REPUBLIC OF KENYA

IN THEHIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 570 OF 2011

(IN THE MATTTER OF THE ESTATE OF KANYARI NJARI alias KANYARI S/O NJARI)

SAMUEL NJARI KANYARI .....APPLICANT

VERSUS

BEATRICE NJOKI KANYARI.....PROTESTOR

JUDGMENT

Before court is the applicant's summons for confirmation of grant dated 4 July 2014 and the protestor's affidavit of protest, against that summons, sworn on 2 December 2014.

The summons and the protest arise from the succession cause in respect of the estate of Kanyari Njari who died intestate on 6 October 2010; he was domiciled in Kenya and his last known place of residence is indicated in the death certificate as Gaaki location in Nyeri County.

The deceased was polygamous but his first wife predeceased him; he was, however, survived by his second wife who is the protestor and children from his two houses; two from the first house and ten from the second house. Of the two children in the first house, the applicant is the eldest.

The record shows on 22 July 2011 the protestor and one of her sons, Samuel Wambugu petitioned for grant of letters of administration intestate after the latter and the rest of the children from the first house were cited by the applicant to accept or refuse the letters of administration of the deceased's estate. Even then, the applicant objected to the petitioner's petition, filed an answer to it and simultaneously filed his own petition for grant of letters of administration intestate of the deceased's estate.

Ultimately a consent was reached according to which the applicant and the protestor were appointed joint administrators of the deceased's intestate estate; the grant to this effect was made and issued on 1 July 2014. They also agreed that either of the administrators was at liberty to lodge the summons for confirmation of the grant. To this end, the protestor filed the summons dated 29 October2013 on 30 October 2013. Not to be beaten to it, the applicant filed his own version of the summons for conformation of grant on 4 July 2014. The protestor eventually filed an affidavit of protest against this latter summons and it is this summons and the protest that are the subject of this judgment.

Both parties are in agreement that the deceased's net intestate estate comprises a land parcel known as LR. No. Aguthi/Gaki/205 which measures approximately 2.47 hectares or 6 acres. They are also in agreement that the first house has two children only, the applicant and one John Gichero Kanyari, while the second was blessed with 10 children; they are listed as:

(i) Purity Nyambura Kanyari

(ii) Susan Wangui Ngatia

(iii) Bernard Mureithi Kanyari

(iv) Rose Wambui Muchoki

(v) Simon Macharia Kanyari

(vi) Jeremiah Wachira Kanyari

(vii) Samuel Wambugu Kanyari

(viii) Richard Mahugu Kanyari

(ix) Francis Nderitu Kanyari

(x) Gerald Gikandi Kanyari

Their only point of disagreement is the manner the deceased's estate should be distributed; while the applicant wants the land to be shared equally between the deceased's two houses, the protestor is of the view that it should be shared equally amongst the deceased's children.

Curiously, during the hearing, both parties cited different versions of wills which the deceased is alleged to have left behind and each of these wills is alleged to represent the diverse positions taken by the parties as the wishes of the deceased.

This question of wills can be disposed of fairly easily; according to section 51(2)(e) of the Law of Succession Act, cap.160, a petitioner for grant of letters of his administration must disclose in his petition whether or not the deceased left a valid will. Where it is alleged that the deceased left a valid will then section 51(3) prescribes clearly what ought to be done and I can do no better that reproduce that part of the law here; it states as follows:

(3) Where it is alleged in an application that the deceased left a valid will –

(a) if it was written, the original will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either

(i) an authenticated copy thereof shall be so annexed; or

(ii) the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;

(b) if it was oral, the names and addresses of all alleged witnesses shall be stated in the application.

Neither the applicant nor the protestor indicated in their respective petitions for grant of letters of administration that the deceased left a valid will; and even if there was such a will none was filed in court as required under section 51(3) (a). If it be oral no names and addresses of the alleged witnesses were given in their petitions.

The short answer to the applicant's and the protestor's contentions is that the deceased died intestate and it is for this reason that both of them are joint administrators of the deceased's intestate estate; they both consented to the grant made to them in this respect.

In the absence of a will, the distribution of the deceased's estate is no doubt subject to intestacy provisions of the Law of Succession Act and in particular section 40 thereof; it states as follows:

(40) (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.

This section was discussed and applied in **Eldoret Civil Appeal No. 66 of 2002, Mary Rono versus Jane Rono & William Rono (2005) eKLR** where the arguments by the contesting parties were more or less similar to those put forth in the present case.

As it is the present case, the primary issue in *Rono* was the distribution of the estate between the intestate's two houses. The learned counsel for the appellant argued that each of the two houses should share the assets and the liabilities of the estate in equal measure. The respondents' learned counsel was of the contrary view; he was of the opinion that the first house should get a larger share of the estate considering, amongst other factors, that it contributed more to the acquisition of the estate.

In the leading judgment by Waki, J.A., it was held that:

"…in the circumstances of this case there is a considerable force in the argument by Mr Gicheru (for the appellant) that the estate of the deceased ought to have been distributed more equitably taking into account all relevant factors and the available legal provisions. I now take all that into account and come to the conclusion that the distribution of the land, which is the issue falling for determination must be set aside and substituted with an order that the net estate of 192 acres of land be shared out as follows: -

(a) Two (2) acres for the farm house now commonly occupied by all members of the family be held in trust by the joint administrators of the estate;

(b) Thirty (30) acres to the first widow, Jane Toroitich Rono

(c) Thirty (30) acres to the second widow, Mary Toroitich Rono

(d) Fourteen decimal four four (14.44) acres to each of the nine children of the deceased."

Although the learned judge appeared to agree with the argument by the learned counsel for the appellant that the estate should be shared out equally, he nevertheless stated that the estate *"ought to have been distributed more equitably…"* and proceeded to do exactly that "*taking into account all relevant factors and the available legal provisions."*

While agreeing with the leading judgment of Waki, J.A., Justice Omolo J.A. discounted any notion that the estate should have been distributed amongst the beneficiaries in equal shares because, in the learned judge's view, there is no such requirement under the Act. The learned judge said: -

> "***I had the advantage of reading in draft form the judgment prepared by Waki, J.A., and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned Judge to be laying down any principle of law that the Law of Succession Act, cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr Gicheru. I can find no such provision in the Act."***

The learned judge invoked section 40(1) and said of it as follows: -

> ***"My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has discretion to take into account the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.***
>
> ***Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in a case of young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality."***

This passage, to great degree answers the protestor's quest for equality, not between the houses but amongst the deceased's children. As I understand it, the notion of equality amongst the children is discounted and it is not the decisive factor; rather, it is equity, fairness and, ultimately, the discretion of the court that count. The exercise of the discretion will, of course, be influenced by circumstances of each particular case; however, whichever direction the court takes, it also has to bear in mind those factors that have been expressly specified in section 40(1). It does not, therefore, always follow that the house with the largest number of children will, as a matter of course, be entitled to the lion's share of the estate.

Turning back to the present case, the protestor conceded that even prior to the deceased's death, she cultivated a particular part of the land in issue; to quote her, this is what she said:

> ***Before my husband's death we were all sharing the land. I was using three acres.***

And in answer to questions during cross-examination, she testified:

> ***Each family is using a portion of the land. I am using one side and the other family is using the other portion.***

In his evidence, the applicant was in agreement with the protestor that indeed this is the reality on the ground; he testified as follows:

The land is divided into two portions and each house lives on its portion. The first house has two children, me and my brother. The second house had seven sons and three daughters. They live on the portion of their mother which is about three acres. We occupy a portion of three acres.

It is apparent from this evidence that the two houses have settled on the deceased's land in such a way that each house has an equal share of the land; that each of the two houses occupies three acres. As a matter of fact, if the protestor's evidence is anything to go by, the second house took possession of its share of three acres even before the demise of the deceased and they have ever since maintained that state of affairs to date.

In these circumstances, it would, in my humble view, be unfair and inequitable if the court was to uproot any of the deceased's houses and their respective children from where they have settled since time immemorial and purport to shuffle them in the quest for equality (in the distribution of the deceased's estate) when no cause has been shown that equality, rather than equity and fairness, is the only scheme that is mete and just. In coming to this conclusion, I note that apart from the deceased's surviving widow, none of her children ever complained that the land they occupy is insufficient and that they would be better of if they got an additional share from the portion occupied by the first house. Indeed, apart from invoking a non-existent will, the protestor herself did not appear to have any particular reason why she would prefer to have each of the deceased's children get an equal share of his estate.

For the reasons I have given, I am inclined to dismiss the protestor's protest; in the same breath, I allow the summons for confirmation of grant dated 4 July 2014 and hereby confirm the grant made in the joint names of the applicant and the protestor. The estate shall be distributed in terms proposed by the applicant; for avoidance of doubt Title No. Aguthi/Gaki/705 shall be divided into two equal portions of 1.235 ha (or approximately 3 acres) each; each of these shares shall be registered in the following names:

1. (i) Samuel Njari Kanyari

   (ii) John Gichero Kanyari

   (As owners in common in equal shares)

2. Beatrice Njoki Kanyari

   (As the sole proprietor subject to life interest)

The protestor will be at liberty, during her lifetime, to exercise her power of appointment under section 35(2) of the Act and transfer part of her share of the estate to her children; the latter may also apply, if they so wish, to court for appointment of their share of the estate due to their house.

Parties will bear their respective costs. It is so ordered.

Dated, signed and delivered in open court this 20th day of September 2019

Ngaah Jairus

JUDGE