



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1384 OF 1998

IN THE MATTER OF THE ESTATE OF HERMAN CHEGE NGOGONGO (DECEASED)

SALOME WAMBUI CHEGE.....APPLICANT

VERSUS

SIMON NJOROGE CHEGE.....1ST RESPONDENT

SHADRACK NDUNGU CHEGE.....2ND RESPONDENT

MARTIN NDUNGU CHEGE.....3RD RESPONDENT

JUDGMENT

1. The deceased herein died intestate on the 23rd of November, 1997, domiciled in Kiamworia in Thika. He left behind the following people surviving him:-

House No. 1

- i) Loise Njeri Chege – widow (deceased)
- ii) Patrick Kiarie Chege – son
- iii) John Njoroge Chege – son
- iv) James Kironyo Chege – son
- v) Shadrack Ndungu Chege – son
- vi) Francis Mburu Chege – son
- vii) Mary Muthoni Chege – daughter
- viii) Fransica Wanjiru Kahiu – daughter

House No. 2

- i) Priscilla Wairimu Chege - widow
- ii) Martin Ndung'u Chege - son
- iii) Mary Wairimu Thuo - daughter
- iv) Andrew Mugwima Chege - son
- v) Stanley Mwangima Chege - son

- vi) Catherine Wangari Chege - daughter
- vii) Salome Wambui Mwangi - daughter
- viii) Wanjiru Gathumbi - daughter
- ix) Lucy Wangechi Chege - daughter

House No. 3

- i) Josephine Nduta Chege - son
- ii) Simon Njoroge Chege - son
- iii) John Njoroge Chege - son
- iv) Salome Wambui Chege - daughter

2. On the 17th of July 1998 Simon Njoroge Chege, Shadrack Chege and Martin Ndung'u Chege sons of the deceased from each of the 3 houses moved the court for grant of representation of the estate. Wherein in the widows consent and some of the beneficiaries were obtained.

3. A grant of probate was issued on the 22nd of September, 2018 and a confirmed grant issued on 9th of November 1999.

4. In the confirmed grant the estate of the deceased said to comprise of L.R. Kiganjo/Gachika/7 was distributed as follows:

Shadrack Ndungu Chege - 1.50 acres

Patrick Kiarie Chege - 1.18 acres

Simon Njoroge Chege - 1.43 acres

John Njoroge Chege - 1.23 acres

John Njoroge Chege - 1.05 acres

James Kironyo Chege - 0.98 acres

Francis Mburu Chege - 0.90 acres

Martin Ndung'u Chege - 1.39 acres

Mary Wairimu Thuo - 1.22 acres

Andrew Mugwuma Chege - 1.07 acres

Stanley Mwangi Chege - 1.05 acres

5. The distribution above was proposed in an affidavit of Martin Ndung'u Chege dated 1st October 1999. No consent of other beneficiaries seems to have supported the distribution.

6. On the 2nd of February, 2018 the Applicant Salome Wambui Chege, a daughter from house No. 3 moved this court seeking to have the confirmed grant annulled and/or revoked; for the administrators to be restrained from encumbering or in any other way interfering with L.R. No. Kiganjo/Gachika/7 (Kiganjo property) and for the court to make such orders as would meet the ends of justice.

7. The grounds in support of the application include the fact that the grant was obtained without the knowledge and involvement of the Applicant and for leaving out other beneficiaries of the estate.

8. In the supporting affidavit by the Applicant dated 31st January 2018 she deposed that the Respondents in setting out the assets of the estate had failed to include several plots that the deceased owned within Ruiru Murera and which they had secretly sold. She further stated that at confirmation, 1 acre of the Kiganjo property should have been set aside for the two widows still alive namely Priscilla Njeri and Josephine Nduta who would share equally and hold in trust for their daughters as she claimed that the daughters and widows had been disinherited.

9. In response to the application the 1st Respondent Simon Njoroge Chege filed a replying affidavit, together with 4 witness statements. The

affidavit and the statements point out to the fact that the deceased shared out his Kiganjo property to his sons in accordance with Kikuyu customary law and did not leave any portion to his widows or daughters.

10. In her evidence before court the Applicant maintained that the deceased daughters were not involved when the grant of letters of administration was obtained and certainly she did not sign any consent. It was her case that their late father distributed his properties in 1996 to his sons and left for himself a portion and allocated to his 2nd and 3rd widows a portion each. Her mother got 0.38 of an acre. Further she stated that Josephine Nduta her mother had 1 acre and a plot at Murera whereas Priscilla the 2nd widow had 2 acres and 2 plots at the same place all purchased by their father and therefore the same belonged to the estate. That the 1st Respondent sold their mother's 1 acre and the other brother John Njoroge the plot at Murera without involving the applicant. Further their mother is sick with dementia and has been neglected by her sons and as a result of the neglect she took her mother three years ago so as to take care of her. That since then the 1st respondent has sold their mother's coffee and applied the money for his personal use. It is also her case that their father gave the 1st respondent 1.18 of an acre and her other brother John 1.05. That she remains unmarried and both their mother and the applicant have been disinherited as her brothers are in the process of subdividing and sharing among themselves the entire share of the 3rd house including their mother's share leaving them out and though there is a claim that her father left a curse that daughters should not inherit she nonetheless claims her mother's share.

11. PW2 Salome Wambui Chege a daughter from the 2nd wife testified that their father distributed land to the 2nd and 3rd widow and had indicated that any of his daughters who is in need could go back home. She also testified that their brothers have taken their mothers' properties. In her case she stated that the girls in their home had built for their mother, however at distribution their 4 brothers divided the entire share amongst themselves. That her mother now stays with her sister Lucy Wangechi. She is also aware that her stepmother stays with the Applicant. On her part she is married and has a home.

12. PW3 Francis Mburu Chege is a son from the 1st house and testified that their father had distributed land to his sons and had left a space for his use. Further, that their father had said unmarried daughters could stay with their mothers.

13. On his part the 1st Respondent confirmed that his father distributed land to their 11 sons. However it was his testimony that no land was given to the daughters or widows. That the distribution was done in the presence of Joseph Njoroge Kamuga, John Githei amongst others. It was also his evidence that his father had separated from his first wife, and gave no portion of his land to the other 2 wives and that his mother took a portion from his share whereas the 3rd widow stayed on the portion of one of her sons. As regards the applicant's claim though she remains unmarried he does not know where she will get land from as none was left for her. He confirmed that two widows had land in Murera, he maintained that his mother gave her share to him and his brother John.

14. DW2 Shadrack Ndung'u Chege 2nd respondent, son from the 1st house stated that their father had left a will where he distributed his property to his sons, gave his 2nd and 3rd widows each 0.38 of an acre each to cultivate and which portion their children would take upon their demise. As regards the Applicants claim, he left it to the court to decide.

15. DW3 was Martin Ndung'u Chege, 3rd respondent, a son from the 2nd house. It was his evidence that their late father had separated with the 1st wife and lived with his two wives in the portion he had given to Stanley one of their brothers. That when survey was carried the portion for the deceased and his two widows went partly to Stanley and partly to Simon the 1st respondent. He confirmed that Murera was taken by him, Simon and John. It was his position though that the applicant has a right to her mother's portion.

16. DW4 Bernard Kariuki Mburu testified that the deceased called him and 2 others though none of them were clan elders, to witness him distribute his land to his sons. The distribution was in writing. The document was given to the deceased sons. In cross examination he said that the deceased placed 11 boundaries for his sons. He then gave 2 portions to his two wives for their lifetime. He maintained that the applicant's mothers portion was still available.

17. DW5 was Priscilla Wairimu Chege 2nd widow of the deceased. She has 5 daughters and 4 sons. It was her evidence that her late husband left a curse that no daughter should inherit him. She got a share for a life time though her sons have already inherited the same.

18. I have considered the application, the responses thereto, the evidence placed before court and the submissions filed by the rival parties. For consideration before court are the following issues:

i. Whether the applicant and all other beneficiaries were involved when the administrators petitioned for the grant.

ii. Whether or not the deceased herein died intestate

iii. Whether the applicant is entitled to benefit from the estate of her late father.

iv. Whether the confirmed grant be revoked and

v. Who pays the costs of the suit.

19. In determining the matter the court has considered the evidence on record, the actual issues on the ground and the best and most efficacious way of resolving the issues between the parties before court.

20. The deceased left behind three 'houses' and it is only the house of the 3rd widow which has issues revolving around the share to that house as between the applicant who is an only daughter and her two brothers. The 1st and 2nd houses have not placed any issues before

court.

21. Though the 3rd house had three properties only one is contentious as the applicant appears not interested in pursuing the other two which her two brothers have already distributed between them to her exclusion and that of their mother.

22. The deceased died intestate and therefore the applicable law is **section 40** of the **Law of Succession Act** which sets how an intestate Estate ought to be distributed.

Section 40 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.”

23. Case law has gone further to state how distribution amongst the children ought to be done. In the celebrated decision of the Court of Appeal **Rono vs Rono (2005) eKLR** Waki J in his findings had this to say inter alia:

“more importantly Section 40 of the Act which applies to the estate makes provisions for distribution of the net estate to the “houses” according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children. A house in a polygamous setting is defined in section 3 of the Act as a “family unit comprising a wife and the children of that wife”. There is no discrimination of such children on account of their sex.”

24. In this case the 3rd house has a widow, a daughter and two sons. Though the respondents and their witnesses maintained that the deceased divided his estate amongst his sons during his life time and had left out his widows and daughters in accordance with kikuyu customary law and had reduced his decision in writing two things stand out one, no written will or document was presented to court, two, not only is customary law inapplicable herein nonetheless the said customary law said to have been applied was neither explained nor proved.

25. All parties are in agreement that the deceased left 3 plots and 3 acre land in Murera-Ruiru and L.R. No. Kiganjo/Gachika/7. The Plots and 3 acre land in Murera Ruiru were in the names of his 2nd and 3rd widows though all acknowledge that the said properties belonged to the deceased. The 3rd house is in possession of 2.48 acres of L.R. No. Kiganjo/Gachika/7 as per the confirmed. It is also not in dispute that the two sons of the 3rd house also got the plot and 1 acre of Murera which were in their mother’s name.

26. Having analysed the facts of the case and the law no doubt all the deceased daughters and the widows ought to have been consulted, involved and unless they renounced their interest in the estate they ought to have been considered in the distribution and therefore in my view the applicant’s claim is valid and must be considered.

27. Several of the witnesses are in agreement that the deceased 2nd and 3rd widows each occupied 0.38 of an acre during their husbands life time and that indeed the 3rd widow who is ailing and in need of medical care had planted coffee on her portion which yields some income and that due to serious incapacitation she currently stays with the applicant.

28. Taking all circumstances into perspective including that the two sons, of the 3rd house. Simon Njoroge Chege and John Njoroge Chege benefited from the plot and 1 acre land in Murera and the fact that the applicant and the widow are ‘homeless’ and currently stay in a rented house, I will redistribute the estate only to the extent that the share of Simon Njoroge Chege will now be 1.18 acres, and 0.38 that the 3rd widow has occupied over the years, and where she has planted coffee will go to the 3rd widow Josphine Nduta Chege who shall have a life interest and upon her demise the same will revert to the applicant Salome Wambui Chege. A fresh grant will issue accordingly.

I further grant the cost of the suit to the applicant.

SIGNED DATED and DELIVERED in open court this **20th** day of **September, 2018**.

ALI-ARONI

JUDGE