



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 463 OF 2011

IN THE MATTER OF THE ESTATE OF NAAMAN M'MWARAWIA- DECEASED

ELIZABETH NAAMAN.....PETITIONER

-Versus-

DAVID MWITI MWARANIA.....OBJECTOR

LILLIAN GAKII.....INTERESTED PARTY

JUDGMENT

1. The Deceased herein *Naaman Mwarania* died on 9th April 2007. As per the letter of the Chief Isiolo Central Location dated 21st July 2011 the deceased left behind the following dependants;

- a. Elizabeth Kiniatore(WIFE)
- b. Fredrick Mwirigi
- c. Lillian Gaki
- d. Japheth Muthee
- e. Lydiah Mukami
- f. Eunice Kendi
- g. Monicah Mwarania
- h. David Mwiti Mwarania
- i. Stella Mukomene
- j. Naomi Nkatha
- k. Fridah Ntinyari

2. The objector herein filed for Letters of Administration on 24th July 2014 in **SUCCESSION CAUSE NO. 6 OF 2011- IN THE MATTER OF THE ESTATE OF NAAMAN M'MWARANIA** and listed the dependants/beneficiaries of the deceased as per the letter of the Chief and also listed the following as properties of the deceased;

- i. Parcel No Kiirua (Ruiru/350)**
- ii. Plot No. 374 Kulamawe Isiolo**

iii. Plot No. 14 Kulamawe Isiolo

3. Vide an Application dated 24th August 2011 the objector sought the transfer of the proceedings in Succession cause No.6 of 2011 In the matter of the estate of Naaman M' Mwarania due to the pecuniary value of the estate of the deceased. The request was granted by this Honourable Court on 29th November 2011 and cause was transferred to this Honourable Court.

4. The court on 9th March 2013 appointed Elizabeth Naaman, Japheth Muthee and David Mwiti M'Mwarania as joint administrators of the estate.

5. **Both** parties herein filed applications and in Particular application dated 30th August 2013 by the objector that sought restraining orders to restrain the interested party from disconnecting water in Plot No. 15 and also Restraining Japheth Muthee from disconnecting electricity in Plot nos. 14 & 15. The orders were granted by this Honourable Court on 5th September 2013. The interested party applied to be joined in these proceedings vide an application dated 12th September 2013. She also sought a stay of the enforcement of the orders dated 5th September 2013 and also sought court's protection from further destruction and wastage of Plot No. 15 Kulamawe.

6. The interested party herein contends he is a purchaser of 0.05 Acres excised out of KIBIRICHA/KIBIRICHA/2011 sold to him by the petitioner. He filed an application to be enjoined to this proceedings on 23rd September 2016 and in an affidavit dated 25th November 2016 he stated that he is a relevant party to this proceedings.

7. In a Ruling dated 20th March 2018 the Court enjoined the interested party in this proceeding. It also held that the matter should proceed on viva voce evidence. However by the consent of the parties the Court on 16th July 2018 directed the parties file written submission on the mode of distribution of the estate.

8. All the parties have since filed their written submissions.

Petitioners Case

9. The petitioner relies on the multiple affidavits dated 19th March 2014, 18th December 2015, 5th November 2015 in response to the respective applications filed herein, the Preliminary Objection dated 6th March 2015 and the written submissions filed on 15th August 2018 wherein she averred that the estate of the deceased is; Plot No. Kiirua/ Ruiru/506 (9.3 Acres), Plot No 374 Kulamawe- Isiolo and Motor vehicle registration No. KQG 763 Land Rover. She also states that Plot No. 14 belongs to Japheth Muthee and Plot No. 15 belongs to Lillian Gakii the same having been granted to Lillian Gakii in the year 1970. She also averred that L.R. No. Kiirua/Ruiru/3507 emanated from the original land reference Kiirua/Ruiru/59 which was also divided as follows; Kiirua/Ruiru/3506 (0.61Ha) to Naomi Nkatha, Kiirua/Ruiru/3503 (0.81Ha) to Japheth Muthee, Kiirua/Ruiru/3504 (0.41Ha) to Lillian Gakii and Kiirua/Ruiru/3505 (0.61Ha) to FridahNtinyariMwarania. She averred that the deceased also had ancestral land in Ntima/Ntakira/1137 that had a dispute but the deceased was finally granted 0.65 Acres. She averred that the objector was allowed to put up a house in the land in Ruiru. By her preliminary objection dated 6th March 2015 she asked the Court to allow her to invoke the provisions of Section 35 of the Law of Succession Act. She also sought to distribute the estate as hereunder;

i. Land Parcel No Kiirua/ Ruiru/3507

- a. Fredrick Mwirigi 2.0 acres
- b. Lillian Gaki 0,25 Acres
- c. Japheth Muthee 1.0 Acres
- d. Lydiah Mukami 0.25 Acres
- e. Eunice Kendi 0.25 Acres
- f. Monicah Mwarania 0.25
- g. David Mwiti Mwarania 1.5 acres
- h. Stella Mukomene 0.25 acres
- i. Naomi Nkatha 0.25 acres
- j. FridahNtinyari 0.25 acres
- k. 0.25 Acrs to be set aside for road reserve
- l. Elizabeth Kinatoro the remainder (Approx 2.0 Acres)

ii. Plot No. 374 Kula Mawe Isiolo Elizabeth Namaam to hold in trust for John Mburugu and James Mutembei (minor)

iii. Motor Vehicle Reg. No. KQG land Rover to Elizabeth Naaman.

10. In her submissions she averred that she should be granted the estate of the deceased and to hold in trust for the beneficiaries. She relied on the cited authorities i.e. Civil Appeal No. 4 of 2013 Esther Karoki M' Magirivrs Glory Kananu & Anor & Civil Appeal No. 30 of 2014 Justus Thiora Kiugu& 4 others vrs Joyce Nkatha Kiugu& Anor.

Objectors Case

11. The objector's main contention related to plot No. 14 Kulamawe which she states does not belong to Japheth Muthee and that Jaheth Muthee fraudulently transferred the aforesaid property after the demise of the deceased. He admitted that the said Japheth Muthee runs a shop and a posho mill in the said estate and also rents out ten (10) rooms. He attached the letter from the County Commissioner secretary dated 24th July 2013 that stated that the transfer does not exist. He also acknowledged that Plot No. 15 belongs to the interested party but it was granted to her by the deceased as a gift. He however averred that he currently resides in the same premises.

12. He stated that Fredrick Mwirigi was gifted Isiolo Kulamawe 378 and proposed to subdivide the estate as hereunder

i. Land Parcel No Kiirua/ Ruiru/3507

- a. Fredrick Mwirigi 3.0 acres
- b. Lydiah Mukami 0.25 Acres
- c. Eunice Kendi 0.25 Acres
- d. Monicah Mwarania 0.25 Acres
- e. David Mwiti Mwarania 2.5 acres
- f. Stella Mukomene 0.25 acres
- g. Leah Gacheri 0.25 Acres
- h. 0.25 Acrs to be set aside for road reserve
- i. Elizabeth Kiniatore 1.0 Acres
- j. John Mburugu 1.0 Acres

ii. Plot No. 374 Kula Mawe Isiolo to be shared equally between Elizabeth Naaman and John Mburugu.

iii. Plot No, 14 Kula Mawe Isiolo to be shared between Japheth Muthee and David Mwiti

iv. Motor Vehicle Reg. No. KQG land Rover to Elizabeth Naaman.

Interested Party

13. The interested party's claim related to Plot No. 15 Kulamawe which she claims that she was granted by the deceased in the year 1970. She averred that the same is not part of the deceased property. She has attached in her list of documents letter of Allotment dated 1st March 1999, Letter of Clearance dated 21st September 2008 and rent and rates receipts dating back to the year 1970. She therefore prays that the Honourable courts discharges and or vacates the Orders issued on 5th September 2013.

Fredrick Mwirigi& Japheth Muthee

14. Japheth Muthee vide his Affidavit dated 16th September 2013 averred that the deceased had gifted him the Property in Plot No. 14 Kula Mawe by applying for the transfer of the plot which was approved through a council Meeting dated 21st December 2005. He attached from the County Secretary dated 1st September 2008 that confirms the council Meeting and the transfer He also stated that he has developed the estate extensively and that the dispute over the property only began after the death of the deceased.

15. Fredrick Mwirigi Naaman Filed an affidavit dated 19th September 2018 claiming that he and Lillian Gakii were beneficiaries of Plot No. 15 Kulamawe and Plot No. 378 Kulamawe Isiolo respectively. That Plots No. 374 & 14 Kulamawe Isiolo were registered in the name of the deceased and remain so to date. That Japheth Muthee encroached on his parcel of Land a result of which he decided to sell the same. That he was granted 1.5 Acres in Kiirua/Ruiru/59 where he had settled with his children until he was chased away by the petitioner. That the processing of the titles in Kiirua/Ruiru/59 was done secretly and that the reason some of the beneficiaries have titles to the properties

Analysis and Determination

16. Despite the turns and drops by parties, the evidence on record and the submissions by the objector, petitioner and the interested party portend one thing for determination;

a. Distribution of the estate

17. From the evidence and admission of parties, Plot No. 15 Kulamawe Isiolo was transferred to the Interested Party. She claimed that it was her plot. Other beneficiaries claim it was a gift made to her by the deceased in the 1970's. At least parties agree that the plot belongs to the Interested Party and is not estate property. Either way such property is not estate property except if it is a gift, it is taken into account under section 42 of the Law of Succession Act when determining the share that beneficiary is ultimately entitled to. In view of the evidence I hold that the property is not estate property. It shall go to the Interested Party.

18. I also find from the evidence and admission of parties that the deceased made a gift to Fredrick Mwirigi Naaman of Plot No. 378 Kulamawe Isiolo. Similarly, the deceased subdivided the Kiirua/ Ruiru/59 into the following portions and made gifts to the persons named thereto:

1. Kiirua/Ruiru/3506 (0.61Ha) to Naomi Nkatha,
2. Kiirua/ Ruiru/3503 (0.81Ha) to Japheth Muthee,
3. Kiirua/Ruiru/3504 (0.41Ha) to Lillian Gakii and
4. Kiirua/Ruiru/3505 (0.61Ha) to Fridah Ntinyari Mwarania.

[19] Be that as it may, **the following** properties remained in the name of the deceased:-

1. LR. No. Kiirua/ Ruiru /3507,
2. Plot No. 374 Kulamawe-Isiolo; and
3. Motor vehicles.

[20] The most intriguing matter is whether the deceased transferred Plot No. 14 Kulamawe- Isiolo to Japheth Muthee.

[21] Japheth Muthee deposed under oath in his Affidavit dated 16th September 2013 that the deceased had gifted him the Property in Plot No. 14 Kula Mawe by applying for the transfer of the plot which was approved through a council Meeting dated 21st December 2005. He attached a letter from the County Secretary dated 1st September 2008 that purportedly confirmed the council Meeting and the transfer He also stated that he has developed the estate extensively and that the dispute over the property only began after the death of the deceased.

[22] The objector produced letters from the County Secretary of Isiolo disputing that the transfer was done at all of the said property to Japheth Muthee. She alleged that Japheth transferred the plot into his name fraudulently after the death of the deceased. These letters acknowledges that the transfer was actually not done.

[23] The evidence of Japheth Muthee is that he has been in occupation of Plot No. 14 Kulamawe Isiolo for a considerable time. This was acknowledged by the objector herein who averred that Japheth Muthee has rented out ten houses and operated a shop and a posho Mill at the said premises. The petitioner also stated that by virtue of being a wife of the deceased she is best placed to know the status of the properties of the deceased and to this end she acknowledged that the deceased had gifted Plot No. 14 Kulamawe- Isiolo to Japheth Muthee.

[23] Evidence by the County government on this plot and particularly whether the transfer is a forgery or not would have been most useful. However, parties were directed to canvas the issue during viva voce evidence. The report by the DCI has not been availed also. It would therefore be imprudent for the court to pretend that it can resolve this issue from the evidence on record. But the law is not helpless; rule 41(3) of the Probate and Administration Rules is the guide. The dispute on plot No 14 Kulamawe Isiolo is ownership which should be resolved completely and effectually by the Environment and Land Court. And this court will abide by the decision thereof. Therefore, I hereby set aside the said property for determination by ELC of the dispute thereto. The administrator, David Mwiti, and Japheth Muthee shall be parties in the said suit. And, subject to the permission by ELC, any other person claiming any interest, beneficial or otherwise in the said property, may be a party in the said suit. In the meantime, I order that current status in the property shall remain until otherwise determined by ELC. Japheth Muthee will not however transfer or dispose of or exchange or charge or do anything that may dissipate the said property pending determination of the question of ownership thereof or disturb the status obtaining in the property at the moment.

Distribution

[24] Now that the elephant in the room has been dealt with, I move to distribute the estate of the deceased. I note that the substantive parties seem to discriminate against daughters of the deceased. This kind of discrimination is loathed in law. I will in the circumstances of the case, strive for equity and fairness.

[25] The deceased left behind a spouse and children. The proceedings also show that the deceased was polygamous from references by the beneficiaries to other beneficiaries as step-brothers and step-sisters. Therefore, the remaining estate shall therefore be divided in terms of

Section 40 of the Law of Succession Act which provides;

40. (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.

[26] I have considered the gifts made by the deceased during his lifetime as commanded by section 28 and 42 of the Law of Succession Act. Now I order that estate herein shall be distributed as hereunder;

i. Land Parcel No Kiirua/ Ruiru/3507

- a. Elizabeth Kiniatore ½ an Acre
- b. Elizabeth Kiniatore 1 ½ Acres to hold in trust for John Mburugu and James Mutembei (minor)
- c. Fredrick Mwirigi 1 Acre
- d. Lydiah Mukami 1.26 acre
- e. Eunice Kendi 1.26 acre
- f. Monicah Mwarania 1.26acre
- g. David Mwiti Mwarania 1.26 acre
- h. Stella Mukomene 1.26 acre

iv. Plot No. 374 Kula Mawe Isiolo Elizabeth Kinaitore to hold in trust for John Mburugu and James Mutembei (minor)

v. Motor Vehicle Reg. No. KQG land Rover to Elizabeth Kinaitore.

vi. Ntima/Ntakira/1137 Elizabeth Kiniatore

Dated, signed and delivered in open court at Meru this 12th day of February, 2019.

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F. GIKONYO

JUDGE

In presence of

Kitheka for interested party

Kitheka for Rimita for Petitioner

Mutegi for respondent

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F. GIKONYO

JUDGE