



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 878 OF 2014

(IN THE MATTER OF THE ESTATE OF STANLEY M'MUGWIKA (DECEASED))

NEWTON KIMATHI M'MUGWIKA

MERCY MWARI M'MUGWIKA

EMILY WANJA M'MUGWIKA.....APPLICANTS

-VERSUS-

HENRY KIAMBI M'MUGWIKA.....PROTESTOR

JUDGMENT

On 20 January 2015, the grant of letters of administration of the estate of Stanley M'mugwika Baichu (hereinafter 'the deceased') was made to the applicants. The deceased had died intestate at Good Hope Medical Hospital, on the 18 May 2013 at the age of 93 years by which time he was domiciled in Kenya his last known place of residence being Oljoro Orok Location in Nyandarua County.

According to the affidavit in support of the petition, both the applicants and the protestor are some the children of the deceased; the rest of the children who survived him are listed in that affidavit as follows:

1. Martin Munene M'Baichu
2. Ruth Gatwiri M'Mugwika
3. Jeska Mbaya M'Mugwika
4. Sabella Mworira M'Mugwika
5. Remmy Kinyua M'Mugwika
6. Jane Karuku M'Mugwika
7. Elizabeth Kagwiria M'Mugwika

The deceased's assets as landed properties identified as:

1. Title No. Nyandarua/Lesirko/3665 measuring approximately 3.395 ha
2. Title No. Kibirichia/kibirichia/233 measuring approximately 6.11

Other assets are what I understand to be income rental income from land leased to Safaricom Limited for its transmission masts and the credit balance in the deceased bank account No. 0278442691 at Barclays Bank at Nyahururu Branch.

The deceased is stated to have been owing one Samuel Gacheru Itegi the sum of Kshs. 100,000; this is listed as the only liability to the estate.

By a summons dated 3 August, 2015, the applicants sought to distribute the estate amongst the deceased's survivors as follows:

1. Title No. Nyandarua/Lesirko/3665

(i) Newton Kimathi (0.95 acres)

(ii) Jane Karuku(0.95 acres)

(iii) Martine Munene (0.95 acres)

(iv) Jeska Mbaya (0.95 acres)

(v) Henry Kiambi (0.95 acres)

(vi) Sabella Mworora (0.95 acres)

(vii) Ruth Gatwiri (0.64 acres)

(viii) Mercy Mwari (0.64 acres)

(ix) Elizabeth Kagwiria (0.64 acres)

(x) Emily Wanja (0.64 acres)

2. Title No. Kibirichia/kibirichia/233

(i) Newton Kimathi (2 acres)

(ii) Jane Karuku (2 acres)

(iii) Martine Munene (2 acres)

(iv) Jeska Mbaya (2 acres)

(v) Henry Kiambi (2 acres)

(vi) Sabella Mworora (2 acres)

(vii) Ruth Gatwiri (0.683 acres)

(viii) Mercy Mwari (0.683 acres)

(ix) Elizabeth Kagwiria (0.68 acres)

(x) Emily Wanja (0.683 acres)

(xi) Kiamogo Water project (0.25 acres)

3. Safaricom rental income

To be shared equally amongst all the children of the deceased.

4. Funds at Barclays Bank Nyahururu Branch A/c 0278442691

To be share equally among the children of the deceased.

The protestor was not satisfied with this scheme of distribution of the estate and so on 28 October 2015 he filed an affidavit of protest on the basis that the deceased died testate. According to him, the deceased left a will in which he, the protestor, was appointed the executor. His case was that the estate ought to be distributed in accordance with the wishes of the deceased as expressed in the will. He also deposed that the petition was filed and the grant made without his knowledge; the applicants, according to him deliberately suppressed from the court that the deceased died testate.

When the protest came up for hearing, the protestor testified that he obtained a copy of the will from his sister Emily Wanja, the 3rd applicant in this cause. He became aware of the will when a certain chief spoke of its existence during the deceased's burial.

Apart from the protestor, the only other witness who testified in support of his case was one Cyrus Rintari whose evidence was that a chief summoned him to witness the writing of the will by the deceased. He testified further that the will was in fact drawn by a lawyer who he

identified as Ndegwa. Although he admitted that the deceased was almost 100 years old and was sickly, he nevertheless instructed the lawyer on the contents of the will. He also advised that there was another witness who witnessed the deceased sign the will. However, none of these people alleged to have been present when either the instructions to draw the will were given or when the will was purportedly signed by the deceased testified. The lawyer who is alleged to have drawn the will did not also testify.

The applicants denied the existence of any will. In any event, the deceased was ailing and senile at the time he is alleged to have signed the will. In particular, the 3rd applicant who is alleged to have given the protestor a copy of the will denied having in possession of such a will at any time. She added that at the age of 93, their father was too sick and senile to write any will.

A clinical officer at the Good Hope Medical center in Nyahururu where the deceased was treated and died testified that the latter had been a patient in that hospital since August, 2011 of various ailments including low blood sugar and senility.

Based on the material before court, it is apparent that the deceased died intestate for the obvious reason that although the protestor claimed that he left behind a will, he never proved the existence of such a will. What he produced as a will is a copy of a document whose source, he could not explain either to the satisfaction of the court or at all.

As a rule, he who asserts must prove; this is what section 107(1) of the Evidence Act, cap. 80 is all about; it says:

107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

It follows that it was always incumbent upon the protestor to prove the existence of the will if at all there was any. In my humble view, he did not discharge this burden.

Assuming what he produced was the will in question, it could not stand the test of time for several reasons; first, the advocate who is alleged to have been given instructions to draw the will never testified; secondly, except for Cyrus Rintari who is alleged to have been present when instructions to write the will were given and when the deceased purportedly signed the will, none of the rest of the witnesses who are alleged to have witnessed the will testified; thirdly, it is not apparent from the will itself when it was drawn although the witnesses are indicated to have attested it on 16 April, 2013; the deceased died on 31 May 2013. Less than two months thereafter. According to the certificate of death, he died of, among other ailments, senility. I agree with the applicant's that owing to his age and poor health, he could not have been in the frame of mind to write a will less than two months before he died.

My conclusion is that there was no will and the deceased died intestate. It follows that the protestor's protest has neither factual nor legal basis it is dismissed with costs to the applicants.

Under section 38 of the Law of Succession Act, cap. 160 where an intestate has left a surviving child or children but no spouse, the net intestate estate devolves upon the surviving child, if there be only one, or is ordinarily subdivided among the surviving children in equal shares.

Except for the protestor all the surviving children of the deceased had agreed on a scheme of distribution which, in their view, will ensure that each one of them, including the protestor, gets an equal share of the estate. A consent to this effect was filed in court alongside the summons for confirmation of grant on 3 August 2014. No doubt their proposal is consistent with section 38 of Act.

I will however temper with their proposal in one respect only; they introduced a beneficiary which they have described as Kiamogo Water Project. It did not come out from the evidence whether this is a legal entity capable of holding property in its own name and if so, how it was related to the deceased as to benefit from his estate. In the face of this uncertainty I hereby order that the parcel of land measuring 0.25 acres in Title No. Kibirichia/Kiandugui/223 allocated to Kiamogo Water Project be registered in the names of the administrator/ administratrixes to hold in their names for their benefit and for the benefit of the rest of the deceased's children. Except for this variation, and subject to payment of the outstanding debt of Kshs. 100,000/= which I hereby order will be paid out of the funds held at Barclays Bank, and if they will not be sufficient, from the proceeds of the rental income as well, the deceased's net intestate estate shall be distributed as proposed by the applicants in paragraph 4 of the affidavit by the applicants sworn on 3 August 2015 in support of the summons for confirmation of grant. The grant made to the applicants on 20 January 2015 is confirmed in those terms. It is so ordered.

Dated, signed and delivered in open court this 7th day of June, 2019

Ngaah Jairus

JUDGE