



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 374 OF 2010**

*(IN THE MATTER OF THE ESTATE OF NDIRANGU GATHUYA (DECEASED))*

**RUTH WANJIKU NDERITU.....APPLICANT**

**-VERSUS-**

**FRANCIS MURIITHI NDIRANGU.....PROTESTOR**

**JUDGMENT**

The deceased in this cause died on 4 February 1975. He hailed from Kiriti village in Tetu, Nyeri County and was domiciled in the Republic of Kenya.

The deceased had seven wives two of whom survived him; one of them, Priscilla Wambui Kiboi petitioned for grant of letters of administration of the deceased's estate. The petition was filed on 25 June 2010 and in the affidavit in its support, the petitioner listed the deceased's children and grandchildren as having survived the deceased. She also listed one Wahuini Ndirangu as the only other surviving wife of the deceased.

The deceased's net intestate estate is listed as Title No. Tetu/Kiriti/12 measuring approximately 4.90 hectares.

The grant was made to the petitioner on 29 September 2010 and by a summons dated 15 October 2010 she sought to have it confirmed. She proposed to have the estate divided into six equal shares each of which was to devolve upon the representatives of the deceased's houses. She proposed that her own share should devolve upon one Ruth Wanjiku Ndiritu who is the present applicant.

The protestor, who is one of the deceased's children opposed the scheme of distribution proposed by his step mother and filed an affidavit of protest in that regard. In that affidavit he swore that all the beneficiaries of the deceased's estate had agreed that the estate be shared out in seven different shares depending on where each of the deceased's houses is settled. The shares should devolve upon various representatives of the respective houses for themselves and on behalf of members of those houses where they are more than one.

He deposed that the applicant, whom the petitioner proposed to cede her share to was neither related to the deceased nor the petitioner herself. The applicant, according to him, is stranger to the deceased's estate and therefore not entitled to any part of the inheritance.

Priscilla died before the protest was heard and the grant confirmed; by a summons for revocation of grant dated 17 July 2014 the protestor and his brother James Muthui Ndirangu applied to have the grant revoked and a fresh one issued to them in their joint names.

The applicant also filed her own summons seeking revocation of the same grant; she sought to be appointed as the sole administratrix of the deceased's estate.

On 10 April 2017 parties agreed that the initial grant be revoked and a fresh one be issued in the joint names of the applicant and the protestor. This consent was not only adopted as the order of the court but the joint administrators were granted leave to file summons for confirmation of the fresh grant before the elapse of six months from the date it was made.

They opted to file separate summonses; the applicant filed hers dated 11 April 2017 on the even date while the protestor filed his a little over a week later, more particularly on 20 April 2017. The applicant's summons having been filed earlier in time was treated as the substantive summons for confirmation of grant while the respondent's version was deemed as the protest against the applicant's summons. It is these summonses that are the subject of this judgment.

In them the protestor and the applicant adopted the respective positions that had earlier been taken by the Priscilla Wambui Kiboi and the

protestor in distribution of the deceased's estate; the protestor reiterating that the estate should be divided into seven portions to be shared out amongst the deceased's houses while the applicant insisted that she was to inherit the share due to Priscilla Wambui Kiboi.

At the hearing of the protest this was the only point of contention; as far as I gathered, none of the deceased's survivors had any qualms with the scheme of distribution proposed by the protestor. Their only concern which is the protestor's concern is the applicant's claim on the share of the deceased's estate when she was neither a beneficiary nor a dependant of the deceased.

The applicant did not dispute the fact that she is not related to the deceased or his wife, Priscilla. All she said in her evidence in court is that she wanted to have Priscilla's share because she 'used to help her and maintain her'.

The deceased died before the Law of Succession Act, cap. 160 came into force and so in ordinary circumstances, this law would have limited application to the present cause. Section 2(1)(2) of that Act is to this effect; it states as follows:

**2. (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.**

**(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.**

None of the parties provided any evidence of the written laws and customs which may have applied at the time of the deceased's death and which, for that reason, ought to guide this honourable Court in making the appropriate orders for administration and ultimate distribution of the deceased's estate. In the absence of such evidence the alternative is to fall back on the relevant intestacy provisions of the Act; subsection (2) provides a window for the application Act on administration of estates of persons who died prior to its commencement.

With this in mind, the immediate provision applicable to the present circumstances would be section 40 of the Act; 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.**

However, the deceased's family are in agreement of how the deceased's estate should be distributed. Each of the houses, as I gather from the proposed scheme, is getting 0.7 hectares of the estate; this, from their evidence, is how the deceased wished his estate to be distributed and they have all along settled on the estate based on this scheme of distribution. Since there is no dispute amongst them, it makes sense not to uproot and unsettle them; in any event, their proposed scheme of distribution of the estate is, by and large, consistent with section 40 of the Act.

As earlier noted, the deceased's family's only concern, is the applicant's claim for inheritance and it is to this claim that I now turn.

I hasten to say that it is apparent from the available evidence that the applicant's claim has no basis in law; according to section 40 that I have referred to, the deceased's estate can only be shared amongst his houses which ordinarily comprise his wives and children; the applicant does not fall into any of these categories.

Although she claims the share of the estate due to Priscilla Wambui Kiboi, one of the deceased's wives, the estate sought to be distributed and which this cause is all about is that of Priscilla's husband, Ndirangu Gathuya. Priscilla died before the distribution of the estate and thus she died without any inheritance from her late husband capable of being passed on to the applicant or any body else for that matter.

I must add that even if Priscilla herself was alive she could not purport to distribute any part of the deceased's estate to the applicant or any other person outside the category of beneficiaries recognised in section 40 of the Act.

If, as the applicant seemed to suggest, that her only basis for claiming a share of the deceased's estate is that she 'helped and maintained' his wife, then the appropriate cause available to her is to sue the deceased's or his wife's estate for compensation. And if her case is that she was her dependant of some sort, then she ought to have invoked section 26 of the Act and seek for a reasonable provision to be made to her out of either of the estates.

In the final analysis, I do not find any merit in the applicant's claim; it is baseless and misconceived. It follows that her summons for confirmation of grant dated 11 April 2017 is dismissed. In the same breath, the deceased's estate shall be distributed in terms of Paragraph 2 of the protestor's summons dated 19 April 2017. For avoidance of doubt, the Title No. Tetu/Kiriti/12 shall devolve upon the deceased's beneficiaries as follows:

- |                                   |        |
|-----------------------------------|--------|
| 1. Johnson Ndungu Ndirangu Mainah | 0.7 ha |
| 2. Johnson Ndirangu Wambugu       | 0.7 ha |

For himself and for:

(i) Agnes Wairimu

(ii) Wanjiru Wambugu

(iii) Wanjiku Wambugu

(iv) Wachira Wambugu

3. (i) Stephen Ndirangu Wambugu )

(ii) Ndungu Wambugu ) (in equal shares) 0.35 ha

(iii) Johnson Ndungu Ndirangu Maina 0.35 ha

4. (i) Francis Muriithi Ndirangu )

(ii) Gerald Gathuya Ndirangu )

(iii) Joseph Muriithi Ndirangu ) (in equal shares) 0.7 ha

5. Johnson Ndungu Ndirangu Mainah 0.7 ha

6. (i) James Muthui Ndirangu )

(ii) John Wanjangi Ndirangu )

(iii) Janet Mumbi Ndirangu ) (in equal shares) 0.7 ha

7. (i) Francis Gathuya Ndirangu )

(ii) Wachira Ndirangu )

(iii) Maina Ndirangu )

(iv) Iregi Ndirangu ) (in equal shares) 0.7 ha

For reasons I have given I revoke the appointment of the applicant as a joint administratrix of the deceased's estate. In the wake of the death of the protestor who has since been substituted in these proceedings by James Muthui Ndirangu and Johnson Ndungu Ndirangu Mainah, the grant made to the applicant and the protestor is hereby revoked; a fresh grant shall be issued in the joint names of James Muthui Ndirangu and Johnson Ndungu Ndirangu Mainah and is hereby confirmed in the foregoing terms. There shall be no order as to costs. It is so ordered.

**Dated, signed and delivered in open court this 18<sup>th</sup> day of October 2019**

**Ngaah Jairus**

**JUDGE**