



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 479 OF 2011

(IN THE MATTER OF GATAWUA KANGATA(DECEASED))

GEOFFREY RIRI MUREITHI.....PETITIONER/APPLICANT

-VERSUS-

LINKON WAIREGI MUREITHI.....PROTESTOR

JUDGMENT

This cause is in respect of the estate of Ephantus Gatauwa Kang'ata who died on 9th May, 1993 aged 82 of what is described in the certificate of death as 'cough with long illness'. He was domiciled in Kenya and hailed from Gitunduti, Magutu location in Nyeri County.

The petition for grant of letters of administration intestate of his estate was filed in court on 25th May, 2011. The petitioner, Geoffrey Riri Muriithi described himself in the petition as the grandson of the deceased. Besides the petitioner, the other survivors named in the affidavit in support of the petition are:

1. Ann Wanjugu
2. Joseph Rumba Muriithi
3. Lincon Wairegi Muriithi
4. Maina Muriithi

Their relationship with the deceased is, however, not indicated in the petition. The only asset listed as comprising the deceased's estate is a parcel of land known as Title No. Magutu/Gaikuyu/616 that measures approximately 0.235ha. The estate has no liabilities.

The grant of letters of administration intestate was made to the petitioner on 23rd January, 2014 and on 24th July, 2014 he filed a summons for confirmation of the grant. In the affidavit in support of this summons, he proposed to have the estate distributed as follows:

Ann Wanjugu Kimotho.....0.11 acres

Geoffrey Riri Muriithi.....0.25 acres

Joseph Rumba Muriithi.....0.11 acres

Maina Muriithi.....0.11 acres

This time round, the petitioner described himself and the rest of the beneficiaries as ‘other dependants’ of the deceased who apparently are the deceased’s only survivors.

The protestor protested against the proposed distribution of the deceased’s estate and swore that those persons listed in the petitioner’s affidavit were not just ‘other dependants’ of the deceased but were his children and that each of them should get an equal share of the estate.

The petitioner swore a further affidavit in which he deposed that the deceased was in fact ‘their’ uncle who was an elder brother to ‘their’ father. He identified their father as one Luka Muriithi Kang’ata who is deceased as well. I take it that reference to ‘their’ in the petitioner’s affidavit connotes that the rest of the persons listed by the petitioner as the deceased’s ‘other dependants’ are his siblings.

In this further affidavit, the petitioner has also sworn that the land comprising the estate was purchased by their uncle but that since their father never owned any land he gave it to the petitioner’s family on condition that the petitioner and each of his siblings were to give him a ram. According to the petitioner, of his siblings, only the protestor did not give out the ram and for this reason he is not entitled to a share of their uncle’s estate.

At the hearing of his protest, the protestor reiterated the depositions in his affidavit that all those people named by the petitioner in the affidavit in support of the petition were some of the deceased’s children and that each of them had settled on their respective share of the estate.

Upon cross-examination, however, he testified that the each of his siblings including himself were to give Ephantus Gatawa Kangata the sum of Kshs 10,000/= but that he died before the money was given to him. It is in this respect that he also admitted that Ephantus Gatuwa Kangata was not their father but a brother to their father and that the land in issue was registered in his name. According to the protestor their uncle was the first born in a family of three sons and that by virtue of his birth status, he was registered as the owner of the land for his benefit and on behalf of the rest of his two other brothers.

As he deposed in his affidavit, the similarly petitioner testified that Ephantus Gatuwa Kangata was their uncle. As a matter of fact, so he added, his uncle had his own children whom he named as Francis Kangata, Geoffrey Kangombe and Lawrence Mwangi. Since they did not appear anywhere in the petition the court stepped the petitioner down and directed each of the deceased’s children be served with the petition and the summons for confirmation of grant before the matter could proceed any further. These children eventually appeared in court and confirmed that they were not interested in their father’s estate since he had surrendered the land in issue to the petitioner’s and protestor’s father.

When he resumed the witness box, the petitioner testified further that Ann Wanjugu Kimotho was not his sister as such but the wife to his brother, Mwangi Muriithi, who is apparently mentally handicapped. He testified that the protestor is not entitled to any share of the estate because he did not pay the sum of Kshs. 10,000/- to his deceased uncle. He admitted, however, that the protestor lived with them on the estate together with his wife and children. According to him, the protestor should settle on a parcel of land which he identified as **Title No. Ruguru/Kiamanga/689** which he alleged belonged to their father.

Although the protestor suggested in his affidavit of protest and earlier in his testimony that he and the petitioner together with their siblings were the deceased’s children, it turned out they were in fact his nephews except Ann Wanjugu Kimotho who is a wife to the deceased’s other nephew and who is alleged to suffer from some disability. At the court’s direction, the deceased’s own children turned up in court and testified that though the land forming their late father’s estate was registered in his name, they were not interested in any share of it. Their evidence was largely consistent with that of the petitioner and the protestor that their deceased father had surrendered the land to petitioner’s and protestor’s family.

In ordinary circumstances, where an intestate is only survived by a child or children the estate devolves upon such a child or children. In the latter case, it is shared equally amongst the children, everything else being equal. This is so provided under section 38 of the Law of Succession Act, cap. 160 which would have been the appropriate provision of law in the circumstances of this case were it not for the fact that the deceased's children have in effect renounced their right to inheritance of his estate.

I have not found any provision in the Law of Succession Act that caters for this kind of situation where an intestate's own children do not want anything to do with his or her estate. The closest that the statute comes to in addressing such a scenario is section 39 which enumerates in an order or priority persons who are entitled to an intestate's estate where there is no surviving spouse or children. This section says:-

39. (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority -

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

In the absence of any provision in the Law of Succession Act that directly caters for distribution of intestate estate where the would-be beneficiaries have effectively renounced their right to inheritance, I am of the humble opinion that the probate and administration court will not be out of order if it invoked the provisions of section 39 of the Act to distribute such an estate. As far as the present protest is concerned, section 39 (1) (c) would be, in my humble view, the most apt provision.

It follows that the order that appeals to me as necessary in order to meet the ends justice is the division of the deceased's property equally amongst the deceased's nephews one of whom is represented by his wife.

The testimony by the petitioner that each of them was supposed to give the deceased a ram or a sum of money before he could benefit from his estate was not supported by any proof. I am not satisfied from the material before me that such demand was ever made and even if it was, the deceased's nephews except the protestor met it. In any event, if such demand was ever made it has no foundation in law and it cannot be a basis for distribution of an intestate's estate.

Again the petitioner's contention that the protestor could benefit from their father's land which he identified as **Title No. Ruguru/Kiamanga/689** was not proved to my satisfaction. There was no evidence that such property exists and if it exists it is registered in the name of their deceased father. But even if their late father owned such property, it would be a basis of a separate succession cause and its distribution would be determined in that particular cause.

In the ultimate, I am persuaded that the deceased estate should be shared equally amongst his nephews and Ann Wanjugu Kimotho who, it is agreed, is the wife of one of the nephews who suffers from a mental disability. Accordingly, I allow the protest and hereby order that the deceased's estate shall be shared equally and registered as follows:

1. Ann Wanjugu Kimotho.....0.116 acres absolutely
2. Geoffrey Riri Muriithi.....0.116 acres absolutely
3. Lincoln Wairegi Muriithi.....0.116 acres absolutely
4. Joseph Rumba Muriithi.....0.116 acres absolutely
5. Maina Muriithi.....0.116 acres absolutely

The grant of letters of administration made to the petitioner on 23rd January, 2014 is confirmed in the foregoing terms. There shall be no orders as to costs.

Dated, signed and delivered this 6th day of April, 2018

NGAAH JAIRUS

JUDGE