



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT SUCCESSION CAUSE NO.1253 OF 2012

IN THE MATTER OF ESTATE OF KANYARI MATONGU (DECEASED)

GITHENYA MATONGU.....PETITIONER/APPLICANT

VERSUS

WILSON MUTHOMI KANYARI.....1ST PROTESTOR

DAVID GITONGA KANYARI.....2ND PROTESTOR

JUDGMENT

Kanyari Matongu is said to have died on 1st July 1967. According to the letter from the chief-Karundu location dated 28th March 2006 he was the proprietor of Thengenge/Unjiru/151 and was survived by the following heirs:-

1. Githenya Matongu-brother
2. Wilson Muthomi Kanyari-son
3. Evans Matongu Kanyari-son
4. Richard Githenya Kanyari-son
5. David Gitonga Kanyari-son
6. Jane Nduta Matongu-daughter

Githenya Matongu the brother to the deceased, and the petitioner herein filed for and was issued with grant of letters of administration intestate on 1st December 2014. This was after he had cited all the other beneficiaries.

Jane Nduta Kimari entered appearance on 13th November 2012.

On 19th June 2015 the petitioner filed summons for confirmation of grant and proposed that the estate be shared between himself and Wilson Muthomi Kanyari a son of the deceased. This provoked affidavit of protest filed on 15th July 2016 by Wilson Muthomi Kanyari and David Gitonga Kanyari stating that they were sons of the deceased and they survived their father together with-

Ø Evanson Matongu Kanyari

Ø Richard Githenya Kanyari

Ø Rebecca Wakuraya Kanyari

They proposed that Githenya Matongu to get 1/3 of the estate and the four brothers would share 2/3 of the estate equally. Their sister was not provided for.

Jane Nduta filed her protest on 27th October 2016 she deponed that she too was a child of the deceased. That deceased was married to 2 wives her mother Monica Wairimu Kanyari and Ruth Wanjiku Kanyari the mother to the other beneficiaries – that the title was registered in equal shares between her father and the petitioner and that her father had shared the property into 2 equal shares before he died one ½ to the petitioner, the other ½ to the wives in equal shares. She therefore proposed that the petitioner get 2.2 acres and each of the houses get 1.1 acres meaning 1.1 acres to herself and 1.1 acres to be shared equally by the other beneficiaries.

The protests and the summons for confirmation of grant were heard by viva voce evidence. The issues that arose are:-

- a) Whether Jane Nduta Kimari was a child of the deceased.
- b) Whether she was beneficially entitled to the estate
- c) Whether the petitioner as brother of deceased is entitled to the estate.
- d) How the estate should be distributed?

Section 38 of the Laws of Succession Act clearly provides that

“where an intestate has left a surviving child/children but no spouse the net intestate estate shall – subject to the provisions of s.41 and 42, devolve upon the surviving child if there be only one or shall be equally divided among the surviving children”.

The deceased died in 1967. The Law of Succession Act came into force in 1981. However **section 2 of the Act provides:**

1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act. (emphasis mine)

Hence despite the fact that deceased died before the Act came into force the administration of the estate is still governed by the Law of Succession Act, and most certainly by the prevailing Constitutional dispensation.

From the evidence before me, the 2nd protester Jane Nduta testified that

“My mother had no children. She bought me to be her child.”

Asked for clarification from the court as to the meaning of the term 'being bought' with reference to herself- whether she was 'bought' as a wife of the deceased or as a child, she told the court that the deceased's 1st wife bought her to be her child because she did not have children of her own. This would appear to mean that the deceased's 1st wife adopted her yet there was no evidence of such adoption. She could not also have been adopted with her own children as on her own testimony she was 'bought' to become a child and came with two of her own children- Anne Wambui and Grace Njeri. She testified that she and had borne other children while at the 1st deceased's wife's home.

It was put to her that she had come to Monica's home as her employee. She insisted that she was not an employee of Monica but a child since 1982 and that it was only after Monica's demise that the rest of the family had began to harass her. She confirmed that the said Monica had other properties land in Kieni, which she bought with her coffee boom, and plots which she had taken over and none of the other beneficiaries herein had interfered. She maintained that the suit property belonged to both her parents.

The intriguing thing was how she interchangeably referred to herself as both a 'child' and a 'wife' of the deceased's home. She would say, 'since I was married in this home' and 'I am a child of Monica'.

Her witness Juliana Gathoni Nderitu's testimony was what Jane Nduta was 'married' by Monica Kanyari making her a 'child' of the home. She confirmed that Monica had land in Naromoru registered in her name, and which Jane had occupied. Daisy Gathoni Gitonga also testified that Nduta was 'child' of deceased's first wife.

It is not in dispute that deceased had two wives. Monica is said to have died in 2003, while deceased died in 1967. It is Nduta's testimony that she came to the home in 1982. This was long after the deceased died. She wants to benefit as 'wife of Monica' and as 'a child of Monica and the deceased'. Obviously, she cannot be both. She testified that Monica did not have children of her own. That Monica 'bought' her. That she came to Monica's home in 1982. Monica had her own property which she took over upon her death, and which the other beneficiaries never asked/looked up despite the fact those properties were registered in Monica's name- she was their stepmother. They say they have left those to Nduta according to Monica's wishes.

Clearly Nduta is not a child of Kanyari by any stretch of imagination. She is not a beneficially entitled to his estate even through Monica's name.

Under s. 40 of the Law of Succession Act, if the estate was being distributed in Monica's lifetime, Monica would be entitled to a share of her

husband's property. If she had children, her house would now get a share of the estate. Upon her own demise she left no spouse and no children, hence her estate would be governed by s. 36 of the Law of Succession Act.

Nduta did not establish either dependency/any beneficial interest in the deceased's estate. If she was married by Monica then she inherited Monica's properties- if Monica 'bought' her as her child then she would have to establish that "buying" amounted to legal adoption that involved the deceased to warrant her lay claim to Kanyari's estate as a child of the deceased.

Hence the question whether Jane Nduta Kamari is a child of the deceased and a beneficiary to the estate – the answer is no.

What about the petitioner? He is brother to deceased. The other beneficiaries concede that he is entitled to a share of their father's estate because they are aware of their father's and uncle's agreements. Hence the only issue is how much. There is the proposal of 1/3 and 1.5 acres out of the parcel of land. The petitioner's position was that the said Jane Nduta is entitled to the estate. However he did not avail any evidence to support her claim. Her own evidence and that of her witnesses did not support her claim either. He did not raise any other opposition to the protests. I would therefore find that the protest by Wilson Muthomi Kanyari and David Gitonga Kanyari succeeds.

In the upshot the protest by Jane Nduta Kimari is dismissed.

The summons for confirmation of grant as filed by the petitioner is also dismissed.

Conclusion

The protest by Wilson Muthomi and David Gitonga is allowed in the following terms;

1. The estate Thengenge/Unjiru/151 be distributed as follows:

Githenya Matongu 1.5 acres

The balance be shared equally among the children of Kanyari Matongu

Wilson Muthomi Kanyari

David Gitonga Kanyari

Evanson Matongu Kanyari

Richard Githenya Kanyari

including Rebecca Wakuraya Kanyari unless she specifically waives her right to inherit.

2. No Orders as to costs

Dated, delivered and signed this 9th Day of May 2019 at Nyeri.

Mumbua T Matheka

Judge

In the presence of

Court Assistant: Jerusha

Wilson Muthomi

Richard Githenya

David Gitonga Kanyari

Githenya Matongu

Jane Nduta

Rebecca Wakuraya Kanyari states to court: I wish to tell the court that I do not want any part of the estate:

Court verifies ID: Name Rebecca Wakuraya Kanyari. ID No. xxxxxxxx.

3. Order: The name of the said Rebecca Wakuraya Kanyari be omitted from the distribution of the estate herein, she having waived her right to inherit in open court.

Judge