



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO.32 OF 2017

(FORMERLY OF NKR.298 OF 2014)

IN THE MATTER OF THE ESTATE OF WILSON KARANJA MUIRURI (DECEASED)

A N D –

JOSHUA THUO.....PETITIONER

JUDGMENT

Wilson Karanja Muiruri (the deceased) died on 2/6/2013 at Matura. The deceased's son Joshua Thuo, petitioned the court for letters of administration which were issued on 16/7/2014. By the application dated 24/6/2015, through the firm of Kerongo & Co. Advocates, the petitioner filed summons for confirmation of grant under Section 71 of the Law of Succession Act and Rule 40 of Probate and Administration Rules.

The deceased was survived by the following children:

- 1. Joshua Thuo**
- 2. James Mwangi**
- 3. Peter Manene**
- 4. Solomon Njuguna**
- 5. Samuel Irungu**
- 6. Isaac Ng'ang'a**
- 7. Hannah Njeri**
- 8. Margaret Mugure**
- 9. Eunice Wambui**
- 10. Martha Wanjiru**
- 11. Judy Muthoni**
- 12. Paul Maina (deceased)**

At Paragraph 5 of his affidavit, the petitioner listed the deceased's property as including:

- a) Nyandarua/Ol'Kalou West/151***
- b) Nyandarua/Ol'Kalou Salient/1776***
- c) Nyandarua/Ol'Kalou Salient/1774***

d) Nyandarua/Ol'Kalou Central/5291

e) Nyandarua/Ndemi/1712

f) Temp Kiosk Rurii

g) Temp Kiosk Captain

h) Shares at Kenya Commercial Bank XX

i) Shares at Kenya Commercial Bank XX

j) Shares at National Bank XX

*k) Shares at Kenya Airways **XX***

l) Shares at Kenenya KCBC/XX

m) Shares at Ol'Kalou Holdings Ltd 97

n) Bank Account at Equity A/C.No.XX

o) Bank Account At Barclays Bank A/C.No.XX

To the application dated 24/6/2015, the petitioner attached a schedule of how the deceased's property was to be shared amongst the deceased's children. Apart from Hannah Njeri who got an equal share of land with the sons of the deceased and the shares including deposits in the bank, the other daughters were only allotted $\frac{3}{4}$ acre each.

Margaret Mugure filed an affidavit of protest to the confirmation dated 23/3/2016.

The protestor disputed the petitioner's contention that the family members had met and agreed on the mode of distribution; that the deceased's daughters had been discriminated against by being given only $\frac{3}{4}$ an acre each from the whole estate. The protestor deponed that the estate should have been distributed in accordance with Section 38 of the Laws of Succession Act.

The parties agreed that the protest be disposed of by way of written submissions which the counsel filed and highlighted.

The protestor's submissions were filed in court on 5/12/2018. Mr. Muriithi, counsel for the protestor submitted that the mode of distribution discriminates against the daughters of the deceased because they are women and are married and hence were given only $\frac{3}{4}$ acre each. Counsel relied on Article 27 (4) and (6) of the Constitution which bars discrimination on account of sex, age, religion, etcetera; that Article 27 guarantees equality before the law. He further relied on the decision of Rono v Rono CA.66/2002 where the Court of Appeal held that all children are equal before the law irrespective of sex. Counsel also cited Article I of CEDAW which bars all forms of discrimination against women on account of sex.

Counsel also cited the case of **Estate of Muga Njagi** where J. Mrima observed that the spirit of the Law under Section 35(5) of the Laws of Succession Act was the equal distribution of the intestate estate amongst the surviving children of the deceased.

The petitioner/respondent, Joshua Thuo, filed a replying affidavit to the protest in which he deponed that the protestor is out to mislead the court because the deceased's daughters signed a consent dated 8/6/2015 (J.T.K.I); that the five brothers and one sister were not involved in the distribution of the estate because it was done by the clan on 7/11/2014. That the clam members were: John Muiruri, Peter Kamau Muiruri, Mary Wambui Ng'ang'a, Peter Njuguna Muiruri, John Mwangi Ng'ang'a, Maina Njoroge, Mrs. Njeri Kungu and Mrs. Kungu Ngugi; that the protestor was present on the said date as per the minutes of the day (JTKII); that the clan took into account the provisions of the Constitution because though the daughters of the deceased had not been provided for by the deceased, the clan did provide for them; that the court should take into account provisions of Section 38 Laws of Succession Act as read with Section 28 of the same Act; that the protestors are greedy because the protestor, Margaret, has 8 acres of land with the husband whereas she still wants to get part of the 3 acres that have been given to the deceased's sons.

Mr. Langat, counsel for the petitioner reiterated the contents of the replying affidavit to the protest. Counsel urged that the court should consider Section 28 and 29 of Laws of Succession Act as what was done was not discriminatory but amounts to equitable distribution which the court should uphold.

After giving due consideration to the affidavits and the oral submissions, I think that the issues that the court needs to resolve are as follows:

1) Whether the deceased left a Will or died intestate;

2) Whether all the beneficiaries agreed on distribution;

3) How should the deceased's estate be distributed;

4) Who bears the costs of the cause.

On the question whether the appellant left a Will:

Joshua Thuo petitioned for letters of administration on 24/4/2014 and in the said Petition (P&A.80), it is clear that the grant was for letters of administration intestate. The affidavit in support of the petition for letters of administration intestate (P&A.5) and the affidavit of justification dated the same day also indicate that it was a petition for letters of administration intestate.

In his affidavit dated 4/5/2016, the petitioner, Joshua Thuo Karanja, at paragraph 8, averred that the distribution was in accordance with the deceased's Will dated 25/4/2013 and annexed the purported Will as J.T.K. III. The said document is dated 25/4/2012 and written in Kikuyu language. There was no translation into English and is therefore not in the language of the court, namely English or Kiswahili. The contents of the documents are therefore unknown to this court.

In addition, it is trite law that a party is bound by their pleadings. Having pleaded that the deceased died intestate, the petitioner cannot change midway and purport to rely on a Will.

The purported Will and its translation were never filed together with the petition. So far, there is no Will before this court. If the applicant is indeed sure that there was a Will and there are witnesses to that Will, then the witnesses' statements should have been recorded and he should have agreed to this matter proceeding by way of viva voce evidence to call the said witness. However, the parties settled on proceeding by way of affidavit evidence. In any case, the petitioner contradicts himself as the pleadings are clearly for an intestate and he now seeks to proceed as if the deceased died testate. I am satisfied that the deceased died intestate and the allegation that a Will existed is an afterthought and unbelievable.

Whether the consent of all beneficiaries was obtained before filing the application for confirmation:

According to the petitioner, all the family members, at a meeting of 7/4/2014, agreed on the mode of distribution of the deceased's estate which was done by the clan. However, a look at the consent annexed to the application dated 24/6/2015 was signed by all the deceased's children except Margaret Mugure, Eunice Wambui, Martha Wanjiru, Judy Muthoni and representative of Paul Maina's family. The only girl who signed the consent is Hannah Njeri. Even the minutes of the meeting dated 7/11/2014 in which distribution was allegedly done do not record the protestor as having been present.

Annexed to the written submissions of the petitioner are a copy of a handwritten statement dated 15/5/2019 allegedly authored by Martha Wanjiru and Judy Muthoni who purported to disassociate themselves with the protest and a call that the estate be divided according to the Will.

I have already found above that no Will exists in respect of the deceased's estate. Further to that, if Judy Muthoni and Martha Wanjiru did not support the protest, they should have sworn affidavits or filed proper statements on which they could be cross examined if necessary. The handwritten statement is of no value and may have been written by anybody.

The court cannot ascertain the authenticity of the said letters of 15/5/2019. I find that the said annexure may not be authentic as it is not procedurally prepared. The court cannot confirm whether the two wrote the letters.

Whether the protestors are entitled to an equal share of the deceased's estate:

The Constitution which is the Supreme Law of this land bars discrimination on account of race, sex or religion, e.t.c.

Article 27(1) of the Constitution provides:

- “(1) Every person is equal before the law and has the right to a good protection and equal benefit of the law;***
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms;***
- (3) Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social systems;***
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status....e.t.c.***
- (5) (8)”***

The petitioner purports to discriminate against the protestors by application of Kikuyu Customary Law, that a married woman is not entitled to inherit from their parent.

Apart from Article 27 which bars any form of discrimination, Article 2(5) of the Constitution provides for application of general rules of International Law that will form part of Kenyan Law if that treaty has been ratified by Kenya.

The Article provides as follows:

“Section 2(5) The general rules of International Law shall form part of the Law of Kenya;

6. Any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this Constitution.”

Kenya has ratified the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). Article I of CEDAW defines discrimination as:

“Any discrimination, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social cultural, civil or any other field.”

The application of Kikuyu Customary Law in this case is therefore repugnant to justice and good morals in that it offends Articles 27 of the Constitution and Article I of CEDAW which bars discrimination against women. In the ***Rono v Rono case (Supra)***, the Court of Appeal invoked provisions of CEDAW as read with the then Constitutional provisions(Retired), Section 82(3); now Article 27 of the Kenya Constitution, 2010.

Section 38 of the Laws of Succession Act echoes the provisions of the Constitution and CEDAW, that the children of an intestate are entitled to an equal share of the deceased’s intestate estate.

Section 38 of Laws of Succession provides as follows:

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

In the end, I find that the deceased’s children are equal before the law, whether male or female, married or unmarried and they should share the estate equally. Section 28 and 29 of the Laws of Succession Act are not applicable because the beneficiaries are not claiming as the deceased’s dependants.

The petitioner had listed the properties comprising the deceased’s estate which I have set out earlier in the judgment. That list was not disputed.

The said properties will be shared equally amongst the deceased’s twelve (12) children.

This being a family matter, each party will bear its own costs.

Dated, Signed and Delivered at NYAHURURU this 19th day of July, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mureithi for protestor – present

Kerongo Advocate for petitioners – absent

Soi – Court Assistant