



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 1199 OF 2012

IN THE MATTER OF THE ESTATE OF WAMBUGU GICHURU alias WAMBUGU s/o GICHURU alias EZEKIEL WAMBUGU GICHURU (DECEASED)

CATHERINE NJERI RUMINJU & 7 OTHERS.....PROTESTORS

VERSUS

STEPHEN KARIUKI WAMBUGU..... PETITIONER

RULING

1. The estate relates to the late **Wambugu Gichuru alias Wambugu s/o Gichuru alias Ezekiel Wambugu Gichuru (deceased)** who died on the 24th July, 1988; he died intestate and his estate comprised of the following properties as listed hereunder:

- (i) Gikondi/Karindi/307
- (ii) Gikondi/Karindi/241
- (iii) Nyeri/Endarasha/405
- (iv) Plot No.20 Gakindu Market

2. As set out in the Petition for Letters of Administration the deceased had six children comprising of three sons and three daughters; there were also numerous grand-children who are all listed in the Petition as having survived him; the names of the deceased's children are as set out hereunder;

- (i) Stephen Kariuki Wambugu -son
- (ii) Jessie Waitherero Maina -daughter
- (iii) Ann Wambui Kariuki - daughter
- (iv) Agnes Wanjiru Mutero -daughter
- (v) Geoffrey Mwangi - son
- (vi) John Ruminju -son

3. The instant cause commenced as a Citation; and upon the citees failing to petition for Letters of Administration the citor Stephen Kariuki Wambugu (**Stephen**) as the son of the deceased petitioned for Letters of Administration and a Grant was issued to him on the 23rd November, 2013; he then applied for the Confirmation of the Grant vide an application dated the 20/11/2015 and therein proposed his mode of distribution; this application was met with opposition by Watson Mutahi Ruminju (**'Watson'**) who filed a Protest on the 13/10/2016 on behalf of his six other siblings who described themselves therein as grand-children of the deceased; he gave his reasons for protesting and included his proposed mode of distribution of the deceased's estate.

4. Directions were taken that the matter proceed for hearing and that **'viva voce'** evidence be adduced; after the hearing both parties were directed to file and exchange written submissions; hereunder is a summary of the respective parties claims.

THE PROTESTORS' CASE

5. The protestors in their undated affidavit of protest stated that John Ruminju Wambugu was his father who was a son of the deceased; Watson Mutahi Ruminju (**Watson**) had been authorized by his siblings to file the protest on their behalf as well as his own behalf; his evidence was that the deceased had three sons and he had gifted them each with a property inter-vivos; the contentious property is known as **Gikondi/Karindi/307** which the protestors contend that before their grandfather, the deceased, passed on their father had told Watson that their grandfather had given the subject property to their late father and that their grandfather had even handed over the title deed to their father;

6. The petitioner (**Stephen**) who is the protestor's uncle had been given the property known as Nyeri/Endarasha/405 - measuring 26 acres; and their other uncle Geoffrey Mwangi was given land in Karindi; Watson and his siblings were not making any claim on these two latter parcels of land;

7. Watson's evidence was that their late father had built a house on the land and had planted 250 coffee bushes and placed piped water thereon; he also lived on the land with the deceased; their parents and the deceased were all interred on this parcel of land; he also knew all along that their father had repaid the loan for the suit property from the pyrethrum and milk deliveries; the petitioner couldn't have been the one who made loan repayments as he was a youngster by then and unemployed and had no income; their uncle, Stephen, who is the petitioner, also knew that the suit property had been given to the protestors father; as of now the protestor and his male siblings lived on the land; that this same uncle, Stephen, resided in Endarasha and had never occupied or utilized the suit property; the protestors contention was that the petitioner was taking advantage of his fathers' death on the assumption that they were minors and could not protect their fathers inheritance

8. Under cross examination Watson acknowledged the existence of a Letter of Demand dated 7/08/1989 which related to the Endarasha property and confirmed that the letter had been addressed to the petitioner; and that the arrears demanded therein was in the sum of Kshs.7,227/-;

9. He prayed that the entire property known as Gikondi/Karindi/307 be distributed only to the children of John Ruminju Wambugu in equal shares.

RESPONDENTS CASE

10. In response the petitioner (**Stephen**) confirmed that the deceased was survived by three sons namely Geoffrey Mwangi, John Ruminju Wambugu and himself; the deceased also had three daughters who had renounced their interest in the estate of the deceased; that all the protestors were all children of his late brother John Ruminju Wambugu;

11. His evidence was that the 26 acres of the Endarasha property was not bequeathed to him by the deceased as alleged by the protestors; the correct position was that he had applied to the Settlement Fund Trustees (**SFT**) and had been allocated the contentious parcel of land; he had taken a loan with SFT and a charge was placed over the land as security and that he had been repaying the loan; he annexed a copy of a Demand Notice (**'DW2'**) and upon having completed paying off the loan the charge was discharged and he had thereafter been issued with the Title Deed (**'DW1'**);

12. Whereas he was not residing on the contentious property the subject matter of these proceedings, known as **Gikondi/Karindi/307** he stated that he did some farming on a portion of it; that as a son and dependant of the deceased he was entitled to his father's inheritance;

13. As the administrator he had identified all the persons entitled to benefit from the deceased's estate and his proposed mode of distribution of this property was as follows;

(i) Stephen Kariuki Wambugu - ½ share

(ii) Catherine Njeri Ruminju)

(iii) Milkah Muthoni Ruminju)

(iv) Ezekiel Wambugu Ruminju)

(v) Morris Muturi Ruminju) - ½ share

(vi) Agnes Wanjiru Ruminju)

(vii) Edward Gichuru Ruminju)

(viii) Watson Mutahi Ruminju)

(ix) George Mugambi Ruminju)

14. The respondent prayed that the Grant be confirmed and the estate be distributed as aforesaid.

ISSUES FOR DETERMINATION

15. After hearing the evidence and the presentations of the respective counsel and upon reading the written submissions this court has framed the following issues;

(i) Whether **Nyeri/Endarasha/405** forms part of the deceased's estate; and whether Section 42 of the Law of Succession is applicable;

(ii) Distribution of the estate;

ANALYSIS

Whether Nyeri/Endarasha/405 forms part of the deceased's estate; and whether Section 42 of the Law of Succession is applicable;

16. The protestor contends that the deceased gave the respondent the property known as Nyeri/Endarasha/405; that this land could not have been acquired by the respondent as he was only a young unemployed man when land was being distributed to the landless by the Settlement Fund Trustees; and that the respondent had been evasive in his evidence on his ability to buy and pay for the land at that time;

17. Their contention was that as he had been given the largest portion of the deceased's property *inter-vivos* this was more than enough and he ought to be satisfied with what he had already been given; that Section 42 should be taken into consideration in determining the Respondent's net share in the estate;

18. The evidence tendered by Watson to support their joint claims related to what he had been told by his father as to how the land had been acquired and how the petitioner had been directed to settle on the land; the period in issue was 1959 which was before Watson was born, having been born in 1979; all this evidence tendered by Watson on behalf of his siblings can only be deemed as hearsay;

19. Further to the above Watson produced nothing to demonstrate that the deceased was allotted the parcel of land **Nyeri/Endarasha/405** by the Settlement Fund Trustee (SFT);

20. Whereas the respondent in his testimony stated that when the SFT allocated land to the landless it was through a loan system by which the property was charged to secure the loan; he was able to produce a copy of a Demand Notice ('DW2') addressed to him by SFT; which notice ought to have been addressed and forwarded to the deceased if he was the original allottee;

21. Upon having completed paying off the loan his evidence was that the charge was discharged and he had thereafter been issued with the Title Deed ('DW1') in his name which he produced as an exhibit;

22. Indeed it is trite law that oral evidence cannot dispel documentary evidence and from the evidence tendered this court is satisfied that the parcel of land known as **Nyeri/Endarasha/405** was purchased and acquired by the respondent through an SFT loan; having repaid the loan the property was later transferred to the respondent; this court is satisfied that the said parcel of land was not gifted to the respondent by the deceased as alleged by the protestors;

23. The protestors sought to invoke the provisions of Section 42 of the Law of Succession Act on the grounds that as the respondent had been given the largest portion of the deceased's property *inter-vivos*; that this section deals with the principle of equity and that this court ought to take this property into consideration when determining the respondent's net share in the deceased's estate; that what the respondent had been given was more than enough and that he ought to be satisfied with what he had already been gifted;

24. Having made a finding that the property had been bought by the respondent as opposed to it having been gifted '*inter vivos*' to the respondent, this court is satisfied that Section 42 of the Law of Succession Act is inapplicable as the property Nyeri/Endarasha/405 does not comprise a part of the deceased's estate; this court will therefore not take this property into consideration when determining the respondent's net share in the deceased's estate;

Distribution of the estate;

25. The protestors had another uncle and he too had been gifted by the deceased *inter-vivos*; the protestors are not interested in this portion; after removing Nyeri/Endarasha/405 the only property earmarked for distribution is the parcel known as Gikondi/Karindi/307;

26. The deceased had three sons and three daughters; the respondent being a son of the deceased by dint of Section 29(a) is entitled to benefit from the deceased's estate; the protestors are the children of one of the sons of the deceased and the respondent when taking out the Letters of Administration had identified the protestors and had listed them as beneficiaries;

27. In their protests the protestors had specified their mode of distribution and the respondent had already outlined his mode of distribution in the application for confirmation; as the parties are not in agreement on how to divide the contentious property this court is then tasked with the duty of dividing the said parcel of land;

28. In this instance there is only one surviving child and there is no surviving spouse; and the applicable section is found to be Section 38 of the Law of Succession Act which provides that subject to provisions of Section 41 and 42 the estate should devolve to the only surviving child or be divided equally among the surviving children;

29. The protestors by dint of Section 41 of the Law of Succession Act are entitled to lay claim to their deceased's father's portion; as stated before the family of one of the deceased's is satisfied with their portion and is making no claim to the contentious property; which then

leaves the protestors as the heirs of John Ruminju and the respondent; and the law as stated provides for division in equal shares; which is exactly what had been proposed by the respondent;

30. This court finds the respondents mode of distribution to be fair; the Grant is hereby confirmed as follows; the property known as Gikondi/Karindi/305 is hereby divided into two equal shares; half of the property to be vested in the protestors and the other half to devolve to the respondent;

FINDINGS AND DETERMINATION

31. This court finds Nyeri/Endarasha/405 does not form part of the deceased's estate;

32. This court finds that Section 42 of the Law of Succession Act to be inapplicable;

33. The protest is found lacking in merit and it is hereby dismissed;

34. The respondents mode of distribution is found to be fair; and the Grant is hereby confirmed in the terms as set out hereunder;

Stephen Kariuki Wambugu - ½ share

Catherine Njeri Ruminju)

Milkah Muthoni Ruminju)

Ezekiel Wambugu Ruminju)

Morris Muturi Ruminju) - ½ share

Agnes Wanjiru Ruminju)

Edward Gichuru Ruminju)

Watson Mutahi Ruminju)

George Mugambi Ruminju)

35. This being a family matter and to bring closure each party shall bear their own costs.

It is so ordered.

Dated, Signed and Delivered at Nyeri this 3th day of October, 2019.

HON. A. MSHILA

JUDGE.