



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO.140 OF 2014

IN THE MATTER OF THE ESTATE OF KABIARU KABUNGU (DECEASED)

JUDGMENT

1. The deceased to whom these proceedings relates died intestate on 4th July 2012. Peter Kabiari Kabungu, Simon Kamau Kabiari and Agnes Wanjiru Kabiari petitioned for grant of letters of administration. The same was gazetted on 22nd November 2013, vide gazette notice number 5357. The grant was issued on 10th January 2014 in **Succession Cause No. C. M. 245 of 2013** Kiambu.

2. Grace Wanjiku Nduru sought revocation of the said grant on 24th January 2014 on grounds that she did not give her consent for taking out grant of letters of administration, some children of one of the beneficiaries who was deceased had not been included and that one of the administrators had been adjudged bankrupt, some of the assets belonging to the deceased were not included in the list of assets. On these grounds the Court found in favor of the Applicant and on 8th May 2015 revoked the said grant and ordered that a new grant be issued in the names of Grace Wanjiku Nduru and Simon Kamau Kabiari and ordered parties to file a mode of distribution within 90 days.

3. Parties entered into consent through Counsel for sale of **LR No Nairobi/Eastleigh36/VII/596** and distribution of funds to beneficiaries be done by the Court. By ruling on 14th June 2016, the consent was set aside as it was contrary to **82(d) of Law of Succession Act Cap 160**. Until and unless confirmation of grant was done in the Succession cause, no property that constitutes the deceased's estate could legally be sold, subdivided or disposed of or transferred

4. Simon Kamau Kabiari vide summons dated 29th July 2015 and after a meeting held on 19th August 2012 sought confirmation of grant. Grace Wanjiku Nduru opposed the proposed of confirmation as the same did not distribute the deceased's estate fairly, the witnesses gave false evidence on oath by stating that the deceased only had one property namely **Kabete /Nyathuna/735 while Plot no. Kabete/Gikui/T15** belonged to their late mother.

5. The application for consideration is the summons for confirmation of grant dated 20th July 2015. The Applicant prays for orders that the grant of letters of administration intestate made to Simon Kamau Kabiari and Grace Wanjiku Nduru on 8th May 2015 be confirmed.

6. The Applicant/Co administrator submitted that the deceased prior to his demise had bequeathed his property to his beneficiaries according to his wishes and in line with the **Kikuyu Customary Law**. He had subdivided his property amongst his beneficiaries while he was still alive and had wished that there would be no dispute about inheritance. The Applicant's witnesses in their testimony indicated that the proposed mode of distribution was as per the wishes of the deceased. They relied on the case of **In re Estate of Ngamini Kirira [2016] eKLR, Kneller JA put it more clearly, when he stated:-**

"Now, by custom, Kikuyu father has to distribute his land among his sons during his lifetime if possible, and usually does so. This often happens where a son marries and it counts as that son's share if his father has not revoked the gift before he dies. (See Restatement of African Law: Kenya:2 Succession by Eugene Cotran, 1969, (1 ed) page 15). He may make a will in old age or on his death bed and the only formalities required are that he must say before the elders of his family (Mbari) and of the clan (Muhiriga) and close friends who will be administrator (Muramati) of his estate and to whom each item of it shall go..."

7. It was submitted that **Kabete/Nyathuna/735** was the deceased's matrimonial property and was bequeathed to two people. He bequeathed 1 acre and his 3 bedroom house where he lived with his wife to John Kabiari Kabungu and 4 acres bequeathed to Simon Kamau Kabiari where he constructed his matrimonial home and went on to build some cow and chicken sheds and continue to cultivate horticultural crops on the remaining 3 acres. The protestor Grace Wanjiru Nduru in her testimony had indicated that Simon Kamau Kabiari has lived in the said parcel of land since 1990's even after he was married. He urges the court to allow him remain in the said parcel of land.

8. **Plot No. 14** Ruku shopping centre was bequeathed to the late Peter Kabungu Kabiari sometime in 1997 to use in trust for his children from his 1st wife in 1991. When he had some difficulties in paying school fees for them. Upon his demise his two children John Kabiari and Micheal Karanja had possession of the said parcel of land and had been collecting rental proceeds from the said property since 1991.

9. **L.R. Nairobi/Eastleigh Plot No. 36/VII/596** was not bequeathed to anyone.

10. **Kabete/Gikuni/T.227** the deceased bequeathed the late Peter Kabungu Kabiari and his estate has been collecting rental proceeds from the same until his demise in 2016 but his wife continues to collect rent from the said premises. That the deceased gave Peter Kabungu Kabiari both properties and a 3 bedroom house constructed on the property as their wedding present.

11. On **Kabete/Nyathuna/739** belonged to their late mother and was to be shared amongst all children. The deceased had bequeathed Agnes Wanjiku Kabiari a portion on this property where she built herself a 3 bedroom house where she resides to-date.

12. They relied on the case of ***Re Estate of Ngamini Kirira (Deceased) [2016] Eklr***, the High court in relying on the Judicature Act upheld the mode of distribution done by the deceased prior to his demise.

13. Further in ***Re the Estate of Gideon Kitivo Ndambuki (Deceased) [2014]***;

“The deceased had done everything that required to be done in relation to the transfer of his land to some of his sons and wives. Indeed some of the parcels of land are now registered in the names of some of the sons under the Registered Land Act Cap 300 Laws of Kenya. The land given by the deceased to his sons and wives is a gift to the sons and wives during the lifetime of the deceased as provided for under section 28 (d) of the Act. The land transferred by the deceased in his lifetime therefore no longer forms part of the estate of the deceased and is not free property that is now available for distribution.”

They urged the court to retain the distribution as done by the deceased during his lifetime.

PROTESTORS

14. Agnes Wanjiru Kabiari in her submissions submitted that the deceased was survived by 5 beneficiaries namely Grace Wanjiku Nduru, the late Peter Kabungu Kabiari, Simon Kamau Kabiari, The late Ann Wanjiku Kabiari and Agnes Wanjiru Kabiari. The following assets **Kabete/ Nyathuna/735, Kabete/Nyathuna/739, Kabete/Gikuni/T.227, L.R. No. Nairobi/Eastleigh No.36/VII/596** are assets that comprise of the deceased's estate. It was submitted that in the application they were only seeking distribution of the deceased's estate without discrimination and in line with the **Article 60 of the Constitution 2010**.

15. She sought to discredit the testimony given by the Petitioners John Mungai Itiru and Simon Kamau Ituru claiming that the same did not reflect the wishes of the deceased but the parties' individual wishes. Further that the parties aimed at disinheriting the daughters of the deceased. She raised the issue of fraud in purported agreement/consent and the forged signature on the same as she was not present at the alleged meeting to discuss confirmation of grant. The withdrawal of monies from the deceased's account by Simon Kamau Kabungu and the late Peter Kabungu and the sale of the deceased's motor vehicle without following due process were also issues of contention.

16. It was submitted that the estate of the late Kabiari Kabungu was neither subdivided nor bequeathed to anyone. That the only parcel bequeathed was **Land. No. Kabete Gikuni/T.51** which was bequeathed to the late Mary Nyawira their late mother and all modalities were done and title deed issued in her name. That the deceased was a man of means and was of sound mind and he could not have subdivided his properties without involving his family. That therefore any subdivision or part bequeathed of his estate is null and void.

17. Grace Wanjiku Nduru in her submissions submitted that the deceased died intestate and was survived by his children and no spouse. Hence, his estate should devolve under **Section 38 of the Law of Succession Act** which provides that;

“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.”

She relied on the case of the estate of **Elizabeth Wanjiku Munge (deceased) Succession Cause, 2015 KLR on this point**.

Further, that **Section 38 is subject to Section 41 and 42** of the Act. **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 of this Act, 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. That since it was determined that there was no will by the deceased and what he said in the presence of **PW2** was not reduced in writing; the issue is whether during the lifetime of the deceased had paid or settled any property to the benefit of a child or grandchild or house. It was submitted that it is trite law that gifts of land must be by way of registered transfer and must be in writing or by declaration of trust in writing. Moreover, it is for the purported donee of incomplete or imperfect gift to declare or complete or perfect a gift to himself where incomplete gift has been challenged.

19. That it was evident that not all family members were present in the alleged meeting held on 19th August 2012 where it is alleged parties agreed on mode of distribution. At the said time Agnes Wanjiru Kabiari is said to have been in Dubai. Parties present were coerced and did not append their signatures. That the allegations by the Petitioner that the deceased distributed his property during his lifetime was not supported by any evidence to prove the same on a balance of probabilities. It was submitted that the Applicant never brought any witness to corroborate his evidence that the deceased distributed his properties during his lifetime.

20. It was submitted that the Applicant relied on the decision in **re Estate of Ngamini Kerira (deceased) (2016) eKLR**, it was submitted that this decision the court acknowledged the **Kikuyu Customary Traditions**. The Respondent however submits that this decision does not apply to this matter. That the said properties are registered under the laws of Kenya and not Customary Law and hence should be distributed in accordance to The Succession Act and other laws.

21. The coming into operation of the Constitution, 2010 radically changed the position, for the new law outlawed discrimination in all its forms. **Article 10 of the Constitution, 2010**, states the national values and principles. **Article 10(2)(b)** includes human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, among the said values and principles. **Article 27 of the Constitution, 2010**, states the principle on equality before the law and the right to equal protection and equal benefit of the law. It also states that men and women have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. There is also **Article 2(4) of the Constitution, 2010**, which states that any law, including customary law, which is inconsistent with the **Constitution, 2010**, is void to the extent of the inconsistency. Thus, any customary law that discriminates against women in inheritance is consistent to the letter and spirit of our constitution and therefore null and void.

DETERMINATION

22. **PW1** Grace Wanjiku Nduru stated that her late father, the deceased did not bequeath any of the properties, he died intestate and there was no gift *intervivos*. There was a car sold and beneficiaries did not share proceeds and money in the account that was not shared to beneficiaries.

23. It is not true that late Peter Kabiari was bequeathed **Kabete /Kibichiku/605/Plot 14 Riku and Kabete/Nyathuna** and that properties should be shared to all beneficiaries equally.

24. This Court noted that the late Peter Kabiari and Simon Kamau Kabiari were settled on the deceased's various properties during his lifetime and they invested in permanent structures. The protestors' did not raise the issue with their father during his lifetime. Although it is trite law that the deceased's estate is an intestate estate; as the deceased left no valid Will and the law provides equal share of properties amongst the children of the deceased. This provision is difficult to apply approximately each time due to peculiar circumstances of each case. In the instant case, the 2 sons of the deceased have erected permanent structures on some suit properties which have increased value of property and if demolished they will not be compensated. Therefore where, Peter Kabiari and Simon Kabiari and Agnes Wanjiku Kabiari have erected permanent structures/homes, they shall remain as is and the rest of the land shall be available for distribution for all beneficiaries equally but taking into account the developed portion by the beneficiaries.

25. **PW1** proposed and was submitted that as at 14th August 2015 the net worth of the properties was in the sum of Kshs.134,100,000/- which she avers should be a guide in the equal distribution of the assets which she proposed to be done as follows;

a) **Nairobi Eastleigh Plot No. 36/VII/596** valued at Kshs. 50,000,000 be sold and the net proceeds compensate those who will get tangible assets with lesser values. **Plot No. 14** Ruku shopping centre valued at Kshs. 6,000,000/- parcel be sold and net proceeds used to compensate those who would get tangible assets of lesser value.

b) **Plot No. Kabete/Gikuni T. 227** valued at Kshs. 15,000,000/- be sold and net proceeds used to compensate those who would get tangible assets of lesser value.

c) **Kabete/Kibichiku/605** consisting of land and buildings valued at Kshs.18,600,000/- she proposes that the whole parcel be given to the estate of Peter Kabiari Kabungu because he occupied the said property as a child adding that he did not build the said buildings.

26. **Kabete/Nyathuna/735** valued at Kshs. 26,900,000 proposes that the said property be shared between the Estate of Peter K. Kabiari and Simon K. Kabiari. She proposes Simon K. Kabiari gets 4 acres and one of the buildings on the land where he resides and other sites whose estate is net value Kshs.21,900,000 since he occupies the said buildings and it would be fair to relocate him. That the other building and one acre that it stands on and whose value is estimated at Kshs. 5,000,00 be distributed to the estate of Peter Kabiari.

Kabete/Nyathuna/739 valued at Kshs.17,000,000 be distributed as follows;

Agnes W. Kabiari 2 acres + the building which have occupies all valued at Kshs. 7,660,000/-

Estate of Ann Wanjiku Kabiari 2 acres valued at 4,060,000/-. That having distribute proposed each beneficiary should get an equivalent of his net estate worth share in the sum of Kshs. 26,820,000/-.

And to distribute and balance equally each party's share's be as follows;

Peter K. Kabiari

Plot No. Kabete/Kibichiku/605 - Kshs. 18,600,000/-

One acre + building: Kabete/Nyathuna/735 – Kshs. 5,600,000/-

Cash Kshs. 2,620,000

Simon K. Kabiari

4 acres + buildings/Kabete Nyathuna/735 Kshs. 21,900,000

Cash Kshs. 4,920,000

Total Kshs. 26,820,000

Agnes W. Kabiari

2 acres + building/Kabete Nyathuna/739 Kshs. 7,660,000

Cash Kshs. 19,160,000

Total Kshs.26,820,000

Estate of Anne Wanjiku Kabiari

2 acre + buildings/Kabete Nyathuna/739 Kshs. 4,660,000

Cash Kshs. 22,160,000

Total Kshs. 26,820,000

Grace W. Nduru

2 acres +buildings//Kabete Nyathura/739 Kshs. 4,660,000

Cash Kshs. 22,160,000

Total Kshs. 26,820,000

What is the ideal distribution of the deceased's estate?

27. It is important to note that the beneficiaries surviving the deceased are not in issue and are as follows;

1. Grace Wanjiku Nduru,
2. the Late Peter Kabungu Kabiari
3. Simon Kamau Kabiari,
4. the late Anne Wanjiku Kabiari and
5. Agnes Wanjiku Kabiari.

28. Assets of the deceased comprise of;

- a) Kabete /Nyathuna/735
- b) Plot No. 14 Ruku shopping Centre
- c) L.R. No. Nairobi/Eastleigh Plot no. 36/vii/596
- d) Kabete /Gikuni/T.227
- e) Kabete/Kibichiko/605
- f) Kabete/Nyathuna/739

It is not in dispute that some of the deceased's beneficiaries had been bequeathed some property by the deceased.

MODE OF DISTRIBUTION

1. This Court will not rely on the value of properties because the values are by developments by deceased and other family members who developed these properties and it is not clear who should benefit from the enhancement of the value of the properties on the suit properties.
2. With regard to Nairobi Eastleigh Plot No. 36/VII/596 it shall be sold and sale proceeds shared amongst 5 children of the deceased equally and/or representatives of the deceased's children who are deceased families.
3. Kabete/ Nyathuna/735 (5acres) the family home on the land that includes 1 acre was bequeathed to the deceased's grandson John Kabiari Kabungu for taking care of Mary Nyawira; deceased's wife and their late mother. The 4acres are bequeathed to the 1st Administrator; Simon Kabiari, the deceased showed him where to build his home which he built. After secondary education, he joined his late father in horticultural business and developed the property with horticultural crops. There are also cow and chicken sheds and he also built a servant quarter. The occupation and development of the suit property begun during and was with authority and approval of the deceased during his lifetime. The same shall remain as is between the 2 stated beneficiaries.
4. Plot no 14.Ruku shopping Centre shall be sold and proceeds shared equally between all beneficiaries.
5. Kabete/Gikuni/T.227 a commercial property with a bar, restaurant and 4 single rooms constructed by the deceased's son late Peter Kabiari. It is alleged that the structures were built by late Peter Kabiari while the Protestor states the same were built by their late father. This matter was not conclusively determined as no evidence was produced to confirm the same one way or another. Apart from the buildings constructed/developed by deceased's son Peter Kabiari if proved, the rest be shared amongst the 4 beneficiaries excluding Peter Kabiari's family as they shall benefit from the development structures built by their late father. Alternatively the suit property be shared by all beneficiaries equally.
6. Kabete/Kibichiko/605 (3acres) where the deceased allocated Peter Kabiari land to build his matrimonial home and he constructed 3 bedroom house. The deceased's son lived with 1st wife and 2 children and after her demise he married 2nd wife and had 5 children. They reside on the property to date. Similarly, the deceased pointed out to his son the land he was to construct his family's home. He developed the land built the permanent structure which cannot be demolished as the deceased's son's family will not be compensated. Therefore this land shall remain with the family of late Peter Kabiari.
7. Kabete/Nyathuna/739 (2.4 ha) shall be shared equally by daughters of the deceased Grace WanjikuNduru, Agnes Wanjiru Kabiari and Estate of Anne Wanjiku Magu.
8. Kabete/Gikuni/T15 is not available for distribution as the children of the deceased agreed that the suit property was transferred to their late mother Mary Nyawira and is registered in their mother's name and therefore not part of the deceased's estate. It is left out of the deceased's estate distribution.
9. Each party shall bear own costs.
10. The summons for confirmation shall be as the distribution herein.
11. The joint administrators to facilitate sale, survey, subdivision, transfer and registration of the divided portions.
12. Any aggrieved party may lodge appeal to Court of Appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT ON 18TH FEBRUARY 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

.....FOR THE APPLICANT

.....FOR THE RESPONDENT

.....COURT CLERK