



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 187 OF 2000

IN THE MATTER OF THE ESTATE OF NAHASON M'NGUTARI M'MUKANGU (DECEASED)

FREDRICK KIOGORA NGUTARI.....PETITIONER

VS

TOM MWETERWA NGUTARI1ST OBJECTOR

TRASILA MWITIABI NGUTARI... 2ND OBJECTOR

JUDGMENT

1. NAHASON M'NGUTARI M'MUKANGU (“the deceased”) to whom this Succession Cause relates died on 12th December 1999. He was survived by the following:

1st House

- a. Harriet Kainda - Widow (*deceased*)**
- b. Elizabeth Ngugi - Daughter**
- c. Fredrick Kiogora - Son (*deceased*)**
- d. Hellen Karimi - Daughter (*deceased*)**
- e. Irene Kanyua - Daughter**

2nd House

- a. Trasila Mwitiabi - Widow**
- b. Tom Mweterwa - Son**
- c. Jane Mutabi - Daughter**
- d. Helena Mucee - Daughter**

His assets comprising of:

- 1. L. R. No. Abothuguchi/Ruiga/1796 (0.81Ha)**
- 2. L.R. No. Abothuguchi/Ruiga/1797 (0.99Ha)**
- 3. Plot No. 2B Nkarine Market**
- 4. Shares at Kagundune properties**

5. Shares at Meru Central Farmers Union

6. Shares at the Co-operative Bank

7. Shares at Nkando Farmers' Co-operative Society

8. M C F Co-operative Union Bank

2. Grant of letters of administration intestate was made to the Petitioner on 16th November 2000. But, the 1st objector applied inter alia for revocation or annulment of the said grant in a chamber summons dated 18th December 2000 which is expressed to be brought under **Section 76 and 68(1) of the Succession Act and Rule 17 (2) and 44 of the Probate and Administration Rules.**

3. The grounds upon which the application is grounded are set out in the application and the supporting affidavit of Tom Mweterwa Nguthari sworn on 18th December 2000. The major contentions are:-

a. That the petitioner filed the cause secretly without informing the 1st objector and his family members.

b. That the petitioner intends to disinherit them considering he was already allocated **land parcel No. Abothuguchi/Ruiga/219** which measures 6.59 acres.

c. That there was a land dispute Tribunal Case No. 51 of 2000 which was decided in his favour but the petitioner filed a Judicial Review No. 162 of 2000 which is pending in court. The case is over the same properties.

4. The 2nd objector in her affidavit sworn on 6th February 2006 augmented the claim by the 1st Objector and asserted that the deceased had indeed gifted the petitioner parcel No. 219 in trust for himself and all the beneficiaries of the deceased. The deceased was then left with **L.R. NO. ABOTHUGUCHI/RUIGA/189** measuring 1.80Ha which he sub-divided into two portions **Abothuguchi/Ruiga/1796 and 1797** which she and her son are in occupation of. As for plot at Nkarine market she proposed that it should be shared equally between the 1st objector and petitioner. She was of the view that, therefore,, parcels No. 291, 1790 and 1791 be combined and divided into two equal portions and shared equally to the two houses.

5. The Petitioner, Fredrick Kiogora Nguthari filed a replying affidavit sworn 6th February 2001. He averred that he requested the objectors to join in the filing of the cause but they refused. Thus, they were informed of the proceedings. They also filed a complaint in the tribunal case No. 51/2000- which was an attempt to circumvent this cause. He termed the allegations made by the 1st objector to be false and perjury as he did not obtain the death certificate through forgery.

6. This matter was to be determined vide *viva voce* evidence. **PW1 Florence Kanyua Kiogora** wife of the petitioner (*deceased*) prayed that the objection be dismissed for want of prosecution and the scheme of distribution filed by the petitioner to be upheld. That Parcel No. 1796 to go to Trasila Mwitabi and No. 1797 to go to Harriet Kainda as it is written so behind exhibit *P1* and *P2* respectively. She claimed that the deceased had written in a notebook dated 3rd August 1998 in his handwriting of how his estate is to be distributed of which he had shown him. She however stated that she did not see him write it. As for Plot 2A Nkarine market she proposed that it should go to Harriet Kainda and Plot 2B Nkarine market to Trasila Mwitabi. She affirmed that she knows nothing about Kagundene Meru Ranching. She stated that Trisila withdrew the money at Nkando Farmers' Co-operative account. Kenya Breweries and Afya Mill shares should be shared 50 -50.

7. PW2 Zakayo Njoka Muongo retired surveyor testified that the deceased instructed him to subdivide plot No 189 into two portions for his respective wives as he wanted to put one house in each plot. Plot No. 1796 was to go to Trasila and Plot No. 1797 to Harriet Kainda.

8. PW3 Elizabeth Ngugi Muriuki daughter of the deceased averred that the deceased left Plot No. 1796 and 2B to Trasila Mwitabi and Plot No. 1797 and 2A to Harriet Kainda. As for plot No. 219 it never belonged to the deceased as it was given to the petitioner by their maternal grandfather.

9. PW4 Cornelius Mboya stated that the deceased was his uncle and he had subdivided the land but had not given his children any land as he had left his wives to give them. When he was sharing his land he called him and showed him the respective portions; Plot No. 1976 to Trasila and Plot No. 1797 to Harriet.

10. At the close of their case, the objectors gave their sworn testimonies. **OB1 Tom Mweterwa Ngutari** affirmed that the petitioner should not get a share as he got 6 acres from the deceased. The record from adjudication shows that Kiogora Ngutari was given land by the deceased since first registration was done in 1965 and petitioner born in 1950. When he got married the deceased asked him to move his family to that land. That the deceased wanted No. 189 which was subdivided into two as one piece for him and the other was for his mother and her daughters. The deceased had transferred one part of Plot No. 2 Nkarine market to the petitioner but died before transferring to him his part of which should be given to him.

11. OB2 Trasila Mwitabi wife of the deceased told the court that she and Harriet used to live with the deceased at Gitune but at the time of his death Harriet had moved to Kaingi to live with his son. She had her house at Gitune but it withered and fell off but her son was arrested of alleged malicious damage. When No. 189 was divided into two the 1st objector took one side and she the other. She proposes that the estate be distributed according to the deceased's wishes that are wife of Kiogora to stay at Kaingi and she at Gitune.

12. This matter was canvassed by way of written submissions. The petitioner submitted that Plot No. 219 is registered in the name of the

petitioner of which it cannot be regarded as free property of the deceased under **Section 3 of CAP 160**. That the said land parcel was not a gift *inter vivos* as a person cannot gift that which he does not own. He relied on the cases of **In re Estate of the Late Gideon Manthi Nzioka (deceased) [2015] eKLR** and **In re Estate of Chepkwony Arap Rotich [2018] eKLR**

13. The objectors submitted that the petitioner filed the petition secretly without informing them. That the 2nd objector being the widow of the deceased should have been issued with the grant letters of administration as she ranks in priority under **Section 66 of the Law of Succession Act**. They affirmed their suggested mode of distribution with regard to the land parcels as plot No. 219 was a gift *inter vivos* to the petitioner. With regard to shares at Kagundune properties, Meru Central Farmers Union, Co-operative Bank and Nkando Farmers' Co-operative Society they stated should be distributed to Trasila Mwitabi Ngutari as she is the widow who is elderly with no income to support her.

ANALYSIS AND DETERMINATION

14. Two matters arise for determination: (1) revocation and or annulment of the grant letters of administration; and (2) distribution of the estate.

Of revocation

15. Circumstances for which a grant will be revoked or annulled are stated in **Section 76 of the Law of Succession Act**. According to the objectors the petitioner filed the cause secretly and without their consent.

16. According to **Rule 26 of the Probate and Administration Rules** consent from the beneficiaries should be filed in Form 38 or 39. I do not see any consent from the objectors and the rest of the family members. Of significance is that, under **Section 66 of the Law of Succession Act** the surviving spouse is given priority in applying for grant. In this case, the 2nd objector is the widow of the deceased and is alive and she ought to be given priority. Nothing shows she renounced her right or gave consent to the applicant desiring to take out the letters. In circumstances as those alleged by the petitioner, a citation should have been issued. See **Rule 7 (7) of the Probate and Administration Rules**:

“(7) Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has—

(a) renounced his right generally to apply for a grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.”

17. No citation was issued. The petitioner did not comply with the law. As a result this grant is amenable to impeachment. In any case by the death of the petitioner, the grant became useless and inoperative in law and must be revoked. The grant is revoked. However, in the appointment of administrators of the estate, the fact that there are two houses is relevant factor in law. The petitioner comes from the first house and the 2nd objector is the widow of the deceased and is the second house. By law, each house should be represented. Accordingly, I appoint the wife of the petitioner and the 2nd Objector as administrators of the estate. I make a grant to them.

Distribution

18. As the deceased was polygamous, **Section 40 of CAP 160** will guide distribution of his estate. See the section below that:

“(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.”

19. The section cited above embodies equality and equity so as to ensure that each beneficiary gets what is rightly theirs. I have always held the view that it is not in all cases that absolute equality is attained. For instance, where a gift *inter vivos* was made, section 42 of the law of Succession Act requires the gift to be taken into account in determining the ultimate entitlement of such donee. Again, other circumstances as provided under section 26 and 28 of the law of Succession Act may tilt the scale against absolute equality. Some beneficiaries may have special needs, say, children in need of education and up-bringing or persons with disabilities in need of special care and attention. Such are relevant considerations in distribution of the estate. These matters will dictate need to attain equitable and fair distribution of the estate as opposed to strictly mathematical equality.

20. Be that as it may, **PW1** told the court that the deceased had made a declaration of how he wished his estate to be distributed. In support of her claim, she produced **P Exh 3b**. **OW1** asserted that he has never seen the declaration and or will. Is this a will in accordance with **CAP 160**? The document is written material. **Section 11** of the Law of Succession Act requires a written will to be signed by the testator and

attested by two or more competent witnesses in the presence of each other. The document in question is written in Kimeru language and is allegedly signed by only the testator. It is said to distribute only part of the estate. As such, the declaration cannot be said to be a will as it does not meet the threshold of a written will as stipulated by the law. Hence the deceased died intestate and his assets will be distributed according to **Section 40**.

Gift inter vivos

21. It was pointed out that **land parcel No. Abothuguchi/Ruiga/219** which measures 6.59 acres was first registered under the name of the petitioner when he was still a very young boy by the deceased. The petitioner refuted this claim and stated that the land originated from his maternal grandfather. It is trite law that whoever alleges must prove. The objectors is the party alleging that the said land parcel initially belonged to the deceased, thus, bears the burden of proof thereto. Unfortunately, they did not provide a shred of evidence to prove their claims. I expected records on gathering, consolidation and adjudication of the land to be availed. None was availed except a word of mouth. They failed to prove the land was a gift inter vivos by the deceased to the petitioner. I will not therefore take it into account under section 28 and 42 of the law of Succession Act. But in passing I should state that I have encountered many cases in this jurisdiction where individuals were registering their minor children so that they could secure more pieces of land during gathering, consolidation and adjudication of land. This was contrary to the law and fraudulent. In such case, the law will not aid a fraud or permit a person to benefit from his own criminal acts. Such land will be taken to belong to the person registered as the proprietor and not the person who committed fraud.

Other properties

22. In all fairness and equity Plot No. 2B Nkarine Market ought to be given to the 2nd house as Plot No. 2A had already been gifted to the 1st house. As for plot No. 1796 and No. 1797 they should be distributed to 2nd House and 1st House respectively taking into account the number of children in each house. The 1st house has an additional member, the widow, as compared to the 2nd house. As such, they should get the larger portion. I note also that some of the deceased's children are deceased, but; they left behind children who are entitled to take their respective parent's share based on the principle of representation and the provisions of **Section 41 of the Law of Succession Act**. As for the shares, they should be distributed to the widow who is elderly and needs income to facilitate nice feeling and quality life of a spouse. I have not also forgotten what I have always stated that surviving spouse has rights to the property of their marriage. The children are also persons who can take care of themselves.

23. From the foregoing analysis, I make the following orders:

- a. The grant of letters of administration intestate issued to Fredrick Kiogora Ngutari on 16th November 2000 is revoked.
- b. Fresh grant of letters of administration intestate is made jointly to Trasila Mwitabi Ngutari and Florence Kanyua Kiogora.
- c. The said grant in (b) is confirmed and the estate shall be distributed as follows:

1. L. R. No. Abothuguchi/Ruiga/1796

To the 2nd House to be shared equally amongst the members thereof.

2. L.R. No. Abothuguchi/Ruiga/1797

To the 1st House to be shared equally amongst the members thereof

3. Plot No. 2B Nkarine Market

To the 2nd House

4. Shares at Kagundune properties, Meru Central Farmers Union, Co-operative Bank, Nkando Farmers' Co-operative Society and M C F Co-operative Union Bank

To Trasila Mwitabi Ngutari

- d. Each party shall bear own costs.

Dated, signed and delivered in open court at Meru this 3rd day of April, 2019

F. GIKONYO

JUDGE

In presence of:

Muriera for Kithinji for 1st objector

Murango Mwenda for Kaumbi for petitioner

F. GIKONYO

JUDGE