



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO.1116 OF 2011

IN THE MATTER OF THE ESTATE OF JUSTUS NGUYO WAITITU alias JASTUS NGUYO WAITITU (DCD)

JULIUS GIKONYO MWANGLI.....PETITIONER/APPLICANT

VERSUS

PHILIP KIHARA.....1ST PROTESTOR

ISAAC MUTUOTA NGUYO2ND PROTESTOR

AMOS GAKU MWANGI3RD PROTESTOR

PETER MBUTHIA NGUYO.....4TH PROTESTOR

MARGARET WANGARI MAINA.....5TH PROTESTOR

ZIPPORAH WANJIKU NGUYO.....6TH PROTESTOR

JUDGMENT

Justus Nguyo Waititu alias Jastus Nguyo Waititu died intestate on 13 January 1998; he was then domiciled in Kenya, living at Chinga location in Othaya, in Nyeri County. He was survived by his widow Zipporah Wanjiku Nguyo and ten children. His only asset that now comprises his estate is a parcel of land known as Title No. Chinga/Gathera/W-92 which measures approximately 2.90 hectares.

The applicant, who is one of his sons, petitioned for letters of administration of the deceased's estate in October 2011. The only evidence on record that he subsequently obtained the grant for administration of the estate is the summons for confirmation of the grant dated 13 January, 2014 which shows that the grant was made to him on 4 March, 2013. I couldn't find a copy of the grant on record but parties have proceeded on the presumption that it was made and therefore nothing much should turn on it.

In the affidavit in support of the summons for confirmation of grant the applicant proposed that each of the deceased's surviving children should get 0.410 ha of the land except Mary Wangechi Mwangi whom he has proposed to give 0.410 ha but to share it with the deceased's widow as joint proprietors. He has also proposed to give Margaret Wangari Maina, a wife to one of the deceased's sons but who is also deceased 0.410 ha.

The deceased's widow filed an affidavit of protest to the proposed scheme of distribution; in that affidavit which she swore on 7 May 2014 she stated that besides herself, the rest of the deceased's children, the 1st to 4th protestors and her daughter-in-law who is named as the 5th protestor and on whose behalf she swore the affidavit of protest are not satisfied with the scheme of distribution of the deceased's estate as proposed by the applicant. Her major borne of contention is that it was the wish of the deceased that his estate should not be divided into separate parcels but rather the entire parcel should be registered in the joint names of his surviving children, herself as the widow and her daughter-in-law. Upon such registration each of the joint owners should cultivate equal shares of 118 by 163.6 feet each.

Where an intestate is survived by a spouse and children the law on succession of his estate is **section 35** of the **Law of Succession Act, cap. 160** which provides as follows:

35. Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—

(a) the nature and amount of the deceased's property;

(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;

(c) the existing and future means and needs of the applicant and the surviving spouse;

(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;

(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;

(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and

(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

The deceased having been survived by a widow and children the net intestate estate devolves upon the widow subject of course to the proviso to section 35(1)(b) that the widow's interest determines upon her re-marriage to any person. But while she enjoys life interest, the deceased's widow retains the power of appointment in exercise of which she may give any part of the estate or even distribute the entire estate to the surviving child or children.

If the widow has the power to distribute the estate in her lifetime she may as well waive her right to the estate and instead share it out in the confirmation proceedings. My understanding of this provision of the law is that nothing stops her from taking this course as long as she is in agreement with her children. At the end of the day the distribution of the estate during the confirmation proceedings invariably achieves the same purpose that the power of appointment is meant to achieve.

Where there is a disagreement, as has turned out to be the case here, then the only available alternative open to this court is to revert to the strict application of **section 35(1) (b)** of the Act and transfer the entire net intestate estate to the deceased's widow subject, of course, to a life interest. Upon the devolution, it will be up to the deceased's widow to exercise the power with which she is clothed and distribute all or any part of the net intestate estate, by way of gift, amongst her children or their heirs.

The door will always remain open for the deceased's children or their heirs as the case may be to exercise their right under subsection (3) and apply for appointment of their share if the deceased either unreasonably exercises her power or if she withholds it, again unreasonably.

I will therefore allow the protest and order that the grant made to the applicant be confirmed in the foregoing terms; that the Zipporah Wanjiku Nguyo be registered as the sole proprietor of Title No. Chinga/Gathera/W-92 subject to life interest. Being a dispute amongst family members, I will not make any order as to costs. It is so ordered.

Signed, dated and delivered in open court this 20th day of September 2019

Ngaah Jairus

JUDGE