



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 577 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE NDIRANGU s/o WAIHIGA alias JOSPHAT NDIRANGU IHIGA (DECEASED)

CYRUS THUMBI CHUCHAI.....PROTESTOR

VERSUS

EUGINIA WANJIRU NGUTHIRU.....1ST PETITIONER

BEATRICE WAIRIMU CHANGE.....2ND PETITIONER

RULING

1. The estate relates to the late **Ndirangu s/o Waihiga alias Josphat Ndirangu Ihiga (deceased)** who died on the 4th April, 2001 at Kariguni Sub-location in Nyeri County. There is one (1) identifiable parcel of land comprising the estate of the deceased known as Parcel No. **Thegenge/Kihora/337** measuring 2.5 acres.

2. The Deceased died intestate and left the following surviving him namely;

- (i) Beatrice Wairimu Change – 2nd widow/ 2nd petitioner
- (ii) Euginia Wanjiru Nguthiru - daughter/ 1st petitioner
- (iii) Stephen Maina Ndirangu - son
- (iv) Cyrus Thumbi Ndirangu - son/ protestor
- (v) Eunice Wothaya Ndereva - daughter
- (vi) Agnes Wanjiku Mwangi - daughter
- (vii) Veronicah Muthoni Wachira - daughter
- (viii) Muringi Mwangi – daughter
- (xi) Mugure Gichohi - daughter

3. The Grant was issued to Beatrice Wairimu Change (**‘Beatrice’**) and Euginia Wanjiru Nguthiru on the 1/12/2014; and on the 11/08/2015 Euginia Wanjiru Nguthiru (**‘Euginia’**) being one of the Petitioners’ filed a Summons for Confirmation of Grant in which she proposed the distribution of the property comprising the estate of the deceased;

4. The Protestor who is a son to Beatrice and step brother to Euginia filed his Affidavit of Protest on the 3rd of November, 2015 and gave his reasons for protesting and included his proposed mode of distribution of the subject property;

5. Directions were taken on the 3/02/2016 that the matter proceed for hearing and that **‘viva voce’** evidence be tendered; all the parties filed statements which they adopted as their evidence; hereunder is a summary of the protestor’s case and the petitioner’s responses;

PROTESTORS CASE

6. His evidence was that his father had two (2) wives namely Juliana Wangari Ndirangu (deceased) who was the eldest wife and Beatrice Wanjiru Change the 2nd Petitioner herein who was the second wife and is his mother;

7. The deceased had a total of eight (8) children; Juliana the first wife only had one (1) child that is Euginia who is the 1st petitioner herein whereas Beatrice the second wife had seven (7) children the protestor being one of them;

8. It was his evidence that he had lived with his deceased father and that his wife took care of his late father and also tendered to his cows; and that his late father had told him how the subject property was to be divided amongst the eight (8) children; he was alone with his father when he told him of his wishes and that he had no document in support of his father's said wishes;

9. He was not agreeable to the Euginia's mode of distribution which was that she takes half of the subject property and the other half goes to his mother Beatrice who was still alive and was the only surviving spouse; he proposed that the property be distributed equally amongst the eight (8) children of the deceased;

1st PETITIONERS CASE

10. In response Euginia confirmed that the deceased had two wives; and that she was the only child from the first house; that the 2nd house consisted of the Beatrice who was her co-petitioner who was still alive; and that Beatrice had six(6) children; that John Kariuki Thumbi and Gichuru Thumbi were her cousins who had been looked after by her late father;

11. The Grant was issued to herself and her co-petitioner and she thereafter filed Summons for Confirmation and therein proposed the mode of distribution for the property that constituted the estate of the deceased; she had proposed that the property be divided into two (2) equal portions between herself and her co-petitioner with each getting 1.25 acres each;

12. That the property had been sub-divided by their late father; this mode of distribution was as per the sub-division but there was no witness when the sub-division was done; that this mode of distribution had been agreed upon after she had sat down with Beatrice and three (3) children from the 2nd house namely Eunice, Stephen and Muthoni;

13. Euginia called two (2) witnesses in support of her claim; **DW2** and **DW3** testified and both stated that the deceased was their uncle and that the 1st petitioner and the protestor are their cousins and the 2nd petitioner their aunty;

14. They adopted the averments made in their respective affidavits as their evidence and stated that their father pre-deceased their uncle the deceased herein; that their late father had left his portion to the deceased though neither had any documentation to support this; they denied having been taken in by the deceased; that they lived in Endarasha and that the deceased did nothing for them and never paid their school fees or bought them food;

15. **DW2** stated that his late uncle had told him how the property was to be divided; that he knew how Euginia intended to distribute the property and that she had excluded his brother and himself; that he was entitled to a share in the subject property; and he expected his family's portion;

ISSUES FOR DETERMINATION

16. After hearing the evidence of the parties and upon reading their respective written submissions this court has framed only one issue for determination;

(i) Whether the two cousins **DW2** and **DW3** were dependant's of the deceased; whether they are entitled to a share in the deceased's estate;

(ii) The mode of distribution where there are two houses and there is a surviving spouse;

ANALYSIS

Whether the two cousins DW2 and DW3 were dependant's of the deceased; whether they are entitled to benefit from the estate of the deceased;

17. Euginia in her evidence stated that John Kariuki Thumbi (**DW2**) and Gichuru Thumbi (**DW3**) were her cousins who had been looked after by her late father; and she called the two (2) cousins as her witnesses to support her claim;

18. **DW2** stated that the deceased was his uncle and that Euginia and the protestor are his cousins and Beatrice was his aunty;

19. His evidence was that his father pre-deceased his uncle the deceased herein; that the petitioners had omitted his name and his brothers as beneficiaries to the estate; the basis of his claim was that his late father had left his portion to the deceased; he tendered no documentary evidence to support this claim; but still claimed that he was entitled to a share in the subject property;

20. The evidence of **DW3** was exactly the same as that of his brother **DW2**;

21. Section 29 (b) of the Law of Succession Act outlines who qualifies to be a dependant and reads as follows;

“For the purposes of this Part, dependant means;

(a).....

(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children who 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;

22. **DW2** and **DW3** did not give any evidence that supported either of the petitioner’s claims that the deceased had sub-divided the subject property into two (2) portions; the evidence of **DW2** and **DW3** was to secure their own personal and beneficial interest over the portion of the estate that they claimed was their father’s portion;

23. The onus of proving an allegation or claim lies on the one who makes it; it was therefore incumbent upon either **DW2** or **DW3** to tender evidence to prove that a portion of the estate belonged to their father and that the deceased held it in trust for them; their evidence it is noted was devoid of any documentary evidence to support their family’s interest; none of them even alluded to the acreage that they were expecting;

24. As to dependancy their evidence controverted the evidence of Euginia as both denied having ever been taken in by the deceased nor having been maintained by him; that they had moved to and lived in Enderasha and that the deceased did nothing for them and never paid their school fees or bought them food;

25. This court finds that the witness failed to demonstrate that they had a beneficial interest in the estate; and from their own admission and from the above definition this court finds that the two cousins do not qualify as dependants within the meaning of Section 29(1) of the Law of Succession Act; they are therefore not entitled to any share in the deceased’s estate;

The mode of distribution where there is a surviving spouse;

26. In this instance it is not in dispute that the deceased was survived by a spouse namely Beatrice who was his second wife and that he also had children;

27. Section 35(1) of the Law of Succession Act provides that;

“.....where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to;

(a) The personal and household effects of the deceased absolutely and;

(b) A life interest in the whole residue of the net intestate estate;

Provided that if the surviving spouse is a widow that interest shall determine upon her re-marriage to any person.”

28. There being no consensus between the respective parties on the mode of distribution of the subject property; therefore it shall devolve as a life interest to the surviving spouse and upon her demise the property shall be divided between the children of the deceased equally;

FINDINGS & DETERMINATION

29. The protest is found to have no merit and it is hereby dismissed;

30. The two (2) cousins are not dependants nor do they have any beneficial interest in any part of the deceased’s estate;

31. The two petitioners’ mode of distribution of the deceased’s estate is found to be unfair;

32. The whole of the subject property shall devolve to the surviving spouse; her interest shall be a life interest; upon her demise the property shall be divided only amongst the deceased’s children in equal shares;

33. This being a family matter each party shall bear their own costs.

It is so ordered accordingly.

Dated, Signed and Delivered at Nyeri this 19th day of July, 2018.

HON. A. MSHILA

JUDGE