



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 616 OF 2001

(IN THE MATTER OF THE ESTATE OF JANE WACHUKA NDUHIU (DECEASED))

WILLIAM GIKANDI NDUHIU.....APPLICANT

VERSUS

PETER NDUNGU NDUHIU.....PROTESTOR

JUDGMENT

Jane Wachuka Nduhiu (deceased) died intestate on 22nd March, 1996 at the age of 94 years. She died of what is described in a copy of the death certificate filed alongside the petition of letters of administration of her estate as 'old age'. She was domiciled in Kenya and her last known residence was at Kiamutiga in Nyeri County.

The deceased was survived by five children two of whom are respectively the applicant and the protestor in this petition. The rest of the children are named in the affidavit in support of the petition as Charles Wanjohi Nduhiu, Ann Wamwere Wambugu and Elizabeth Nyambura Ndiritu. The youngest of them was aged 44 as at 8th November, 2001 when the petition for letters of administration intestate was filed in this Honourable Court.

The only asset comprising the deceased's estate is a parcel of land known as Title No. Thegenge/Gathuti/354 measuring approximately 4.98 hectares. The estate had no liabilities.

The grant of letters of administration intestate was initially made to the applicant alone but on 14th February, 2007 another grant was made in the joint names of the applicant and the protestor. Although there is no specific order on record revoking the earlier grant, this latter grant obviously superseded it. While making this subsequent grant, the Court allowed either of the joint administrators to apply for confirmation of the letters of administration upon the expiry of six months.

The applicant took the initiative and filed the summons for confirmation of grant on 11th September, 2007. In the affidavit in support of the grant of letters of administration, the applicant proposed to have the estate distributed equally amongst the three sons of the deceased; that is, himself and his two brothers.

His brother, Peter Ndungu Nduhiu, protested against the proposed distribution and filed an affidavit in that respect. The basis of his protest is that the applicant had been given his own land by their late father way back in 1974. He described the land as Parcel No. Laikipia/Ngobit/Block 2/953. The protestor also swore that besides having been given the land, the applicant was also given a sum of Kshs 1,500/=, apparently by his late father.

In the protestor's view, he is entitled to 8.8 acres of the estate while his brother, Charles Wanjohi Nduhiu should get the remainder of 4 acres. The applicant, according to the protestor, is not entitled to any share.

At the hearing of his protest, the protestor testified that their father passed on in 1973 but before his demise, and in particular on 7th December, 1972 he distributed his land between his two wives and the applicant. Their deceased mother, who was the second wife, was given the land that now comprises her estate while the applicant was given land in Nyandarua which he described as Nyandarua/Besi/15. The applicant is said to have declined the land and it is then that he was then given the sum of Kshs 1,500/= to buy another parcel of land of his choice. According to the protestor, it is under these circumstances that the applicant purchased land known as Land Reference No. Laikipia Block2/953 (Wiyumirere) in 1974; however, he sold it in 2005.

The applicant admitted that indeed he was given the sum of Kshs.1, 500/= by his late father to buy land elsewhere. However, when he failed to get an ideal land to buy, he returned the money to his mother in 1995. The money was then shared between himself and his two siblings. He was therefore entitled to a share of his mother's estate.

His brother Charles Wanjohi Nduhiu supported his case and testified that he was not aware of any land that the applicant had purchased. As far as he knew, the applicant returned the money he was given by their late father. The money was shared out equally amongst the three sons. It was also his evidence that the land comprising the deceased's estate was surveyed and sub-divided into three equal portions and each of the deceased's sons has developed and settled on their respective portions. It was his view that the estate should be shared out accordingly.

Though neither the applicant nor the protestor said anything about their two sisters' entitlement, Charles Wanjohi Nduhiu testified that they were married and, in any event, they were not interested in the deceased's estate.

One thing that the contestants in this dispute seem to have lost sight of is that the estate, the subject of the current succession proceedings, is not that of their father but of their deceased mother. It may very well be true that prior to his demise, their father made some advancement to the applicant or to any other person entitled to benefit from his estate; however, such an advancement or an inter vivos transfer would only have been relevant in the distribution of his estate but has no relevance whatsoever in the distribution of their mother's estate.

There is no doubt, and there is sufficient evidence that the land in dispute and which now comprises the deceased's estate was initially registered in the deceased's husband's name. But the land register in respect of this particular parcel shows that the deceased assumed its absolute proprietorship on 26th April, 1974; it is on this date that she was duly registered as the absolute proprietor of the land. It follows that upon the deceased's registration, her late husband's rights over the same parcel of land were extinguished and therefore it is not open to any of the children to seek to distribute their late mother's estate as if it was their father's.

It is with this understanding that I am persuaded that the appropriate law applicable to the circumstances of this case is section 38 of the Law of Succession Act, cap.160 which is to the effect that:

38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

Section 41 of the Act which this provisions makes reference to is all about the property due to a child or children in circumstances where they are the only survivors of either of their parents but they have not attained the age of majority. Their share of the estate in such circumstances is held in trust until they are of age or if they are female until such time that they marry.

Section 42 on the other hand talks of property which an intestate has given or settled for the benefit of a child during his lifetime or such property as has been appointed or awarded to any child under the provisions of section 26 and 35 of the Act. Any of such property has to be taken into consideration whenever the net intestate estate has to be distributed amongst the surviving children of the deceased.

None of these two provisions applies in circumstances of this case because, as noted earlier, all the deceased's children are relatively of advanced age and therefore the question of trust does not arise. Again, it has not been proved that any property which would have formed the estate of the deceased was given or settled for the benefit of any of his surviving children.

The net result is that the devolution of the deceased's estate upon her children is not subject to the restrictions imposed by sections 41 and 42 of the Act. It thus follows that the estate has to be divided amongst the deceased's surviving children equally.

For some unexplained reason, the contesting parties never made any reference to their sisters in their proposal on the distribution of their late mother's estate; they omitted them from the list of beneficiaries. Although their brother Charles Wanjohi Nduhiu testified that their sisters were married and that they were not interested in the estate, none of them filed any affidavit or testified renouncing their right to inheritance. In these circumstances, the court cannot proceed and distribute the estate to the exclusion of the daughters of the deceased. Going by the provisions of section 38 of the Act, they are entitled to an equal share of the estate as much as their brothers.

If, for some reason, they are disinterested in benefitting from their mother's estate they are at liberty to transfer their respective shares back to their brothers as they wish. It is not for this court to proceed on the assumption that they have no interest in the estate and proceed to distribute the estate as if they do not exist; taking such a course will not only be in flagrant disregard of the provisions of section 38 of the Act but will also effectively disinherit a section of the deceased's children.

For the foregoing reasons I order that land parcel Title No. Thegenge/Gathuti/354 be divided into five equal shares each of which shall be registered in the respective names of the children of the deceased as follows:

1. William Gikandi Nduhiu.....2.46 acres (absolutely)
2. Peter Ndungu Nduhiu.....2.46 acres (absolutely)
3. Charles Wanjohi Nduhiu.....2.46 acres (absolutely)
4. Ann Wamwere Wambugu.....2.46 acres (absolutely)
5. Elizabeth Nyambura Ndiritu.....2.46 acres (absolutely)

The grant of letters of administration intestate made to William Gikandi Nduhiu and Peter Ndungu Nduhiu on 14th February 2007 is hereby confirmed in the foregoing terms.

Parties will bear their respective costs. It is so ordered.

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

Ngaah Jairus

JUDGE