



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**SUCCESSION CAUSE NO. 570 OF 2015.**

**IN THE ESTATE OF THE LATE CHARITY MUTHONI NGUGI - DECEASED**

**NORAH WANJIKU THOMAS.....PROTESTOR**

**VERSUS**

**MARGARET MUTHONI.....1<sup>ST</sup> PETITIONER**

**SUSAN MUTHONI.....2<sup>ND</sup> PETITIONER**

**JUDGMENT**

1. This suit commenced by way of petition for grant of letters of administration intestate dated **11<sup>th</sup> June 2015** filed by the petitioner herein in respect of **Charity Muthoni Ngugi** who died on 6<sup>th</sup> April 1999 at Nakuru Nursing Home. The petitioner filed this petition in her capacity as the daughter of the deceased herein. From the pleadings the deceased was survived by the following children: -

- i. Samuel Sukhdev Hansraj (deceased) – represented by daughter Susan Muthoni.**
- ii. Baldev Kaka Hansraj**
- iii. Norah Thomas**
- iv. Bulbil Hansraj Budu (deceased) – represented by Margaret Muthoni**
- v. Savitri Hansraj**

2. The letters of administration intestate were issued to **Baldev Kaka Hansraj, Norah Thomas, Margaret Muthoni and Susan Muthoni** on 10<sup>th</sup> November 2016.

3. At the time the deceased passed on, the following properties were registered in the name: -

- i. LR. No. 519/XXV/2;**
- ii. Njoro/Ngata Block 1/161;**
- iii. Kabazi/Munanda Block 2/776;**
- iv. Njoro/Ngata Block 1/380**
- v. Shares at Maombi Farmers Co. Ltd;**

4. The petitioner in summons for confirmation of the grant dated 30<sup>th</sup> August 2017 proposed the following mode of distribution: -

- i. Njoro/Ngata Block 1/161 (6 acres)**
  - a. Susan Muthoni Sukdev - 1 acre;

- b. Baldev Kaka Hansraj - 1 acre;
- c. Norah Thomas - 1 acre + a plot (50 \* 100)
- d. Margaret Muthoni - 1 acre to hold in trust of her children;
- e. Savitri Hansraj - 1 acre
- f. Burial site - ½ an acre;
- g. 3 plots to be sold to cater for legal fees and remaining balance to be shared equally among all the beneficiaries;

**ii. Njoro/Ngata Block 1/380 - plot (50 \* 100)**

§ Savitri Hansraj

**iii. LR. No. 519/XXV/2 - plot (50 \* 100)**

§ Baldev Kaka Hansraj

**iv. Kabazi/Munanda Block 2/776 - approximately 1.4 acres**

§ Margaret Muthoni - To hold in trust of her children

5. Parties failed to agree on the mode of distribution. The protestor herein **Norah Thomas** opposed the proposed mode of distribution. This Court directed that this matter proceeded by way of *viva voce* evidence.

**PROTESTOR'S CASE.**

6. The protestor **Norah Wanjiku Thomas** adopted her statement dated 10<sup>th</sup> August, 2018. She testified that the deceased had 5 children and that she was the second daughter of the deceased.

7. She proposed the deceased property to be distributed as follows: -

**i. Njoro/Ngata Block 1/161 (6 acres)**

§ Norah Wanjiku Thomas Hansraj;

**ii. Njoro/Ngata Block 1/380 - plot (50 \* 100)**

§ Savitri Hansraj

**iii. LR. No. 519/XXV/2 - plot (50 \* 100)**

§ Baldev Kaka Hansraj

**iv. Kabazi/Munanda Block 2/776 - approximately 1.4 acres**

§ Bulbul Budu - deceased

**v. LR. No. 519/23/6 – Njoro Town.**

§ Samwel Sukudev – deceased

8. In her evidence, she opposed the petitioner's mode of distribution claiming that they want a share out of her inheritance yet all other siblings had been given their respective shares.

9. She testified that **Njoro/Ngata Block 1/161 (6 acres)** was given to her by her deceased mother during her lifetime and she has lived on parcel of land **for** a period of about 25 years and has brought up her 9 children in the land after separating with her husband.

10. The protestor testified that she has developed the land; that she has planted trees, cultivated on the farm, reared livestock on the farm and connected utilities like water and electricity. She stated that her deceased brothers and mother were buried on the said land parcel; and other grand children were buried there though without her consent. She stated that the Court should give her the entire share as per her mother's wishes.

11. On cross examination by **Ms. Nancy Njoroge** counsel for the petitioner, the protestor stated that **Sukudev** had 2 wives and **Susan** who is one of the administrators is a child to one of them. She confirmed that Susan's mother is deceased. She said that one wife had 4 children and the other had 5 children. She also confirmed that **Bulbul Budu** is her brother; that he is deceased and his wife **Muthoni** is one of the administrators. She confirmed that he was buried in Kiamunyi.

12. She stated that all members of Kiamunyi were given 6 acres and one plot measuring 100 by 100. She further stated that her mother had 5 plots in Njoro town and that she sold one plot and gave 2 to **Samuel Sukudev**, one is used by **Kaka Baldev** and the other was given to **Bulbul Budu** now deceased but husband to **Margaret** the administrator.

13. The protestor testified that her mother had land in Kabazi measuring 2 ½ acres. She said she does not know who is using it but his brother **Bulbul** was given. She said the plot in Kiamunyi was given to her sister **Savitry Hansraj**. She proposed that the shares her mother had in Breweries be shared equally among them. She denied that her mother gave her only where to build in the Kiamunyi land. She confirmed that her mother never wrote anywhere that she was giving her land. She said the land is hers alone having been given by her mother.

14. The protestor testified that it is only **Budu** who died before her mother and stated that most family members were buried in the land without her consent; that two have been buried without her knowledge. She said her mother was buried in the land. She stated that her mother showed her where to build and live with her 9 children.

15. On further cross examination by **Cheruto** for **Balder Kaka**, the protestor stated that there is no document to show that her mother the deceased herein, gave her the Kiamunyi land but stated that all receipts for utility bills are in her name; that she has planted trees and has been paying rates for the land. She said she is the only one living in Kiamunyi land and that she was given the land by the owner. She opposed to have one acre of the land as burial site. She said her mother's intention were for her children to be buried there but the grandchildren should not be buried there. She also opposed the proposal to have her sister **Savitri** given one acre and also opposed the proposal to have all her siblings given share in Kiamunyi land. She said his brother **Kaka** has the title deed of the land and that her sister has not built in the plot in Olive Inn. She also opposed her sister being given land in Njoro. She said her sisters' interest is to sell the land. She further stated that she has no objection to plots her mother gave out when she was alive.

16. DW 1 **Balder Kaka** the protestor's brother and a son to the deceased testified that he does not recognize the 1<sup>st</sup> petitioner as a beneficiary. He stated that she was living with his brother **Bulbul Budu** but were not officially married and she later left. It was his testimony that he doesn't recognize her as the brother's wife. He said no dowry was paid for her. He stated she obtained her ID with his deceased brother's name in 1997 while he had passed on in 1988. He proposed that his brother's share land parcel **Kabazi/Munanda Block 2/776** - approximately 1.4 acres to the children; his brother's children alone.

17. **Baldev Kaka** stated that he is agreeable to the mode of distribution of all the other land parcel as proposed by his siblings except for **Njoro/Ngata Block 1/161 (6 acres)** where he proposed that **Nora** to have 2 acres, **Savitri** – 1 acre, him – 2 acres, set aside a burial site ½ acre and sell the remainder to clear the legal fees. He stated that if he was given **Kabazi/Munanda Block 2/776** he would not ask to be given a share of **Njoro/Ngata Block 1/161** since the land measure 1.4acres.

18. DW 2 **Savitri Hansraj**, is a sister to the protestor. In her testimony she affirmed what his brother DW1 had testified. The protestor was not given the entire land parcel **Njoro/Ngata Block 1/161 (6 acres)**. She wants the protestor given 1 acre.

19. The parties proceeded to file in their submissions which has basically echoed what is contained in the statements and the testimony before Court.

#### **PETITIONERS' CASE.**

20. The petitioner called two witnesses. The 2<sup>nd</sup> petitioner in her testimony adopted her statement filed on 15<sup>th</sup> August, 2018. She testified that she is the deceased's granddaughter being a daughter to **Samuel Sukhdev Hansraj** deceased and is claiming for a share on behalf of her father. She stated that she is agreeable to the proposed distribution in the summons for confirmation of grant.

21. The Petitioner's 2<sup>nd</sup> witness **Sospeter Muiruri Njuguna** adopted his witnesses statement filed on 16<sup>th</sup> November, 2019.

#### **ANALYSIS AND DETERMINATION.**

22. I have considered the pleadings, statements, testimonies and the submissions of the parties.

23. It is not disputed that the deceased **Charity Muthoni** had 5 children 3 sons and 2 daughters. The protestor **Nora Thomas** being one of the daughters of the deceased. Two sons **Samuel Sukudev** and **Bulbil Sukudev** are now deceased. **Susan Muthoni** represent the family of **Samuel Sukudev** and **Margaret Muthoni** represent the family of **Bulbil Sukudev**.

24. DW 1 and Dw2 disputed the marriage of **Margaret** to **Bulbil Sukudev** on ground that the marriage was not formalised to solemnize the same. They argued that no dowry was paid for **Margaret** and they therefore don't recognize her as their sister in law but they accept that they had children together. They stated that the children should inherit and not their mother. The issue was that they did not tender sufficient evidence to prove that the 1<sup>st</sup> petitioner was not a wife. No sufficient evidence was adduced on the issue of giving or receiving dowry; they failed to state what ought to have been to solemnise the union. In my view **Margaret** is entitled to claim a share of the share of her late husband's share for her benefit and her children.

25. It is not disputed that is the two plots in Njoro town, industrial area were transferred the late **Samwel Sukudev** by the deceased herein

during her life time and the two plots are therefore not available for distribution and the other beneficiaries have no objection to his family retaining the two plots.

26. The parties also have no issue with plots already allocated to smaller plots measuring 50 by 100 allocated to **Baldev Kaka** and **Savitri Havraj** but **Baldev Kaka** argue that Kabazi land allocated to **Bulbil Sukudev**'s family measure 1.4 Acres and it should be enough.

27. Save for the protestor all the other beneficiaries argue that the land parcel **Njoro/Ngata Block 1/161 (6 acres)** was meant to be a family property and all children of the deceased to get a share. The protestor however argues that the land measuring 6 acres was given to her alone and according to the deceased, she only wanted her own children and not the grandchildren to be buried in the land parcel. The other beneficiaries argue that all family members who have died including the deceased herein, her children and grandchildren have been buried in the land.

28. It is evident from the evidence adduced that parties herein have failed to agree on distribution of land parcel **Njoro/Ngata Block 1/161 (6 acres)** the protestor is currently living in the land and she argues that the deceased gave her after she separated with her husband; she contends that she is entitled to the land together with her 9 children. The petitioner and other beneficiaries argue that the other beneficiaries are getting the shares that had been allocated to them by the deceased and where they have lived and utilised except for the petitioner's share where all the beneficiaries need a share of **LR Njoro/Ngata Block 1/161 (6 acres)** which is a prime land whose value has risen. They argue that all the beneficiaries are entitled to a share.

29. From evidence adduced, there is no doubt that the deceased never left a written or oral will. The law provides that, in the absence a valid will, the Court is required to apply the law as it relates to an intestate estate. **Section 34 of the Law of Succession Act** provide as follows: -

**“A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.”**

30. In the instance case there was no spouse left behind, the deceased was only survived by the children. Therefore, the applicable section is **Section 38 of the Law of Succession Act** which provides for 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.”**

31. However, the preexisting settlement of the children should be taken into account when distributing the estate. As enunciated in the case of **Margaret Wanja Elija vs Peter Ngari Elijah Kimani [2013] eKLR**: -

**“There is nothing in the Law of Succession Act cap 160 Laws of Kenya which authorizes a court of law to disregard a deceased person's wishes on how his estate is to be distributed especially where the same is within the parameters permitted by the said Succession Act, and it is also fair to the satisfaction of the court and all or a majority of the beneficiaries of the deceased's estate with the exception of the appellant.”**

32. Whilst complying with the provisions of the **Law of Succession Act**, the Court is required to ensure that distribution is equitable and fair, with all beneficiaries being duly catered for, also take into account the deceased's wishes and ensure that the deceased's children already settled during her life time are not disturbed.

33. It is not in dispute that the children of the deceased have settled in the following plots: -

i. **Njoro/Ngata Block 1/380 - plot (50 \* 100)** - Savitri Hansraj

ii. **LR. No. 519/XXV/2 - plot (50 \* 100)** - Baldev Kaka Hansraj

iii. **Kabazi/Munanda Block 2/776 - approximately 1.4 acres** -The children of the late **Bulbil Budu** a son of the deceased herein.

34. I also note that the protestor herein has been given a house in **Njoro/Ngata Block 1/161**. Evidence adduced also show that two plots in Njoro were transferred by the deceased to her son **Samuel Sukudev** and are not part of this estate. None of the beneficiaries is interested in interfering with the plots already occupied by siblings save for land parcel **Njoro/Ngata Block 1/161** which is 6 acres to be shared as follows: -

a) Susan Muthoni Sukdev - 1 acre;

b) Baldev Kaka Hansraj - 1 acre;

c) Norah Thomas - 1 acre + a plot (50 \* 100)

d) Margaret Muthoni - 1 acre to hold in trust of her children;

e) Savitri Hansraj - 1 acre

f) Burial site - ½ an acre;

g) 3 plots to be sold to cater for legal fees and remaining balance to be shared equally among all the beneficiaries;

35. Having considered evidence adduced I find it fair and just to allocate a bigger portion of **L. R No.Njoro/Ngata Block 1/161** to the protestor on ground that she has no other plot and she is the one who has occupied and taken care of the land. I note that the late **Bulbil Sukudhev's** family have 1.4 acres in Kabazi and find it fair to allocate half acre to his wife and children.

**FINAL ORDERS**

36. I hereby distribute the estate of the deceased as follows: -

1. **LR. No. 519/XXV/2;**

2. **Kabazi/Munanda Block 2/776;**

3. **Njoro/Ngata Block 1/380**

4. **Shares at Maombi Farmers Co. Ltd to be shared equally between the beneficiaries.**

5. **LR Njoro/Ngata Block 1/161 allocated as follows: -**

a. **Susan Muthoni Sukdev - 1 acre; (to hold in trust for herself and siblings)**

b. **Baldev Kaka Hansraj - 1 acre;**

c. **Margaret to hold in trust for herself and children of the late Bulbil Sukudhev - ½ acre**

d. **Norah Thomas - 1 ½ acre**

e. **Savitri Hansraj - 1 acre**

f. **Burial site - ½ an acre**

g. **½ an acre to be sold to cater for legal fees and remaining balance to be shared equally among all the beneficiaries.**

**Judgment dated, signed and delivered via zoom at Nakuru This 3rd day of December, 2020**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jeniffer - Court Assistant

Ms. Nancy Njoroge for Margaret Muthoni and Susan Muthoni (1st and 2nd petitioner.

Mutai for the protestor (Norah Thomas)