



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 503 OF 2013

IN THE MATTER OF THE ESTATE OF PETER NDIGIRIGI KABUGI (DECEASED)

NANCY NYAMBURA NDIGIRIGI

ROSE WANJIKU NDIGIRIGI APPLICANTS

-VERSUS-

JANE NYAWIRA MUTHAMI PROTESTER

RULING

Peter Ndigirigi Kabugi the deceased died on the 31 August 2007.

According to the assistant chief Gachira sub location vide his letter of 20 March 2013 the deceased had one wife Dorcas Muthoni and was survived by nine children, eight daughters and one son as listed herein below

1. Ruth Wanjiku Kahariri
2. Esther Wangechi Ndung'u
3. Joyce Wothaya Mwangi
4. David Wachira Ndigirigi
5. Rose Wanjiku Ndigirigi
6. Nancy Nyambura Ndigirigi
7. Jane Nyawira Muthami
8. Alice Wanjiru Muturi
9. Anne Wanjiru Muturi

The petition was filed on 22 July 2013 by Nancy Nyambura and Rose Wanjiku. On 7th January 2014 letters of administration intestate of the estate of the deceased were granted to the two petitioners.

According to the form P&A5 dated 22nd July 2013, the deceased left one asset **NAROMORU/NAROMORU/BLOCK 2/AGUTHI/EIGHT 51**.

On 3rd March 2014 Jane Nyawira filed summons for revocation of the grant under section 76 of the Law of Succession Act and rule 44 of the Probate and Administration rules, on the ground that the grant of letters of administration intestate issued to the respondents on 7th January 2013 had been obtained by concealment from court of something material to the cause and by the making of an untrue statements.

In her supporting affidavit the applicant deponed that the respondents had filed the petition without her knowledge that she had only come to know about it through the Kenya gazette. Further that the intention of the respondents was to deny her her inheritance.

On 6th June 2014 the grant was revoked and a fresh one issued to Nancy Nyambura, Rose Wanjiku and Jane Nyawira as co administrators

On 24th February 2015 summons for confirmation of grant was filed and it indicated that it was supported by the affidavit the three co administrators. The proposed mode of distribution was that the estate would be shared equally among the three.

On 1st December 2015 Jane Nyawira filed an affidavit of protest against the above.

She deponed that her father the deceased was polygamous and her own mother was his second wife. That her two sisters had forged her signature to make it appear that she had consented to the proposed mode of distribution, that the first family had already inherited the only other parcel of land AGUTHI/MUNGANIA/215 and which they had transferred to themselves after the death of their father. She proposed that the remaining property be shared between the two houses.

On 28th November 2016 another summons for confirmation of grant was filed this time proposing that the property be transferred to Nancy Nyambura.

Jane filed another affidavit of protest sworn on 6 February 2017.

She explained that her mother who was also the mother to Rose Wanjiku, died when they were very young and that the first family had taken advantage of them. She now explained that her father's estate comprised of two parcels of land Aguthi/Mungaria/215 and Naromoru/Naromoru/ block II/ Eight 51. That the first family had already inherited the first parcel of land and it was only fair that her family now inherited the second parcel of land.

The protests and the summons were heard by way of oral evidence. Both the protester and the petitioners called witnesses. For the protester the witnesses only testified that she was the daughter of the deceased and the deceased had two wives. For the co administrators, they were majorly their sisters including the protester's sister. Theirs was that she did not deserve to inherit because she never cared for their parents, and never attended their burials. Secondly that it was the wish of the deceased the second property be inherited by Nancy. A document was produced dated 3rd August 2004 which was purported to be the wishes of the deceased. In addition, unlike Nancy she was married and under Kikuyu customary law she could not inherit from her father.

Ultimately each filed submissions through their counsel.

The issues to be determined are whether;

- i. What was the deceased estate?
- ii. The deceased left a will or wishes that could be treated as such granting the second property inter vivos to Nancy?
- iii. Who is beneficially entitled to the deceased's estate?
- iv. In what shares?

The protester argued that she and her sister were children of her father. That her father was polygamous and had two wives and that the only fair thing was for her father's estate to be shared equally between the two houses however because the first house had already inherited the first property and the only properties remaining in the name of her father was a second one. She had no problem with her mother's house given that particular property.

It has been argued by counsel for the co administrators that Kikuyu customary law applies in this case and that Nancy is the one who deserves to inherit her father's property. In the event that the court finds that the property ought to be inherited by all the children of the deceased, then it ought to be divided into seven portions.

I have carefully considered the submissions by both counsel and looked at the authorities cited by each one of them.

It is not in doubt that the deceased had two wives both of whom predeceased him. It is also not in doubt that the deceased had two parcels of land. It is not disputed that the first house transferred the first property into the name of their brother after the death of the deceased. The certificate of search clearly indicates that the property was transferred to David Wachira on 11th September 2008 in the title deed was issued on the same date.

The record shows that his cause was filed for grant of letters of administration intestate. So clearly there was no will. The document that is alleged to be a will was never mentioned at any stage before the distribution of the estate. In fact, it is peculiar that the first summons for confirmation of grant proposed that the estate be distributed equally among the three or co-administrators. Only for this to change later, where now Nancy wanted the whole estate for herself on the strength of the alleged oral will.

The Law of Succession Act provides for what an oral will is and how it is to be proved. At section 9 it states:

Oral wills

(1) No oral will shall be valid unless—

(a) it is made before two or more competent witnesses; and

(b) the testator dies within a period of three months from the date of making the will:

Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.

(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by sections 18 and 19.

At section 10 it provides the manner in which oral wills may be proved.

If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.

It is noted that the first Summons for confirmation of grant proposed equal distribution of the estate among the three co administrators. That changed along the way.

The document produced by the petitioner does not come anywhere close to an oral will. It was allegedly written about three years before the death of the deceased, some of the beneficiaries were present at the meeting and signed the alleged will or wishes, and more importantly none of the independent witnesses appeared in court to testify that they were present and witnessed the recording of the same. I must find that the was no oral will. In other words, I agree with the reasoning of Mativo J in **Nyeri Succession Cause no. 692 of 2012 in the matter of the estate of Joseph Mwangi Maina** cited by the protester with regard to the document produced by the co administrators to represent the wishes or will of the deceased did not amount to a will either oral or otherwise, and was not sufficiently supported by evidence to amount to the wishes of the deceased. If indeed he had gifted the co administrator Nancy with the property and her brother as well in 2004, why was there no evidence of any efforts to transfer the same to them during his lifetime?

I find that the deceased estate was made up of the two parcels of land.

The first family already took for themselves the larger parcel of land. It is only fair that the second family also gets their share.

It has been submitted that the protester is driven by greed? That is not supported by any evidence. In fact the facts show that the greedy person is the 1st respondent. Her brother, representing her mother's house holds the lion's share of their father's estate. Why would she not want the sisters to share?

Surely if the protester was such an evil child as depicted by the petitioners and their witnesses, surely, the father would have said something very specific about her. There is no evidence to support that her failure if at all, to come home had antagonized her with her parents sufficient enough to warrant her being disinherited.

On the application of customary law to the estate of the deceased,

Section 2 on the application of the Law of Succession Act is particularly relevant.

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and on the administration of estates of those persons. (emphasis added)

The Law of Succession Act Commenced on the 1st of July 1981. The deceased died in 2007. In any event the application of customary law is subject to the values in our Constitution and cannot be applied in a manner that appears to support discrimination or the indignity of the person of the woman. I am amazed at the authority cited in support of the Nancy's case:

Karanja Kariuki vs. Kariuki (19eighty 3) eKLR (Madan, Porter and Kneller JJA). In a case where the deceased died in 1964.

And **Kanyi vs. Muthioru 19eighty4 KLR (Kneller, JA, Chesoni and Nyarangi Ag.JJA** where it was held that **'under Kikuyu customary laws, land is inherited by sons to the exclusion of married daughters, unmarried daughters are allowed to inherit land. Where such a daughter has no children, her share is for the remainder of her life. If she has an illegitimate male child, then the child can inherit her share'**.

The patriarchal undertones in that authority can be heard across the ridges and beyond. That the daughter could not inherit from her own father but her 'illegitimate son' could inherit her share.

First of all there is no illegitimate child under our legal system. Secondly discrimination is anathema to our constitutional values and the LOSA recognizes children.

Hence in my humble view all the deceased's children whether married or not with or without children are entitled to inherit from their father.

It is on record that the sisters to the protester indicated they had no interest in their father's property in their testimony. However, I do find that the applicable legal regime in my view is 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.

The protester is alive to the fact that the 1st family has already taken over the larger property. She is not interested in that one and will be contended with her mother's house getting the smaller share.

I think that is reasonable.

From the foregoing I find that the protest is merited. I allow the protest dated 6th February 2017. Hence the estate will be distributed as per Para 16 of the affidavit of protest.

Dated, delivered and signed this 3rd Day of May 2018 at Nyeri.

Mumbua T. Matheka

Judge

In the presence of:

Mr. Waruinge

Mr. Gathiga Mwangi