



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 823 OF 2010

IN THE MATTER OF THE ESTATE OF GITARI MUNYORI(DECEASED)

ERASTUS MUNYORI GITARIAPPLICANT

VERSUS

PATRICK GICHUKI GITARI.....PROTESTOR

JUDGMENT

The applicant is the administrator of the estate of Gitari Munyori alias Elijah Gitari Munyori (the deceased) who died intestate on 23 March 1992. He was domiciled in the Republic of Kenya and his last known residence was at Ihwa village in Kiriti location, Tetu district in Nyeri County.

The petition for grant of letters of administration was made on 21 September 2010. In the affidavit in support of the petition, the applicant listed the following assets as comprising the deceased's estate:

- (a) Title No. Tetu/Kiriti/15
- (b) Title No. Tetu/Kiriti/16
- (c) Plot No. 54 Kinunga Market (County Council of Nyeri)
- (d) Plot No. 11 Kinunga Market (County Council of Nyeri)
- (e) Mobile kiosk at Ihwa village
- (f) Shares with Tetu Coffee Growers

The following were listed as his survivors:

- 1. Erastus Munyori Gitari (son)
- 2. David Mwangi Gitari (son)
- 3. Mary Njeri Wakahiu (daughter-in-law)
- 4. Patrick Gichuki Gitari (son)
- 5. Mary Wahu Warutere (daughter)

The grant of letters of administration intestate was subsequently made to the applicant on 19 January 2011 and by a summons for confirmation of grant dated 21 June 2011 he sought to have it confirmed. He sought to have the estate divided in equal shares and distributed amongst the deceased's survivors except Mary Wahu Warutere.

Patrick Gichuki Gitari filed an affidavit of protest the substance of which is that Title No. Tetu/Kiriti/15 is not part of the deceased's estate because the deceased had transferred it to him in his lifetime. Except for the inclusion of this property in the list of the deceased's estate, he has no issue with the proposed scheme of distribution of the rest of the estate.

At the hearing, the protestor produced a certificate of official search showing that he was registered as the owner of Title No. Tetu/Kiriti/15 on 24 January 1991; a charge had been registered in favour of an institution identified as Nyeri Trade Development Joint Board for a loan of KShs. 70,000/= on 18 December 2014. The certificate was issued on 29 June 2017.

Intriguingly, a certificate issued to the applicant in respect of the same parcel of land on 3 February 2010 shows that as at that date, this parcel of land was still registered in the name of the deceased. It is not clear how the land register would show that the deceased was the owner of this parcel of land on this date when the protestor was registered as its owner nine years earlier. In the absence of any evidence of fraud on the part of the protestor, it is safe to assume that he is a beneficiary of an inter vivos transfer and thus the rightful owner of the property; it is for this reason that it is not available for distribution as part of the deceased's estate.

Except for the dispute over Title No. Tetu/Kiriti/15 the deceased's children agreed on the distribution of his estate in a manner that is more or less consistent with section 38 of the Law of Succession Act cap.160. This section states as follows:

38. 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 be equally divided among the surviving children.

Thus, everything else being equal, the estate should be shared out equally amongst the deceased's children surviving him. But this scheme of distribution is subject to sections 41 and 42; of these sections, section 42 is pertinent to the circumstances of this case; it states as follows:

42. Where

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b)...

Without belabouring the point, the relevance of this provision to the present case is obvious: the protestor is a beneficiary of an inter vivos transfer and therefore whatever he received from the deceased in his lifetime must be taken into account in the determination of his share of the estate vis-à-vis those of his siblings. To this end, I would opine that the most practical approach which, in my humble view, is also fair and equitable, is to give the protestor a share of the land available for distribution less the acreage of Title No. Tetu/Kiriti/15.

Incidentally, of the assets comprising the deceased's estate, Title No. Tetu/Tetu/16 which, going by its registration number, is in the neighbourhood of the protestor's land, is the only other asset of the deceased's estate where this scheme of distribution can be realised. According to the certificate of official search this parcel of land measures approximately 4.77 hectares or roughly 11.78 acres.

The applicant had proposed this parcel of land to be shared out in equal shares of 1.19 hectares each amongst the following people:

1. Mary Njeri wakahiu
2. Patrick Gichuki Gitari
3. Munyori Gitari
4. David Mwangi

The deceased's daughter, Mary Wahu Warutere has been left out though no particular reason has been given why she was omitted from the list of beneficiaries. Since she has not filed any renunciation of her right to inheritance, she would effectively be disinherited if she does not benefit from the deceased's estate. I must therefore make provision for her share not only from this part of the deceased's estate but also in the rest of the estate as well. She has the liberty to transfer her share to whomsoever she wishes if she does not want anything to do with her father's estate.

With her inclusion, the five beneficiaries would have been entitled to 2.36 acres each if Title No. Tetu/Kiriti/15 was out of equation. This parcel measures 1.6 acres and therefore the protestor's share will be reduced by this margin and which shall be shared out equally amongst the rest of the beneficiaries. Accordingly, Title No. Tetu/Kiriti/16 shall be shared out as follows:

1. Mary Njeri Wakahiu 2.76 acres
2. Patrick Gichuki Gitari 0.76 acres
3. Munyori Gitari 2.76 acres
4. David Mwangi 2.76 acres
5. Mary Wahu Gitari 2.76 acres

The rest of the estate shall be shared equally amongst the five beneficiaries.

The grant made to the applicant is confirmed in the foregoing terms. Parties shall bear their respective costs.

Dated, signed and delivered in open court this 18th day of October, 2019

Ngaah Jairus

JUDGE