



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**SUCCESSION CAUSE NO. 359 OF 2013**

**IN THE MATTER OF THE ESTATE OF GACHOKI KABWAI (DCD)**

**MARTHA WANGARI GACHOKI.....PETITIONER**

**V E R S U S**

**NANCY WAMARWA GACHOKI .....PROTESTOR**

**JUDGMENT**

1. This is a matter which relates to the estate of Gachoki Kabwai (deceased).

2. The petitioner Martha Wangari Gachoki applied for Grant of letters of administration intestate of the estate of Gachoki Kabwai (deceased) which she was granted on 27/08/2009. She proceeded to file an application for confirmation of grant dated 28/04/2010 in which she stated that the deceased was survived by 12 dependants. She proposed the following deceased's estate be jointly shared between Nancy Wamarua Gachoki and herself as follows:

- a) **Kabare/Nyagithuchi/17**
- b) **Toyota Hilux KWS 931**
- c) **Kimunye District Farmers Sacco proceeds**
- d) **Kirinyaga District Farmers Sacco shares.**

3. Nancy Wamarwa Gachoki objected to the mode of distribution and filed an affidavit of protest sworn on 21/12/2010.

**Protestor's case**

The protestor Nancy Wamarua Gachoki proceeded depones that she is the 1<sup>st</sup> wife of the deceased while the petitioner is the second wife. That the deceased left behind a Will dated 26/10/2006 in which he bequeathed his properties as hereunder;

- a) **Kabare/Nyagithuchi/17** to Nancy Wamarua Gachoki to hold in trust for her children
- b) **Mwea/Murinduko/306** to Martha Wangari Gachoki to hold in trust for her children

4. That the petitioner has obtained letters of administration by means of untrue allegations of facts and without knowledge of the protestor. That she is willing to share the estate as distributed excluding **Kabare/Nyagithuchi/17**.

**Petitioner's case**

In her response she stated that **Mwea/Murinduko/306** is registered in the names of Alexander Njagi Gacagia who is a stranger to the estate. That she is in possession of **Ngariama/Lower Ngariama/306** which is registered under Kabwai Gachari her father-in-law.

5. That on 27/01/2014 via **Succession Cause No. 60 of 2010** both the protestor and herself shared equally **Ngariama/Lower Ngariama/306**.

**Protestor's response**

She indicated that **Succession Cause No. 60 of 2010** was filed secretly without her knowledge and the same should be disallowed since the petitioner filed two succession matters in respect of the deceased.

6. However, protestor cannot seek to have the grant via **Succession Cause No. 60 of 2010** disallowed in this file and should make a formal application under the said file.

7. The protestor had filed an application for revocation or annulment of grant dated 5/2/2014 which was later withdrawn.

8. The protestor submits that she is not willing to share the estate equally with the petitioner who is her co-wife. She submits that land parcel No. Kabare/Nyagithuci/17 belongs to her and her children as listed in the will of the deceased. That land parcel No. Mwea/Murinduko/306 belongs to the petitioner with her children as listed in the said will. The petitioner submits that she has made out a prima facie case to warrant the court to disallow the proposed distribution. The protestor submits that she has been in possession of land parcel No. Kabare/Nyagithuci/17 living on the land and cultivating during the lifetime of the deceased and after his death.

9. For the petitioner it is submitted that the deceased left the following:-

**1<sup>st</sup> House**

- a) Nancy Wamarwa Gachoki - Wife
- b) Julius Muriuki Gachoki - Son
- c) Peter Muthike Gachoki - son
- d) Peninah Njeri - Daughter-in-law
- e) Alice Wambui Gachoki - Daughter
- f) John Githinji Gachoki - Son
- g) Ann Wanjiru Gachoki - Daughter.

That in the 1<sup>st</sup> House, Peninah Njeri takes over from James Muriithi Gachoki, her husband, who has since passed on.

**2<sup>nd</sup> House**

- a) Marth Wangari Gachoki - Wife
- b) Nicholus Waweru Gachoki - Son
- c) Ireen Wakuthii Gachoki - Daughter
- d) Jane Wanjiru Gachoki - Daughter
- e) Francis Mwai Gachoki - Son

That the estate of the deceased comprises of:-

- **Kabare/Nyangati/17**
- **Toyota Hilux KWS 931**
- **Proceeds in Kirinyaga District Farmers Sacco Society Limited A/C No. 125-14884.**
- **Shares in Kirinyaga District Farmers Sacco Society Limited.**

10. The petitioners submits that the shares and proceeds in the accounts at Kirinyaga district Farmers Sacco and Toyota Hilux KWS 931 were left out when Form P & A 5 was filed. That the list of the survivors is not in dispute.

11. She further submits that land parcel No. Mwea/Murinduko/3026 does not form part of the estate of the deceased as it is registered in the name of Alexander Njagi Gacagia who is a stranger to the estate of the deceased. That land parcel Number Ngariama/Lower/Ngariama/306 is registered in the name of Kabwai Gachari and has attached a certificate of official search to confirm the same.

12. The petitioner submits that if at all the deceased had a will dated 26/10/2006 it should be disregarded for the following reasons.

a) The will was incomplete as it had left out some properties.

b) The will had distributed land parcel No. Mwea/Mrinduko/306 which belongs to Alexander Njagi Gacoria and does not form part of the estate of the deceased.

c) The will distributed land parcel No. Kabare/Nyagithuci/11 to the protestor and her children without making provision for the petitioner and her children which is unfair, unlawful and unconstitutional.

13. The petitioner submits that the grant be confirmed as per the Para-7- of her affidavit sworn on 28/4/2010 or in the alternative the distribution be as provided under **Section 40 of the Law of Succession Act**.

14. The issue which arises pending for determination is whether the Will can be invalidated since **Mwea/Murinduko/306** is registered in the names of a stranger and the petitioner has not been provided for.

#### **Validity of will**

**Section 11 of the Law of Succession Act** provides for the formal requirement of a valid will.

No written will shall be valid unless—

a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

15. A testator is free to distribute his estate, **Section 5(1) Law of Succession Act** provides:

***“Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing”.***

16. As per the above provisions, the Will dated 26/10/2006 was valid. However, the contention is that the petitioner was never provided for since **Mwea/Murinduko/306** is registered in the names of Alexander Njagi Gacagia who is a stranger to the estate.

#### **Section 26 of the Law of Succession Act**

*Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.*

#### **Section 28 of the Law of Succession Act**

*In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—*

a) the nature and amount of the deceased’s property;

b) any past, present or future capital or income from any source of the dependant;

c) the existing and future means and needs of the dependant;

d) whether the deceased had made any advancement or other gift to the dependent during his lifetime;

e) the conduct of the dependant in relation to the deceased;

f) the situation and circumstances of the deceased’s other dependants and the beneficiaries under any will;

g) the general circumstances of the case, including, so far as can be ascertained, the testator’s reasons for not making provision for

*the dependant*

**James Maina Anyanga v Lorna Yimbiha Ottaro & 4 others [2014] eKLR**

The Court held;

**A testator has power to dispose of his property as he pleases and the court is bound to respect those wishes as long they are not repugnant to the law and he does not leave out some dependants and beneficiaries.....**

**Failure to make provision for a dependant by a deceased person in his will does not invalidate the will as the court is empowered under Section 26 of the Law of Succession Act to make reasonable provision for the dependant. In exercise of its discretion, Section 28 provides some guidelines for consideration.**

**Section 26 of the Law of Succession Act checks the freedom given to a testate by making provision that the beneficiaries who are left out or who have not been adequately provided for by the will are catered for. It gives the court discretion to make such reasonable consideration for the dependents who fall under the definition given under Section 29 of the Law of Succession Act. The section provides:-**

***“For the purposes of this Part, “dependent” means***

***(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;***

***(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and***

***(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”***

A wife and children of the deceased are dependants. There is no dispute that Martha Wangari and her children are dependants of the deceased. The property which was bequeathed to them does not belong to the deceased and does not form part of his estate. The deceased could only bequeath his free estate.

17. Act defines estate as follows ***“means the free property of a deceased person”***. A property that does not belong to a deceased cannot be distributed by will or intestacy.

***“Free property” in relation to a deceased person means the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by is death”.***

18. The will made by the deceased was valid in view of the requirements under **Section 11 of the Act** which I have cited above. The deceased had good intention to give the petitioner and her children a portion of land. However, the deceased included property which was not his. This effectively means that the deceased failed to make provision for the petitioner and her children. The petitioner and her children who are entitled to a share of his estate. The court will therefore make a reasonable provision for them.

19. The petitioner attached a certificate of official search for land parcel No. Ngariama/Lower/Ngariama/306 showing that it is in the name of Kabwai Gachari who according to her is his father-in-law and is where she lives. The only land parcel in the name of the deceased is Kabare/Nyagithuchi/17 which should be distributed to his dependants. I therefore order that a reasonable provision for the petitioner shall be made by having land parcel No. Kabare/Nyagithuchi/17 shared equally between the two houses as provided under **Section 40 of the Law of Succession Act** which provides:-

***“(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.***

***(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38”.***

20. As for proceeds and shares of the deceased at Kirinyaga District Farmers Sacco, they shall be shared equally between the petitioner and the protestor.

21. The vehicle Toyota Hilux KWS 931 shall be shared equally (may be sold and the proceeds be shared equally) between the petitioner and the protestor.

22. The grant shall be confirmed as follows:-

a) Land parcel No. Kabare/Nyagithichi/17 shared equally amongst the houses according to the number of children in each house and the two wives as an additional unit to the number of children.

b) Proceeds of Account number 1125-1484 at Kimunye District Farmers Sacco Limited

To be shared equally between:

- Martha Wangari Gachoki
- Nancy Wamarua Gachoki

c) Shares in Kirinyaga District Farmers Sacco Ltd.

To be shared equally between:

- Martha Wangari Gachoki
- Nancy Wamarua Gachoki

The grant shall be issued and confirmed in those terms.

Each party to bear its own costs.

**Dated at Kerugoya this 13<sup>th</sup> Day of November 2019.**

**L. W. GITARI**

**JUDGE**