



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 126 OF 2002

IN THE MATTER OF THE ESTATE OF DOMINIC KIHURI KIBIRA alias DOMENIKO KIHURI s/o KIBIRA alias KIHURI s/o KIBIRA (DECEASED)

JOHN GITONGA KIHURI.....1STPROTESTOR

GEOFFREY MUGO KIHURI2NDPROTESTOR

JAMES MUTAHI KIHURI.....3RD PROTESTOR

STEPHEN KIBIRA KIHURI.....4TH PROTESTOR

VERSUS

STEPHEN KIBIRA KIHURI (A)..... RESPONDENT

RULING

FACTS

1. The estate relates to the late Dominic Kihuri Kibira (deceased) who died on the 17th April, 1982; the deceased was polygamous and had three (3) wives all are deceased; and he was survived by the following children;

FIRST HOUSE

- (i) Rosa Gathoni Wanjohi - daughter
- (ii) Stephen Kibira Kihuri - son
- (iii) Adele Njoki Mundui – daughter

SECOND HOUSE

- (i) Stephen Kibira Kihuri (C) - son
- (ii) Ruth Muthoni Mutua– daughter

THIRD HOUSE

- (i) John Gitonga Kihuri - son
- (ii) Geoffrey Mugo Kihuri -son
- (iii) James Mutahi Kihuri - son
- (iv) Theresa Njeri Kibira -daughter

And - Stephen Kibira Wambui—a nephew

2. The parties hereto filed several succession causes all related to the deceased's estate; vide a Consent Letter dated the 20/09/2006 this succession cause was consolidated with Succession Cause No.442/2006; on the 10/04/2017 the Grant of Letters of Administration was issued to Geoffrey Mugo Kihuri (A), John Gitonga Kihuri and Stephen Kibira Kihuri (A) all as joint administrators; on the 31/05/2017 Stephen Kibira Kihuri (A) (herein referred to as Stephen) filed an application for the Confirmation of the Grant and his proposed mode of distribution was as set out in his Supporting Affidavit dated 31/05/2017; John Gitonga Kihuri (John) filed his Affidavit of Protest on the 19/09/2017 because Stephen's proposed mode of distribution as set out in the application for confirmation was done without consultation and had not been agreed upon; and therein also set out his proposed mode of distribution; Geoffrey Mugo Kihuri (Geoffrey) also filed his Affidavit of Protest on the 16/01/2018 stating that the mode of distribution proposed by Stephen was not correct as it had been filed without consultation;

3. The parties consented to court annexed mediation and entered into a partial Mediation Settlement Agreement on the 30/04/2019; the settlement excluded the three properties the parcel numbers are as listed hereunder; these properties were left for the court to distribute;

(i) Othaya/Kiahugu/84 measuring approximately 6.4 Acres;

(ii) Othaya/Gura/25

(iii) Othaya/Kihugiru/561/4

4. Directions were given on the 28/11/2019 and counsel were directed to file and exchange written submissions on the distribution of properties that were left out; hereunder is a summary of the parties' rival claims;

1st PROTESTOR'S CASE

5. The Affidavit of Protest is dated 24/08/2017 and therein he opposed the proposed mode of distribution set out in the application for confirmation filed by Stephen; and his proposed mode of distribution as follows;

(i) Othaya/Gura/25 be allocated to James Mutahi Kihuri, Geoffrey Mugo and Stephen Kibira Kihuri; were in occupation of this property and had extensively developed it;

(ii) Othaya/Kiahugu/84 be shared equally between John Gitonga Kihuri and Stephen Kibira Kihuri (A);

(iii) Othaya/Kihugiru/561/4 be shared equally between John Gitonga Kihuri, James Mutahi and Geoffrey Mugo Kihuri as per the wishes of the deceased; the beneficiaries were in possession and had extensively developed this parcel of land; and he urged the court not to disturb this arrangement;

(iv) Giathenge Plot be distributed to Stephen Kibira Kihuri (C)(Njeri) and Stephen Kibira Kihuri (A) (Thogori) to share equally;

(v) Uwaka Shares to Stephen Kibira Kihuri (B)(Wangari) (deceased) to be inherited by Theresa Njeri Kibira;

(vi) Othaya Farmers Makindi Mahoti – Jumapili – his contention was that these shares were not part of the estate of the deceased and belonged to Regina Wangari;

6. As the parties were not in agreement the protestor prayed that the court distribute these properties; and when distributing the estate to apply the provisions of Sections 35, 36, 37, 38, 40 of the Law of Succession Act and to also take into consideration the provisions of Section 42 of the Act as there those who had already benefitted from the estate.

2nd, 3rd and 4th PROTESTORS' CASE

7. They submitted that the properties listed hereunder form part of the deceased's estate and that these properties were left out;

(i) Othaya/Kiahugu/84

(ii) Othaya/Gura/25

(iii) Othaya/Kihugiru/561/4

(iv) Shares in Makindi Muhota

(v) Uwaka Shares

8. The protestors sought the assistance of the court in the distribution of these properties and urged the court to take into consideration that;

(i) The property known as Othaya/Gura/25 had been allocated to James Mutahi Kihuri, Geoffrey Mugo and Stephen Kibira Kihuri;

that James Mutahi Kihuri had developed his portion;

(ii) As for the parcel known as Othaya/Kiahugu/84 the court was requested to note that John Gitonga Kihuri and Stephen Kibira Kihuri were settled on this parcel;

(iii) The parcel known as Nyandurua/Leshau/Karagoini/Block 1/241 had been given to Stephen Kibira Kihuri (B) and a Land Ownership Certificate had been issued;

(iv) The protesters proposed that the Uwaka Shares be distributed to Stephen Kibira Kihuri absolutely; the shares in Makindi Mahoti and Jumapili Farmers Co-operative Society Ltd be distributed to Regina Wangari, Stephen Kibira Kihuri (B) and John Gitonga.

RESPONDENT'S CASE

9. The respondent opposed all the protestors' proposed mode of distribution; his contention was that all the properties that comprise the deceased's estate be distributed equally amongst the nine (9) surviving children and the single nephew;

10. That the matter had been referred for mediation and a partial settlement had been agreed upon; the court adopted the Partial Mediation Agreement on the 24/07/2019 and therefore the court should be guided by this settlement when distributing of the estate; the shares which were in Uwaka Company Ltd, Makindi Mahuti and Jumapili Farmers Co-operative Society Ltd were the only properties left out of the settlement; and in distributing these shares the respondent prayed that the court be guided by Sections 35, 36,,37,38,39 and 40 of the Law of Succession Act.

ISSUES FOR DETERMINATION

11. After reading the rival written submissions this court has framed only one issue for determination;

(i) Distribution of the properties and those that had been left out of the Partial Settlement Agreement;

ANALYSIS

12. The deceased was polygamous and had three houses; and it is not disputed that there were surviving widows; it is also not disputed that the deceased was survived by nine (9) children and one nephew;

13. The parties were referred to court annexed mediation and on the 30/04/2019 entered into a Partial Settlement Agreement on the distribution of the land parcels Othaya/Kiahugu/84; Othaya/Gura/25; Othaya/Kihugiru/561/4; but the shares in Makindi Muhota, Uwaka Shares and Jumapili were left out;

14. The agreement was adopted as an order of the court on the 24/07/2019; this court is therefore tasked with the distribution of the deceased's property; with the exception of the Shares; this court shall be guided by the settlement agreement when distributing the estate;

15. Starting with Othaya/Kiahugu/84, the beneficiaries named in the settlement agreement are John Gitonga and Stephen Kibira Kihuri (ID.No.1076754); the parties agreed that no other siblings had any claim in this parcel; in this instant as the deceased left no surviving spouse Section 40 of the Act is inapplicable; the two (2) children named in the settlement are both surviving children of the deceased therefore the applicable law is found at Section 38 of the Act; which reads 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.”

16. The section provides for equal distribution amongst the children; therefore John Gitonga and Stephen Kibira Kihuri (ID.No.1076754) shall share this parcel of land in equal shares;

17. Land parcel No.Othaya/Gura/25 – this court notes that Stephen Kibira Wambui (ID.No.1428642) is described as a nephew of the deceased and his name having been included as a beneficiary by consensus this court will treat him as a dependant of the deceased; Theresa Njeri Kibira is described as a daughter-in-law and therefore is inheriting her deceased husband's share in the estate of his father; the parties agreed that a portion measuring 50 by 100 be excised from this parcel and be set aside as a family grave site; this portion to contain the two graves already thereon one being for the deceased and the other that of a deceased's son; the remainder of this parcel shall also be subjected to Section 38 of the Act; the beneficiaries thereof in equal shares are James Mutahi Kihuri, Geoffrey Mugo, Stephen Kibira Wambui (1428642) and Theresa Njeri Kibira; when the sub-division is carried out James Mutahi Kihuri's portion should fall within the section he has already developed;

18. The parties had requested that Section 42 of the Act be taken into consideration as there were beneficiaries who had already benefitted from the estate; the only shortcoming is that the parties did not prepare Valuation Reports which would have greatly assisted this court in taking into account the value of the awards previously made;

19. The beneficiaries who stand to benefit in the distribution of the parcel Othaya/Kihugiru/561/4 have already been awarded portions in the other afore-going parcels of land; but in the absence of any Valuation Reports this court reiterates that Section 42 of the Act shall not be applicable in the distribution of this parcel; this property shall only be subjected to the provisions of Section 38 of the Act; and the

beneficiaries John Gitonga Kihuri, James Mutahi Kihuri, Geoffrey Mugo Kihuri, Stephen Kibira Wambui (1428642), Theresa Njeri Kibira and Stephen Kibira Kihuri (ID.No.1076754) shall share this portion in equal shares;

20. The shares in Makindi Muhota, Uwaka Shares and Jumapili Farmers Cooperative Society Limited shall be shared equally amongst the nine (9) siblings.

FINDINGS AND DETERMINATION

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

(i) The estate of the deceased shall be distributed in the terms as set out in paragraphs 15, 16, 17, 19 and 20 hereinabove; and the Grant is hereby confirmed accordingly;

(ii) Parties at liberty to apply;

(iii) Each party shall bear their own costs.

It is so ordered.

Dated, Signed and Delivered Electronically at Nyeri due to the Pandemic this 1st day of October, 2020.

HON. A. MSHILA

JUDGE