



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 34 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE DAVID KANYARU (DECEASED)

JOHN MWATHI KANYARU.....PETITIONER

VERSUS

MITUGO MIGWI NGARURO.....1ST PROTESTOR

M'MUGWIKI MIGWI.....2ND PROTESTOR

J U D G E M E N T

1. This cause relates to the estate of the late **DAVID KANYARU** (Deceased) who died on 10th November 1978 domiciled at Tunyai. The petition for letters of administration filed herein indicates that the deceased died intestate leaving behind the following dependants surviving him.

- i. John Mwathi Kanyaru (Petitioner)
- ii. Agnes Wairimu Mutegi &
- iii. Zachary Mutegi Cecilia

2. The deceased's net estate comprise that property known as S. Tharaka/Tunyai A/481 measuring approximately 8.8.Ha or 22 acres.

3. **JOHN MWATHI KANYARU** the Petitioner herein was appointed the administrator on 6th October 2015 and issued with a grant dated 8th October 2015. Pursuant to that grant, he moved this court for confirmation of grant through summons for confirmation of grant dated 8th February 2016 proposing to have the estate herein distributed as follows:-

- i. John Mwathi Kanyaru - 6 acres
- ii. Agnes Wairimu Mutegi - 6 acres
- iii. Regina Kanyaru - 1 acre
- iv. Mitugo Migwi Ngaruro - 2 acres
- v. Mugwika Migwi - 2 acres
- vi. Zachary Mutegi Cecilia - 3 acres

4. The Petitioner's proposal met some resistance from Mitugo Migwi Ngaruro and M'Mugwika Migwi who filed affidavit of protest sworn by Mitugo Migwi Ngaruro on 5th April 2016. The main gist of their protest is that the deceased herein held the estate in trust in the sense that their late father Ntanganuro Karingo died before adjudication process was completed. The protestors have faulted the Petitioner for proposing to give them only 2 acres when in their view, he knows that their entitlement is more. They have also protested that Zachary Mutegi Cecilia is not a beneficiary.

5. This court upon filing of the protest directed that the protest be canvassed by way of oral evidence. The petitioner during trial on his part testified that the protestors are his uncles and conceded that they have been living on the estate where they have each developed by

constructing houses where they live respectively. He further conceded that he found them living on the estate when he grew up. He also testified that their paternal grandfather is buried in the estate herein but insisted that the property belongs to his father the deceased herein.

6. The Petitioner has justified his proposal of giving two acres each to the protestors on account that they live and have been living on the estate. He has further averred that as the only son to the deceased, he is best placed to effect the wishes of his late father. He insists that Zachary Mutegi Cecilia is a member of deceased's family although he did not give any elaborate information about his dependency.

7. The Protestor on his part made attempts to call a witness named Cyprian Muchai Irandu who was aged over 100 years. However upon being sworn this court realized that the witness could not give useful information/evidence due to senility and stood down the witness for purposes of psychiatric examination to vouch for reliability of the evidence to be tendered. The protestors' counsel later informed this court that the said witness was found to be senile and did away with his evidence.

8. Mitugo Migwi Ngarura (DW2) testified that the deceased herein was his uncle. He further testified that his mother was initially married by one Migwi and that when Migwi died, the late Ngaruro re-married her mother and that the late Ntangaruro Karingo was the father of David Kanyaru (the deceased herein). He further testified that the deceased herein bribed the adjudication officials in order to have himself registered as the sole proprietor of the estate herein.

9. According to the 1st protestor, the estate herein belongs to Ngaruro (deceased) who was his late father. He conceded that he is not a child to the deceased and that the deceased had 3 children namely:-

- i. John Kanyaru
- ii. Mutegi Kanyaru (deceased) &
- iii. Regina Kanyaru

He also added that Mutegi (deceased) left behind a wife named Agnes Wairimu Mutegi who has been named by the Petitioner as a beneficiary.

10. When questioned by this court, the 1st protestor told this court that he was born and brought up in the estate and that he has lived there all his life. He further confirmed that he had been living side by side with the deceased in the estate and that his mother was buried in that estate.

11. The Petitioner has submitted that the protestors are not beneficiaries of the estate as in his view the two were not dependants of the deceased but tenants at will in the estate. He has further contended the ownership of the estate by the deceased herein was absolute and not a trust adding that the evidence of trust was not tendered. He has further submitted that the relationship between the protestors and the deceased was not clearly established. He has invited this court to take a look at the introductory letter from the Area Chief that clearly specifies who the beneficiaries are. He has cited the provisions of **Section 107 (1)** of the **Evidence Act** that states that any party who desires the court to give judgment as to any right dependent on the existence of facts must prove that those facts exist.

12. This court has considered the protest filed herein and the evidence tendered by both parties. The main issue in this matter is whether the protestors are dependants of the deceased by virtue of existence of a trust over the estate.

13. The protest herein as observed above, is based on existence of a trust which they claim was held by the deceased for their benefit. A trust is a question of fact which means that it is necessary for whoever is claiming over the same to prove to the required standard which is a balance of probability. The protestors in this cause had the burden to prove that the deceased held the estate in trust for them. I am however afraid that they failed to discharge that burden of prove for two reasons.

14. In the 1st place, the protestors appeared not certain about their relationship with the deceased herein. In their affidavit of protest, the 1st protestor has deposed that the deceased was his brother. During trial, he stated that the deceased was an uncle and child of his uncle. When pressed to explain during cross examination he indicated that the father of the deceased herein was one Ntamigwi while his father was known as Ntangaruro Karigu. He also stated that Migwi had initially married her mother before Ngaruro re-married her. The explanation in my view failed to give or show the common ancestry between the protestor and the deceased herein.

15. Secondly, the protestors claim that the deceased used undue influence or corruption to have himself registered sole proprietor of the estate. They however failed to show what action they took to remedy the wrong visited upon by them if at all by the deceased during the deceased's lifetime. They should have sued him or even take a complaint/claim to the local administration, but did not do either of the two. I have looked at the introductory letter from the chief dated 13th May 2014, filed together with the petition for letters of administration herein, and the protestors' names are missing from the list of beneficiaries given by the Area Chief, who is in a better position to know if the protestors are dependants or not.

16. Thirdly, the protestors have failed to prove that the deceased bribed the adjudication officials during demarcation process. The claims of bribery serious as they remains just that. Allegations without any iota of proof. The property forming the estate was formally registered in 1988 as per the certificate of official search filed together with the petition herein. This clearly shows that the property forming the estate was registered long after the demise of the deceased and it is therefore difficult to believe that the deceased used undue influence to have himself registered as the sole owner of said estate.

17. This court finds that the protestors have failed to discharge their burden as per the provisions of **Section 107** of the **Evidence Act**. Their claim/protest cannot be sustained in law and that is why perhaps they should be at least grateful that the Petitioner has graciously

proposed have given them 2 acres each by virtue of the fact that they have been in occupation on a portion of the estate.

18. The law (Section 38 of Law of Succession Act) provides that the estate of a deceased person dying intestate with no surviving spouse should be distributed equally among the surviving children. However, where there is a consent or a consensus on the alternative mode of distribution, the court will abide the consent so long as the same is just and equitable. All the beneficiaries herein have filed a consent dated 8th February 2018 to the mode of distribution proposed by the petitioner.

In the premises, the grant issued on 8th October 2015 is hereby confirmed as per paragraph 5 of the affidavit in support of Summons for Confirmation of Grant sworn on 8th February, 2016. I shall make no order as to costs so each party to bear own costs.

Dated, signed and delivered at Chuka this 15th day of October 2019.

R. K. LIMO

JUDGE

15/10/2019

Judgment signed, dated and delivered in the open court in presence of Mutani for Petitioner and 1st Protestor in person.

R.K. LIMO

JUDGE

15/10/2019