



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 214 OF 2010

IN THE MATTER OF THE ESTATE OF NTHIGA MBOGO (DECEASED)

LYDIA MUTHONI DANIEL.....CO-ADMINISTRATOR/PROTESTOR

VERSUS

MARY WAMBETI EDWARD.....CO-ADMINISTRATOR

J U D G M E N T

A. Introduction

1. The protestor and the applicant are co-administrators in this cause having been appointed on the 3rd March, 2011. The grant had been confirmed earlier in favour of the protestor as the sole beneficiary. The confirmation was set aside in the ruling of the court delivered on 20/09/2016 and the administrators or any of them directed to file a fresh application for confirmation of grant. This was preceded by summons for revocation of grant by the applicant despite the fact that she was a co-administrator.

2. The applicant with the courts directions filed an application of confirmation of grant dated 13/10/2016 proposing that the deceased estate be distributed as follows: -

a) Ngandori/Kirigi/6421

Alexander Muriithi & John Mucangi Njeru

b) Ngandori/Kirigi/6422

Gerald Mbogo Njagi

c) Ngandori/Kirigi/6423

Margaret Gatari Evanson (As trustee of her sons Humphrey Keneth Muriithi and Edward Muchangi

d) Ngandori/Kirigi/6424

Antony Gitonga Mbogo

e) Ngandori/Kirigi/6418

Mary Wambeti Edward, Margaret Gatari Evanson, Ann Njura Mbogo, Tabitha Rwamba Njagi, Jane Gicuku Moses, Madrin Wanja Moses and Pauline Gikuu

3. The protestor in her affidavit of protest sworn on 10/11/2016 opposed the mode of distribution of the applicant and set out her own.

4. Both parties had earlier testified exhaustively on 26/07/2016 on the beneficiaries and identification of shares during the hearing of the summons for revocation dated 8/04/2015. However, in the affidavits for confirmation of grant sworn on 13/10/2016 and in the affidavit of protest, each of the parties raised new issues by bringing grandchildren of the deceased on board as heirs as well as 3rd parties and proposing allocation of shares. For this reason, the court directed that evidence be adduced by the parties on the issue of grandchildren which was done.

5. From the evidence of both parties which was not at variance, the grandchildren were described as follows: -

- a) Anthony Gitonga Mbogo – son of deceased's son Christopher Njiru
- b) Alexander Muriithi and John Muchangi – sons of the applicant Mary wambeti a daughter of the deceased.
- c) Alfred Muriithi and Edwin Muchangi – sons of Margaret Gaturi, daughter of the deceased

6. The applicant also proposed Gerald Mbogo Njagi the brother in-law of the applicant married to her sister Annah Njura as heir to the estate. She said that Gerald looked after the deceased when he was sick and was given LR. Ngandori/Kirigi/6422 as a reward.

7. The other beneficiaries are seven (7) daughters of the deceased named in the affidavit of the applicant.

8. The deceased was survived by the following persons: -

- 1) Lydia Muthoni Daniel - widow
- 2) Mary Wambeti Edward - daughter
- 3) Margaret Gaturi Evanson - daughter
- 4) Annah Njura - daughter
- 5) Tabitha Rwamba - daughter
- 6) Pauline Gikuu - daughter
- 7) Christopher Mbogo - son
- 8) Anderson Kariuki - son
- 9) Jane Gicuku - daughter
- 10) Naftali Ileri - son
- 11) Peter Muchira - son
- 12) Madrine Wanja - daughter

9. The evidence of the parties which was not at variance was that the deceased had distributed part of his assets to his four (4) sons each getting 1½ acres.

10. It is not in dispute that the protestor is the surviving widow of the deceased having been married to him in 1994 after his first wife Isabella passed on. The applicant and her sisters are children of the first wife.

11. The applicant testified that the protestor should not inherit any share from the deceased because her land in the estate was sold by the deceased during his lifetime and the proceeds used to buy the protestor land elsewhere. This was denied by the protestor who testified that she resides on a portion of land given by her father after the applicant and her siblings chased her away from the matrimonial home following the death of the deceased. She called one witness DW2 to support her case.

12. The applicant did not produce any evidence of any portion of land having been sold in the estate by the deceased during his lifetime for the purpose of raising funds to buy other land for the protestor. If this was true, documentary evidence should have been availed.

13. The protestor testified that the applicant and the other daughters of the deceased are married and should not inherit from the deceased. She further argued that the deceased shared the remaining land between his two families after he first gave his sons 1½ acres each. It was further stated that the share of the protestor which was registered in the name of the deceased was 1½ acres which was sub-divided into five (5) plots now forming the estate of the deceased.

14. The protestor's case was that since the 1 ½ acres portion was her share in the family land, she is the only one entitled to the five (5) plots in the deceased's name.

15. The law applicable is **Section 40 of the Law of Succession Act** which provides: -

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

16. My view is that Section 42 of the Act will be applied in this case to achieve fairness among the heirs since some sons of the deceased had been given land during the deceased's lifetime.

17. Section 42 provides: -

Where –

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

18. It is not in dispute that the heirs of the deceased who had not been allocated land during his lifetime and who are entitled to share the remaining assets are as follows: -

- a) Lydia Muthoni Daniel - widow
- b) Mary Wambeti Edward - daughter
- c) Margaret Gaturi - daughter
- d) Annah Njura - daughter
- e) Tabitha Rwamba - daughter
- f) Pauline Gikuu - daughter
- g) Jane Gicuku - daughter
- h) Madrine Wanja - daughter

19. The argument of the protestor that the daughters of the deceased are married and should not inherit is contrary to the law which does not discriminate between married and unmarried children.

20. I am of the considered opinion that the daughters whether married or not are entitled to inherit from their deceased father under the law.

21. As I have said earlier, the widow of the deceased is entitled to inherit in terms of Section 40 of the Act in equal shares as the daughters of the deceased.

22. **Section 42 of the Act** provides that the shares given during the lifetime of the deceased be taken into consideration in the distribution. The four (4) sons of the deceased did not claim any share herein. Even if they had done so, Section 42 would have excluded them since they received the bulk of the shares of the deceased's land leaving only five small plots to the rest of the beneficiaries who are more in number. This status will result in the surviving widow and the beneficiaries getting meagre shares in comparison with the sons of the deceased. None of them showed interest in this cause.

23. The law entitles this court to find under Section 42 of the Act that the four (4) sons of the deceased have been catered for and are not heirs in regard to the assets available for distribution.

24. In regard to the grandchildren, the law does not recognise them as heirs of the deceased unless they are taking shares of their deceased parents.

25. **In the matter of the estate of Veronica Njoki Wakageto (Deceased) [2013] eKLR**, it was stated as follows:

“Under part V, grand children have no right to inherit their grandparents who die intestate after 1st July, 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents indirectly through their own parent, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time the grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

26. It is my considered opinion that the five (5) grandchildren brought on board by the parties herein are not heirs in the estate of the deceased. The parent of Anthony Gitonga who is a son of the deceased already received his share during the lifetime of the deceased.

Anthony will inherit from his father when the right time comes.

27. Similarly, the two children of the applicant Alexander Muriithi and John Muchangi and those of her sister Margaret Gaturi namely Alfred Muriithi and Edwin Muchangi have no legal interest in the deceased's estate because their parents have been identified as heirs and will receive their respective shares in the distribution.

28. As for Gerald Mbogo Njagi, the son in-law of the deceased, it was argued that he looked after the deceased in his ailing state and was given land LR. Ngandori/Kirigi/6422.

29. There was no evidence to this effect produced by the applicant to that effect. Nonetheless, the law does not recognize a son in-law as heir of the deceased's estate unless he is claiming the share of his deceased wife. This is not the case in this cause since no such evidence is available.

30. It is not in dispute that the deceased died intestate and as such, the law applicable to intestacy must be applied in the distribution of this estate. I find that Gerald Mbogo is not entitled to inherit from the deceased.

31. Having identified the heirs of the deceased, I herein proceed to distribute the estate in accordance with **Section 40 of the Act**.

32. Taking into consideration that the parcels of land are five in number, small in size and that the heirs are eight in number, it is not possible to achieve equality in the distribution.

33. However, the court will do its best to achieve fairness in the circumstances.

i. Ngandori/Kirigi/6418 – Lydia Muthoni Daniel

ii. Ngandori/Kirigi/6421 – Mary Wambeti Edward

iii. Ngandori/Kirigi/6422– Anne Njura Mbogo and Tabitha Rwamba

iv. Ngandori/Kirigi/6423 - Margaret Gaturi Evanson and Jane Rwamba

v. Ngandori/Kirigi/6424 - Madrin Wanja Moses and Pauline Gikuu

34. A certificate of confirmation to issue in the foregoing terms.

35. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF JANUARY, 2019.

F. MUCHEMI

JUDGE

in the presence of: -

Both parties