



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO.1073 OF 2013

IN THE MATTER OF THE ESTATE OF CYRUS MUCIRA KARURI (DECEASED)

MARY WAWIRA GICAMBA.....1ST PETITIONER/APPLICANT

VERSUS

FAITH WAMARWA MUCIRA.....2ND PETITIONER/PROTESTOR

JUDGEMENT

1. This matter relates to the estate of **CYRUS MUCIRA KARURI [DECEASED]** who died intestate on 27.12.2010. Temporary Letters of Administration were issued to Mary Wawira Gacamba and Faith Wamarwa Mucira.

2. Summons for confirmation of grant were filed on 22.12.2015. However, one of the Administrators Faith Wamarwa Mucira filed an affidavit of protest sworn on 14.3.2016 disrupting the proposed mode of distribution. Her contention was that the deceased in his lifetime had shared out his land parcel No.KABARE/GICHIGE/304 and showed all those he wanted to give land where to occupy way back in 1990 and the sons and unmarried daughters of the deceased occupied their respective portions and some made permanent developments. That the married daughters should not inherit as the deceased had distributed his land during his lifetime. She proposes that the distribution be as per her proposal at paragraph 14.

3. The Petitioner Mary Wawira Gichamba proposed the mode of distribution at paragraph 4 of her affidavit.

4. The parties testified and also filed written submissions. For the protestor the main ground of contention is that the deceased had distributed his estate during his lifetime which excluded the married daughters. The mode of distribution remained undisturbed during the lifetime of the deceased and should be maintained. That the married daughters were not given a portion but the deceased made it clear that if they ever went back they should settle on portions given to their respective mothers. Her submission is that the distribution which was made by the deceased during his lifetime should be respected.

5. For the applicants it is submitted that the proposal by the protestor was not provided for her unmarried daughter Janet Wandia which is discriminatory, illegal and unconstitutional. They further submit that the deceased had not made a will and the deceased died intestate.

6. I have considered the evidence tendered and the submissions. The issue as to what comprises the estate of the deceased and the beneficiaries is not in dispute. The issue is on the distribution of the estate.

7. During cross-examination of the applicant Mary Wawira Gichamba (DW1), she admitted that the deceased had shown everybody where to build. She further admitted that all have developed their portions. She also admitted that the distribution was as per the sketch map which was annexed by the protestors and the beneficiaries are occupying those respective portions. She further admitted that each person has a place where they access their portions. She also admitted that the way she wants to distribute will disrupt how others are on the land.

This shows that though the deceased had not made an oral will, he had made his wishes known during his lifetime and allowed the beneficiaries to take possession and develop their respective portions. This is a fact which is not in dispute in view of the admission by DW1.

The law of succession Act recognizes gifts which are made by the deceased during his lifetime. Those are gifts inter vivos. **Section 42 of the Law of Succession Act** provides: -

Previous benefits to be brought into account 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) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

The section shows that the Act recognizes that a deceased person can give a gift in his lifetime not by necessarily making a will and the act recognizes and respects such gifts. Where an intestate has made such gifts during his lifetime they are not to be disrupted but should be honoured, respected and honoured.

In the case of ***JOSEPH KARUGA MIGWI VS. MIKIELINA NGINA MUNGA [2016] eKLR, Justice Mativo*** stated;

“I have

carefully considered the affidavit and oral evidence adduced by the parties and the submissions by both advocates. I have also taken into account the provisions of the Law of succession act [11]. I have considering the justice of the case and taken into account that it is not always easy to achieve equality in cases of this nature as was observed in the case of Rono Vs Rono [12] and what may be fair in one case may not be fair or applicable in another case. In the present case the second wife is said to have ten children while the first wife has only three. That may be so, but the express wishes of the deceased cannot be ignored. To me, the deceased was clear in his mind as to what he wanted and he freely bequeathed each of his two wife’s a parcel of land during his lifetime, and lived for another 10 years after doing so and no one raised an objection.

I find useful guidance and resemblance in the above cited case of Martha Wanjiku Waweru Vs. Mary Wambui Waweru [13] where Onyancha J observed inter alia as follows;

“in this case the deceased had in his lifetime distributed his estate as he wished. He had power to do so. His family members did not protest or change his mode of distribution which they had opportunity to do during his lifetime. He fixed clear physical boundaries which no one interfered with at any stage even after his death. In my view his wishes should have been respected”

I also find it necessary to reiterate with approval the above cited excerpt from the judgement of Makhandia J (as he then was) in the case of Paul Kiruhi Nyingi & Another Vs. Francis Wanjohi Nyingi [14] where he uphold the wishes of the deceased in circumstances similar to the present case”

He was dealing in a matter similar to the present one where the deceased had distributed his estate to his two houses during his lifetime.

8. The contention by the applicant that the deceased had not made a will and died intestate is indeed true. The protestor is not relying on a will but is stating that though the deceased died intestate, he had made his wishes known to all those concerned including the applicant. Section 42 is clear that a deceased is free to distribute his properties during his lifetime and such distribution will not be disrupted by the court but will be respected.

9. The deceased had not made any provision for his married daughters but according to the protestor he had indicated that if the married daughters returned home, they should share the portion of their mother.

10. The deceased is said to have distributed his land in 1990. All the beneficiaries were alive and none objected or protested at the way he wished his estate to be distributed. Even the applicant and the other married daughters did not oppose.

11. I find that there is no dispute that the deceased had distributed his estate during his lifetime and none of his children or wives raised an objection. The court should uphold such distribution and not upset it. There was no discrimination as the deceased had made it clear that the married daughters should get a portion from portions which were given to their mothers. The mode of distribution by the deceased was not unconstitutional. Nothing prevents a proprietor of land from distributing his estate during his lifetime. That is why **section 42 of the Act** which I have cited above okays such distribution and seeks to recognize it.

12. This should be distinguished from a will which is defined under ***Section 3 of the Act as follows:***

“will” means the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II, and includes a codicil.

A will is supposed to take effect after the even, that is the death of the deceased. It is distinguished from a gift or a settlement which the deceased makes during his lifetime. The petitioner missed the point by stating that the law applicable is the law relating to wills. The matter was filed as an intestate succession by the Petitioner and she cannot seek to submit validity of a will which has not been alleged or proved. Other than alleging unfairness, the protestor has not disputed that the deceased had distributed his properties during his lifetime. The applicant and other beneficiaries lived on those properties for a long time during the lifetime of the deceased. I find that the mode of distribution by the deceased during his lifetime should therefore be respected. I find that the applicants have not proved that the estate should be re-distributed as proposed.

The 2nd Petitioner’s mode of distribution which is in line with the distribution by the deceased should be upheld. I dismiss the mode of distribution by the applicant.

I order that the distribution be as proposed by Faith Wamarwa Mucira. Jane Warigia will be registered jointly with her mother. On her mother's portion.

On the issue of Josphat Kinyua who is proposed to hold 1.5 in trust for the children of Virginia Wanjiku, it cannot be termed to be unfair because some of the children that is Josphat Kinyua, Reuben Muthike, James Muriuki are proposed to get 1.6 acres each. The 1.5 acres must be what is meant for the daughters from that house who are married and who the deceased said they get their mother's share. I order that the estate be distributed as proposed by the 2nd petitioner that is to say;

The 2nd petitioner Faith Wamarwa Mucira filed affidavit of protest and proposed the sub division as follows;

1. Faith Wamarwa – wife - 1.5 acres
2. Margaret Wagacigi - 1.66 acres
3. Ann Wanjiru - 1.66 acres
4. Josphat Kinyua - 1.66 acres
5. Justus Gichobi - 1.66 acres
6. Reuben Muthike - 1.66 acres
7. Leonard Chomba - 1.66 acres
8. James Muriuki - 1.66 acres
9. Francis Mbui - 1.66 acres
10. Josphat Kinyua - 1.5 acres (to hold in trust for children of the late virginia Wanjiku)
11. Access road - 0.62 acres

The grant shall be issued and confirmed as proposed by 2nd Petitioner Faith Wamarwa Mucira. There will be no orders as to costs. Each party will bear its own costs.

Dated at Kerugoya this 13th day of November 2019.

L. W. GITARI

JUDGE