



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 1281 OF 2011**

**IN THE MATTER OF THE ESTATE OF THE LATE**

**MIRIAM WANGARI NGOCHI (DECEASED)**

**EPHANTUS WACHIRA NGOCHI.....PROTESTOR**

**VERSUS**

**GODFREY MUTHEE NGOCHI.....PETITIONER**

**RULING**

1. The estate relates to the late **Miriam Wangari Ngochi (Deceased)** who died on the 26<sup>th</sup> September, 2011. The estate of the deceased comprises of the following assets;

- (i) L.R. 36/11/1045
- (ii) Iria-ini/Kairia/806
- (iii) Karatina Town Block1/597
- (iv) Plot nos.231,232 and 233 in Supili
- (v) 500 Safaricom Shares
- (vi) Post Bank A/c No. KKA[V[Particulars Withheld]
- (vii) Equity Bank A/c No. [Particulars Withheld]
- (viii) 113 KGGCU Shares
- (ix) One cow situate at Iria-ini/Kairia/806

2. The Form P&A5 indicates that the Deceased died intestate and left the following surviving her namely;

- (i) Godfrey Muthee Ngochi - son and respondent herein
- (ii) Ephantus Wachira Ngochi – son and protestor herein
- (iii) Gladys Nyaguthii Karanja - daughter

3. The Grant was issued to the Protestor and the Petitioner in their joint names on 7/05/2012; both administrators filed an application for Confirmation of the Grant on 16/07/2013 and therein both parties set out the mode of distribution that they had initially agreed upon;

4. Thereafter the protestor Ephantus Wachira Ngochi who is also a co-petitioner was opposed to the mode of distribution and in particular to the distribution of the property known as **IRIA-INI/KAIRIA/806** and on the 11/02/2014 filed his Affidavit of Protest and therein gave his

reasons for protesting and included his mode of distribution of the subject properties;

5. Directions were taken on the 23/11/2016 that the matter proceed for hearing and that 'viva voce' evidence be tendered; and parties were directed to file and exchange witness statements; the court also directed that the Government Valuer visits the contentious property that is **IRIA-INI/KAIRIA/806** and prepares and files a Valuation Report; on the date set for hearing further directions were given that the matter be disposed of by way of written submissions and the parties were directed to file and exchange written submissions; only the respondent filed written submissions as directed; hereunder is a summary of the protestor's case and the respondent's submissions;

#### **PROTESTORS CASE**

6. The protestor is a step brother to the respondent; the deceased died on the 26/09/2011 and a Grant of Letters of Administration was made to himself and the respondent on the 7/05/2012; they both filed an application for the Confirmation of the Grant; being aggrieved with the initial mode of distribution he filed this protest; his contention was that the said mode was against the wishes of their deceased mother; in the affidavit of protest he proposed the following mode of distribution;

- (i) L.R. 36/11/1045- this property was to be shared equally between the respondent and himself;
- (ii) Iria-ini/Kairia/806 – this was the most contentious property; the protestor wanted the whole of this property to be distributed to himself absolutely as he had been put in possession of the property by the deceased prior to her death and had been in possession since 2008; that there was an oral will in existence in support of the bequest made to him witnessed by three named persons; that the respondent had been given IRIA-INI/KAIRIA/737; he was also seeking the sum of Kshs.1,978,965 as re-imbursement for improving and securing this contentious property; that he had paid the above sum from his own personal finances;
- (iii) Karatina Town Block1/597- to the respondent absolutely provided the respondent transfers half his share in Karatina Town Block 1/737 to the protestor;
- (iv) Plot nos.231,232 in Supili - to the respondent and 233 in Supili to the protestor;
- (v) 500 Safaricom Shares –to Gladys absolutely;
- (vi) Post Bank A/c No. KKA[V[Particulars Withheld]- all the monies in the account to be shared equally between the protestor, the respondent and Gladys;
- (vii) Equity Bank A/c No. [Particulars Withheld] - all the monies in the account to be shared equally between the protestor, the respondent and Gladys;
- (viii) 113 KGGCU Shares – to Gladys absolutely;
- (ix) The one cow situate at Iria-ini/Kairia/806- to be sold and the proceeds shared equally between Gladys, the protestor and the respondent;

#### **THE RESPONDENT'S SUBMISSIONS**

7. The respondent confirmed that the estate relates to Mirriam Wangari Ngochi who died intestate on the 26/09/2011; that she was survived by two sons that is the protestor and the respondent and a daughter Gladys Nyaguthii Karanja (Gladys); that the Grant of Letters of Administration was issued on the 7/05/2012 in the joint names of the protestor and himself; on the 16/07/2013 both the protestor and respondent jointly filed Summons for Confirmation and both signed the supporting affidavit which set out the agreed proposed mode of distribution for the properties that constituted the estate of the deceased;

8. Later on the 26/02/2014 the protestor filed his affidavit of protest and set out his proposed mode of distribution; the contentious property being Iria- ini/Kairia/806 which the protestor wanted allocated to himself absolutely; that the protestor had not demonstrated why he should be allocated the greater part of the estate; that the protestor had also not come to court with clean hands and has been taking unfair advantage of the others;

9. The initial agreed proposed mode of distribution as set out in the application for Confirmation of Grant is as follows;

- (i) L.R. 36/11/1045 – to be divided equally between the protestor and the respondent;
- (ii) Iria-ini/Kairia/806 – ½ acre to Gladys – the remainder to be shared equally between the protestor and the respondent;
- (iii) Karatina Town Block1/597 – to be shared equally between the respondent and the protestor- less one shop given to the respondent vide a Will in Succession Cause 190/1995
- (iv) Plot nos.231,232 and 233 in Supili – to be shared between the protestor and the respondent;
- (v) 500 Safaricom Shares – to be sold and the proceeds shared equally between the protestor, the respondent and Gladys;

(vi) Post Bank A/c No. KKA[V[Particulars Withheld]- 4 – to Gladys absolutely

(vii) Equity Bank A/c No. [Particulars Withheld]- – monies held in the account to be shared equally between the protestor and the respondent;

(viii) 113 KGGCU Shares – to be shared equally between the protestor and the respondent;

(x) One cow situate at Iria-ini/Kairia/806 - to be sold and the proceeds shared equally between Gladys, the protestor and the respondent;

10. The Respondent prayed that in the absence of any family agreement then the contentious property be divided in accordance with Section 38 of the Law of Succession; the case law relied on was **Dan Ouya Kodwar vs Samuel Otieno Odwar & Anor [2016] Eklr; Stephen Gitonga M’Murithi vs Gerith Ngira Murithi CA No.3 of 2015; Dedan Kimathi Magambo & Anor vs Grace David & 3Others [2016] eKLR; In Re Estate of Stephen Nyongo Mutinda(Deceased) [2011] eKLR; Koinange & Others vs Koinange (1986) KLR 23;**

#### **ISSUES FOR DETERMINATION**

11. After reading the parties respective affidavits and upon reading the respondent’s written submissions this court has framed the following issues for determination;

(i) The existence and validity of the oral will;

(ii) Compensation for the improvements to Iria-ini/Kairia/806;

(iii) Distribution of the estate of the deceased;

#### **ANALYSIS**

12. The parties were directed to canvass the matter by putting in written submissions; the respondent and the beneficiary both complied and filed and served their written submissions and a date for judgment was given set for the 12/07/2018; the protestor failed to put in his submissions and instead filed three (x3) applications one for recusal, one for compensation and the last one seeking to stay the judgment; the applications had a date for hearing on the 11/04/2018 and were adjourned on that date as service had not been effected upon the beneficiary; the applications are still pending and may be overtaken by the judgment;

#### **The existence and validity of the oral will:**

13. The protestor was opposed to the initial mode of distribution and contends that it was not acceptable as it went against the gift *inter vivos* made by the deceased to him; his contention was that the contentious property was allocated to him and that he had been in possession since 2008 and that it should therefore be distributed accordingly; that there were witnesses present when the gift/oral Will was made, namely Rosalind Wangechi Thiomi, Joseph Githinji Muriuki and Stephen Mugo Kanyoro; but this court notes that the court record is devoid of any affidavits or witness statements made by these witnesses as their evidence in support of the protestors claim.

14. The affidavit of protest does not set out the date the oral will was made but only states that he was put in possession; nor did the protestor tender any evidence in support of the gift nor any evidence to test the competency of Will and/or the witnesses; it is this courts considered view that the failure by the protestor to actively participate in the proceedings by putting in written submissions as directed and within the time specified means that there is no dissenting evidence to be taken into consideration; the respondents submissions stand uncontroverted and unchallenged; it therefore follows that the protestor failed to prove his claim of the gift *inter vivos* and or the existence of the oral will as envisaged by Section 9(1) of the Law of Succession Act;

15. This court finds that the protestor failed to prove his claim of the gift and or the existence of an oral will.

#### **Compensation for the improvements to Iria-ini/Kairia/806;**

16. The protestor contends that he is entitled to compensation for securing and improving the contentious property and seeks reimbursement in the sum of Kshs.1,978,965/-; upon perusal of the annexure which gives a breakdown of the works carried out this court notes that the bulk of the works were carried out on this property after the 7/10/2015 despite there being a restraining order issued against the protestor by the Hon Justice Ngaah;

17. The protestor cannot seek the courts assistance to benefit from the wrong doing;

#### **Distribution of the estate of the deceased.**

18. The estate initially belonged to the father of the litigants; he bequeathed the same to the Miriam; she died intestate and it is not disputed that there is no other surviving spouse; there is also no dispute as to who comprise the beneficiaries of Miriam’s estate and that the litigants are siblings;

19. Section 38 of the Law of Succession Act provides as follows;

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

20. There is no dispute as to the mode of distribution of the properties listed hereunder and this court finds no good reason to deviate and interfere where the parties are in consensus; the properties listed hereunder shall be distributed as follows;

(i) L.R.No.36/II/1045 – the property to be divided between the protestor and the respondent in equal shares;

(ii) The one cow situate in Iria-ini/Kairia/806 - to be sold and the proceeds thereof be shared equally between the protestor, the respondent and their sister Gladys;

21. It is this courts considered view that for the remainder of the properties listed hereunder there is no consensus in that each party has presented their own different modes of distribution; therefore in the absence of consensus between the protestor and the respondent on the mode of distribution of the deceased’s estate the reminder of the estate as listed hereunder shall devolve as provided for under Section 38 of the Law of Succession Act; The estate shall therefore be distributed as set out hereunder;

(i) Iria-ini/Kairia/806 – to be shared equally between the protestor, the respondent and Gladys;

(ii) Karatina Town Block1/597- the net to be shared equally between the protestor, the respondent and Gladys;

(iii) Plot in Supili No.231 to the respondent, Plot No.232 to Gladys and Plot No. 233 to the protestor;

(iv) 500 Safaricom Shares – to be sold and the proceeds shared equally between the protestor, the respondent and Gladys;

(v) Post Bank A/c No. KKAV[Particulars Withheld]- – the monies in the account to be shared equally between the protestor, the respondent and Gladys;

(vi) Equity Bank A/c No[Particulars Withheld]- – the monies in the account to be shared equally between the protestor, the respondent and Gladys;

(vii) 113 KGGCU Shares - to be shared equally between the protestor, the respondent and Gladys.

#### **FINDINGS AND DETERMINATION**

22. The mode of distribution set out in the protest is found to be unfair; the protest is found lacking in merit and it is hereby dismissed;

23. The application for confirmation is hereby confirmed in the terms as set out in paragraph (20) and (21) hereinabove;

24. Parties at liberty to apply;

25. Each party shall bear their own costs as this is a family matter;

It is so ordered accordingly.

**Dated, Signed and Delivered at Nyeri this 12<sup>th</sup> day of July, 2018.**

**HON. A. MSHILA**

**JUDGE**