nd</sup> protestor has stated that Mugo Njagi has a parcel of land in Mwea though the petitioner has proposed to give him one acre. However, no particulars of the land at Mwea were given. It further submitted that Mugo Njagi is now deceased. He submits that the protestor has proved that he was a dependant.

9. For the petitioner it is submitted that from the evidence tendered the protestor has not proved that he is related to the deceased in anyway. He submits that it is the father of the protestor who was given a place to construct a house as his father had a court case in court in regard to his land at Mwea in Kirinyaga County. It is further submitted that the protestor Francis Mwai Muchira admitted that he was born alongside other siblings on the subject land parcel. That upon conclusion of the case which the protestors father had in court all the other siblings left the deceased's land and re-located to Mwea where their father's land is. That the protestor is a beneficiary of his father's estate. That the protestor does not rank in priority to the petitioner and his siblings who are children of the deceased. That the protestor remained on the estate as a licensee who has no right to inherit under the **Law of Succession Act (Cap 160 Laws of Kenya)**.

**Determination:-**

The 1<sup>st</sup> protestor (refers to Francis Mwai Muchira) claims that he is a dependant. The **Law of Succession Act (Cap 160 Laws of Kenya)** to be referred to as the **Act** defines a dependant under **Section 29 of the Act**

**“(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; and**

**(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”**

10. From the foregoing definition as it can be seen, the **Act** recognizes dependants as persons who are blood relatives of the deceased. These includes wives, children, parents, step-parents, children, brothers and sisters, half- brothers, half-sisters who were being maintained by the immediately prior to his death.

11. The only window for a person who is not a blood relative being considered as a dependant is where the deceased had taken a child/ren into his family as his own.

12. The protestor (PW-1-) testified that he is not related to the deceased but that the deceased had given him a place to stay on land parcel No. Baragwi/Guama/506. This rules out his claim for dependency. It also rules out the claim that the deceased had taken him into his family as his own. He further testified that he was living on the land with his siblings but surprisingly none of the other siblings is claiming a portion of the estate of the deceased. The protestor further testified that he was born on that land and he lived with his parents. His mother died in 1996 while his father died in 2001.

13. The deceased in this case died on 20/8/1976. Going by what the protestor said that he was 46 years old at the time he was giving evidence in court in December 2018, he was only Four years old when the deceased died. Both parents of the protestor were still alive and lived on for many years later after the deceased died. There is therefore no possibility that the deceased could have taken him as his own when his parents were still alive. My view is that for a person to be taken in as a dependant on account that the deceased had taken him as his own child there must be an element of the person having been brought up under the same roof with the children of the deceased and maintained by meeting all his need s like school fees, clothing and food etc. This protestor has not proved. In cross examination he said he came to know the deceased when he grew up.

14. The protestor admitted during cross-examination that he has other siblings like Simon Gakono, Maclus Gichobi, Margaret Njoki, Lucia Waguama, Catherine Nginda and Violet Kabari and he is the last born. His father was living in a house he was given by the deceased on his land.

15. The deceased died long before the parents of the 1<sup>st</sup> protestor and did not claim the ½ acre which the protestor is claiming now.

16. The protestor was shown proceedings in succession cause No. 157/2002 at the Principal Magistrate's Court Kerugoya and he admitted

that he is one of the beneficiaries named to get a share of his father's estate at Mwea. He admitted that he inherited land Parcel No. Gichugu Settlement Scheme 3558. He must have inherited the land as a child of his father and therefore a dependant. The protestor admitted that his father's land had a dispute going on in court.

17. From the foregoing it is clear that by his own admissions when the protestor testified, it is his father and his siblings who were given a place to live in. He was never taken in by the deceased as his own. The protestor inherited his father's estate as a child and dependant. The protestor has not proved that he was a dependant entitled to the estate of the deceased. Even the 2<sup>nd</sup> protestor did not prove that the 1<sup>st</sup>protestor was given land as he admitted that he was not present when he was given land and that first protestor used to live with his parents. The 1<sup>st</sup> respondent is a stranger to the estate who has not proved dependency. In the case of **Re Estate of Joshua Orwa Ojodeh – Deceased 2014 eKLR** it was held that:-

**“The Law of Succession Act ensures that widows and orphans are given first priority in terms of access to the property of a dead husband and father. The other relatives including parents are relegated to a secondary position and access the property in the event that there is no widow or child -----”.**

18. This applies to other claimants like the protestor. Such claims are not known to the Act where there are children of the deceased and can only be considered where the person proves dependency.

19. The 1<sup>st</sup> protestor has deponed that he has built a house on the land. It means he was earning even after the deceased's death. I fail to see how he was dependent on the deceased immediately prior to his death when he was living with his parents throughout his life and now earns his living. In a persuasive decision in the case of **John Gathe Githae –v- Rose Wanjiru Muturi (2016) eKLR** where a brother to the deceased claimed dependency on the basis that he was educated by the deceased and was given a place to build a house and a garage and had inherited a portion of the estate of his father, the court held that –

**“I fail to understand how a person capable to provide his basic needs and even purchase property was still dependent on the deceased. The applicant is also said to have benefited from his late father's estate LR Githii/Thanji/337. I find that the applicant has failed to demonstrate that he was a dependant of the deceased.”**

20. The respondent testified that it is the father of the first protestor who was given a place to stay as he had a case over his land at Wang'uru. That when the father of the 1<sup>st</sup> protestor won the case he moved to his land. Some of his sons refused to move including the 1<sup>st</sup> protestor. That the 1<sup>st</sup> protestor later moved on his volition. That the 1<sup>st</sup> protestor got a share of his father's estate and has a title deed.

21. I find that the Petitioner's (DW-1-) testimony is credible as it was admitted by the 1<sup>st</sup> protestor who stated that it is his father who was given a house by the deceased. The protestor admitted that he got a share of One and Half acre or there about from his father's estate. The certificate of official search produced by the petitioner as exhibit 2a, b & c shows that the 1<sup>st</sup> protestor is the registered proprietor of Land parcel No. Gichugu/Settlement/Scheme/3558 approximately 0.548 which he admitted was his inheritance from his father. The certificate of confirmation of grant in the estate of Muchira Kabui exhibit-1- shows that the 1<sup>st</sup> protestor Francis Mwai Muchira was one of the beneficiaries who shared the estate – i.e of the 1<sup>st</sup> protestors father.

22. I find that the claim by the 1<sup>st</sup> protestor which is based on dependency has not been proved. The 1<sup>st</sup> protestor is out to unjustly enrich himself from the estate when he is clearly not entitled as a dependant. He cannot be a heir from two different fathers. The question of fairness does not arise as he is not a destitute. The protestor has no merits.

23. On distribution the petitioner testified that Mugo Njagi is his Uncle and there was a consent which DW-2- ie the second protestor supported. He supported the evidence with certificate of official search for land parcel No. Baragwe/Guama/506 which the 2<sup>nd</sup> protestor (DW-2-) supported. Indeed, from the record, the 2<sup>nd</sup> protestor Kagai Njoka had signed a consent in support of the summons for confirmation of grant. He confirmed during cross-examination that they had filed succession cause No. 14/05 and he had agreed. The protest by the 2<sup>nd</sup> protestor is therefore without basis and is an afterthought. The protest by 2<sup>nd</sup> protestor has no merits.

#### **In Conclusion:-**

For the reasons which I have stated:-

- 1. The protestor Francis Mwai Muchira is not a dependant of the deceased Njoka Njagi and is not entitled to any share of his estate.**
- 2. The protest by Francis Mwai Muchira is dismissed with costs to the petitioner.**
- 3. The protest by the 2<sup>nd</sup> protestor Kagai Njagi is dismissed with no orders as to costs.**
- 4. The application for confirmation of grant is allowed. The grant of letters of administration issued on 2/2/2012 is confirmed and a certificate of confirmation of grant shall be issued.**
- 5. On distribution the share for Mugo Njagi who passed away during the pendency of these proceedings to go to Grace Muthoni Mugo and Beatrice Kamori his wives who had filed an application for rectification of grant in an application dated 17/7/2014 which has not been opposed. They will share the portion of One Acre equally.**

Dated at Kerugoya this 8<sup>th</sup> day of May 2020.

L. W. GITARI

JUDGE