



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 695 OF 2014**

**IN THE MATTER OF THE ESTATE OF PETER NDIRANGU MUTHUA alias PETER NDIRANGU MUTHWA(DECEASED)**

**BETWEEN**

**MARGARET WANJIRU MAHUGU }**

**PETER NDIRANGU NGAHURO}.....PROTESTORS**

**AND**

**JANE KAGURE KAMUNYA }**

**BENJAMIN MUCHEMI NDIRANGU}..... PETITIONERS**

**RULING**

1. The estate relates to the late **Peter Ndirangu Muthua alias Peter Ndirangu Muthwa** (deceased) who died on the 7<sup>th</sup> November, 2004; he died intestate and his estate is comprised of two (2) properties namely:

(i) **Thegenge/Gathuthi/476**

(ii) **Nyandarua/Ndaragwa/93**

2. As set out in the Chiefs letter dated the 26/01/2009 the deceased was survived by the following children;

(i) Marion Wangechi Njuki - daughter

(ii) Lydiah Wanjiku Muthua -Daughter in law

(iii) Jane Kagure Kamunya - daughter in law

(iv) Elizabeth Gathigia Ndirangu - daughter

(v) Milkah Wairimu Muhiu - daughter

(vi) Mary Wambui Ndirangu - daughter

(vii) Eva Wangui Gatu - daughter in law

(viii) Grace Wahito Ndirangu - daughter

(ix) Margaret Wanjiru Mahugu - daughter

(x) Benjamin Muchemi Ndirangu -son

3. The two Petitioners herein that is Jane Kagure Kamunya and Benjamin Muchemi Ndirangu as the daughter in law and the son of the deceased petitioned for Letters of Administration and a Grant was issued to them on the 18<sup>th</sup> November, 2014.

4. On the 24<sup>th</sup> December, 2015 the Petitioners applied for the Confirmation of the Grant and proposed a mode of distribution as set out hereunder;

**Nyandarua/Ndaragwa/93** be divided as follows;

- (i) Lydia Wanjiku Muthua - 6 acres
- (ii) Jane Kagure Kamunya - 6 acres
- (iii) Elizabeth Gathigia Ndirangu- 6.5 acres
- (iv) Mary Wambui Ndirangu - 6 acres
- (v) Eva Wangui Gatu - 7.5 acres
- (vi) Grace Wahito Ndirangu - 6 acres
- (vii) Benjamin Muchemi Ndirangu - 6 acres
- (viii) Presbyterian Foundation (PCEA Church Githima) - ½ an acre;

**Thegenge/Gathuthi/476** – No mode of distribution was proposed by the petitioner/respondents for this property as it had already been gifted *inter-vivos*;

5. Subsequent thereto the Protestors who are a daughter and grandson of the deceased filed an Affidavit of Protest against the summons for confirmation and gave their reasons for protesting and also included their proposed mode of distribution of the deceased's estate.

6. Directions were taken that the matter proceed for hearing and that '*viva voce*' evidence be tendered; after the hearing hereof all the parties were directed to file and exchange written submissions; hereunder is a summary of the respective parties.

#### **THE PROTESTORS' CASE**

7. The protestors (**'Margaret and Peter'**) who described themselves as the daughter and **grand-son** of the deceased opposed the proposed mode of distribution put forward by the respondents;

8. Margaret testified that the deceased was survived by eleven (11) children whom she named in her statement; that the deceased had two known properties one in Nyeri and another in Ndaragua;

9. She claimed that her father had invited all his children to a party not a meeting and that at this function he never discussed anything to do with the properties; she later came to hear that there was a WILL that he had written and had been shown the same by her mother; that she was not opposed to the equal distribution of Nyandarua/ Ndaragwa/93 between her siblings but proposed that three beneficiaries that is David Kimunya, Elizabeth Githigia and Benjamin Muchemi who had been gifted inter-vivos in the property known as Thengenge/Gathuthi/476 be given less portions in the subject property that was available for distribution;

10. Margaret's evidence was that the deceased had another daughter one Joan Wanjiku Ndirangu who had predeceased him and that her deceased's sister three children namely Charles Reuben Mutuota, Margaret Njeri Mutuota and Peter Ndirangu Ngahuro be given her; portion and that these three were the deceased's grand-children;

11. Her late sister lived at a place called Rugamamo with her husband Zakaria Mutuota and their three children; upon her demise the children continued to live with their father;

12. Margaret proposed that they be included in the distribution of the estate and that they be rightfully apportioned their deceased mothers portion;

13. That the provisions of the Law of Succession Act be followed to the letter during the process of distribution;

14. As for Peter his evidence was that the deceased was his maternal grandfather; his mother was the late Joan Wanjiku Ndirangu and she passed on in July, 1984 which was about 20 years before the demise of his grandfather; that she was buried on his paternal grandfather's property; his mother had three children namely Charles Reuben Mutuota, Margaret Njeri Mutuota and himself; at the time of his mother's demise he was aged 19 years and was in Form IV studying at Thika High School; that they lived with their paternal grand-mother and that it was his father who paid his school fees;

15. He testified that he was never a dependant of the deceased; that he never attended any of the meetings or parties arranged by the deceased as he was resident in the United States of America; that he had nothing to inherit from his father who only had the house he lives in;

16. He stated that he had not petitioned for any Grant of Letters of Administration to his mother's estate; but prayed that the estate be divided into equal shares amongst all the children of the deceased including their deceased mother; and that they be given their mothers share;

## **RESPONDENTS' CASE**

17. In response Benjamin Muchemi Ndirangu confirmed in his testimony that he was one of the administrators to the estate of the deceased; that his father passed on in 2004; that there were eleven (11) siblings comprising of seven sisters and four brothers; his father had property in Gathuthi and in Nyeri and that the land in Ndaragwa was in a settlement scheme and had been purchased in 1965 and was not ancestral land; before his demise the deceased had distributed the land located in Gathuthi; a portion was given to him, a brother and a sister;

18. On the 31/07/2003 his father summoned the family members, clan elders, the Chief and the Assistant Chief of Gathuthi Sub Location were present; the Protestor Margaret did not attend and his sisters who were married were not invited; at the meeting minutes were taken and were signed by his father and his mother;

19. The land in Ndaragwa was divided into seven portions as set out hereunder;

- (i) A portion to his father and wife
- (ii) Joseph Muthua
- (iii) David Kamunya
- (iv) Elizabeth Gathigia Ndirangu
- (v) Mary Wambui Ndirangu
- (vi) Elijah Ndigirigi
- (vii) And to Benjamin – the Respondent/Petitioner

20. Even the portion that had been left for the parents had been divided amongst the aforementioned seven siblings; his sisters who were married namely Milcah and Wangechi were not mentioned or given any portion and Margaret was also one of the sisters who did not benefit; and this was in accordance with the deceaseds' wishes and Benjamin also believed that married women should not inherit their fathers property; as for his sister Joan she had passed on a long time ago and her children were also not provided for by the deceased;

21. After one year of making the will the deceased passed on; that even though the deceased had written down his wishes the document was not considered to be a Will and that is why the proceeded intestate;

22. His father had cancer and his mother was diabetic and it is Elizabeth who looked after his ailing parents; and the children of Margaret also assisted in caring for their grandparents;

23. He called a witness John Munene (**DW2**) to support his case; the deceased was his uncle; he recalled that the deceased called him to his home with three *Wazees* and the sub-chief and chief were present; he could not recall the date; the children were not present neither was his wife; the deceased was sickly and wanted to distribute his estate and he told them how he wished to distribute the estate; the sub-chief took down the minutes; the Gathuthi property was given to David Kamunyu, Benjamin Muchemi and Elizabeth; the Land in Ndaragwa was divided amongst the children who didn't get in Gathuthi and the PCEA church was given half an acre; he recalled that Margaret, Milcah and Marion were not given anything; when the deceased was questioned his reason was that he was free to choose whom to give; there was no opposition to his decision; he confirmed that the will was read back to them and that he signed and the wife came out from her bedroom and also signed;

24. Two years from the date of the meeting the deceased passed on; Margaret wanted land but this was against the wishes of his uncle; Joan's children also wanted a stake in the deceased's estate but to him that was not proper as it was against Kikuyu custom as their father was still alive and this also would be against the wishes of the deceased;

25. At the close of his evidence the Respondent's prayer was that the court follows his father's wishes when distributing the property;

## **ISSUES FOR DETERMINATION**

26. After hearing the presentations of the respective counsel and reading the written submissions this court has framed the following issues;

- (i) Whether Peter and his siblings as grand-children are dependant's of the deceased; and whether they are entitled to benefit from the deceased's estate;
- (ii) Whether the oral will made by the deceased on the 31/07/2003 was valid;
- (iii) Whether to apply Section 42 of the Act;
- (iv) Distribution of the deceased's estate;

## **ANALYSIS**

**Whether Peter and his siblings as grand children are dependants of the deceased; and whether they are entitled to benefit from the deceaseds estate;**

27. The dispute is as between a sister teaming up with a grandchild of the deceased against her siblings who are Peter's aunts and uncles; it is also not disputed that the protestors are a daughter and a grandchild of the deceased; from the evidence adduced there is no dispute that it is only the Nyandarua/Ndaragwa/93 property that is available for distribution;

28. The Protestor's claim that the grandchildren are entitled to Joan's share in the estate of the deceased; the applicable provision of the law is Section 29 of the Law of Succession Act which defines a dependant; it reads as follows;

**“Section 29: For the purposes of this Part ‘dependant’ means-**

**(a).....**

**(b) Such of the deceased's parents, step-parents, grand- parents, grand-children, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;**

29. This court notes that the protestors tendered no evidence to show that upon the demise of Peter's mother the deceased had taken in the grandchildren in as his own family; there was nothing to show that the said grandchild and his siblings were maintained by the deceased during his lifetime as his own; at the hearing no documentary proof was produced to show that the deceased financially assisted the grandchildren in the payment of any bills or school fees;

30. In fact, the Protestor named Peter testified that upon the demise of his mother, he and his siblings stayed with their paternal grandmother and that it was his father who paid his school fees; he was categorical that they were never dependant's of his paternal grandfather;

31. In considering the evidence of both sides in totality this court is satisfied that the grandchild and his siblings were not dependant's of the deceased and therefore do not qualify to inherit any interest in the deceased's estate.

**Whether the oral will made by the deceased on the 31/07/2003 was valid;**

32. The petitioner Benjamin stated that even though the deceased had written down his wishes the document was not considered to be a written Will; and that is why they proceeded to petition for Letters of Administration for an intestate; but he was still adamant about his late father's wishes made at the meeting be upheld;

33. In accordance with his father's wishes none of his married sisters were to benefit; as for his sister Joan she had passed on a long time ago and her children were also not provided for by the deceased;

34. Bearing in mind that the deceased did in fact cause his intentions to be made known on the 31/07/2003 when he summoned the family members, the clan members and the chiefs and told them the manner he had bequeathed the Ndaragwa property; the presumption then is that the father made an oral will on the date of the meeting which Benjamin wants validated;

35. The applicable law is found to be Section 8 of the Act which provides that a Will may be made orally or in writing; Benjamin stated in evidence that the meeting was on the 31/07/2003 and after one year the deceased passed on; **DW2** stated that the deceased passed on two years thereafter; the death certificate indicates the date of death as 7/11/2004;

36. Upon carefully considering the evidence on the date of demise and the date the oral will this court finds that the oral will does not conform to the provisions of Section 9(1)(b) of the Act which provides that an oral will is only valid if the testator dies within a period of three months from the date of making the will;

37. For these reasons the oral will made on the 31/07/2003 is found to be invalid;

**Whether to apply Section 42 of the Act;**

38. This court reiterates that there is no dispute as to the property of the deceased that is available for distribution; the dispute hinges on distribution of the deceased's estate and the parties are not agreeable upon its mode of distribution; this court is therefore tasked with resolving this.

39. The Protestor Margaret stated that she was not opposed to the equal distribution of Nyandarua/ Ndaragwa/93 but proposed that all the three beneficiaries that is David Kimunya, Elizabeth Githigia and Benjamin Muchemi who had been **gifted inter-vivos** in the property known as Thengenge/Gathuthi/476 be given less portions in the subject property that was available for distribution; Margaret seeks for the application of the principle of equity which is enshrined in Section 42 of the Act and it reads as follows;

**“42. Where –**

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

(b) .....

**That property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house;'**

40. It is also not disputed that the deceased had distributed one of the properties to the above named beneficiaries; the only property that was not *gifted inter-vivos* was the subject property; unfortunately, this court is unable to be of any assistance to Margaret as no valuation reports were prepared and filed with respect to the properties that were gifted by the deceased *inter-vivos*; neither was the subject property valued and a report prepared and filed;

41. In the absence of such valuation reports any decision made will be merely speculative and thus no informed decision can be arrived at by this court;

**Distribution of the estate of the deceased**

42. The deceased's wish was that the married daughters were not to benefit from the estate; and Benjamin also believed that married women should not directly inherit their fathers property;

43. The 2010 Constitution prohibits any form of discrimination on grounds of gender; the law of succession also does not distinguish between male and female children neither does it discriminate against women whether married or unmarried; all children of the deceased irrespective of their gender or marital status have an equal right as their male siblings to inherit their fathers property; refer to the Court of Appeal decision of **Rono vs Rono [2008] 1 KLR 803** which did away with any form of discrimination against women;

44. Benjamin's proposed mode of distribution is found to be patriarchal and unfounded particularly when he stated that the land was not ancestral land as it formed part of a settlement scheme and had been purchased in 1965;

45. From the evidence it is discerned that there is no surviving spouse of the deceased; Benjamin stated that there were eleven (11) children who survived the deceased comprising of seven (7) sisters and four (4) brothers; the Applicable law is found at Section 38 of the Act which provides that the estate be divided equally among the surviving children;

46. The mode of distribution proposed by the Protestors is found to be untenable; and the mode of distribution proposed by the petitioners is not only unfair but discriminatory;

47. This court is satisfied that the best mode of distribution is in accordance with Section 38 of the Act; which is in equal shares among all the surviving children;

**FINDINGS AND DETERMINATION**

48. The grandchild Peter and his siblings are found not to be dependants of the deceased and do not qualify to inherit any interest in the deceased's estate.

49. The oral will made by the deceased on the 31/07/2003 is found to be invalid;

50. In the absence of valuation reports Section 42 is found to be inapplicable;

51. The Protests are thus found lacking in merit and are hereby dismissed.

52. The Petitioners mode of distribution is found to be unfair and discriminatory; the 1<sup>st</sup> Protestor's mode of distribution is found to be untenable;

53. The Grant is hereby confirmed on the terms as set out hereunder;

The property known as is land parcel number **Nyandarua/Ndaragwa/93** shall be divided into eleven (11) equal shares between all the surviving children of the deceased; the sisters to be included whether married or unmarried;

54. Each party shall bear their own costs.

It is so ordered.

**Dated, Signed and Delivered at Nyeri this 7<sup>th</sup> day of February, 2019.**

**HON. A. MSHILA**

**JUDGE.**