



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO.53 OF 2017

IN THE MATTER OF THE ESTATE OF NGANGA KEMUNYI KIOGO (DECEASED)

A N D

MARGARET WANJIRU NGIGE ..1ST PETITIONER/RESPONDENT

JOSEPH KARANJA NGANGA.....2ND PETITIONER/PROTESTOR

JUDGMENT

This dispute relates to the estate of Nganga Kemunyi Kiogo (deceased) who died intestate on 20/1/2000.

The deceased was survived by the following:

- 1. Leah Wanjiku Nganga - Widow**
- 2. Margaret Wanjiru - Daughter**
- 3. Florence Wairimu - “**
- 4. Jane Waithera Wabiyu - “**
- 5. Esther Nyambura - “**
- 6. Gladys Wangari - “**
- 7. Joseph Kerage Nganga - Son**

By a grant of letters of administration dated 15/3/2016, Margaret Wanjiru Ngige 1st petitioner, and Joseph Karanja Nganga, the protestor, were appointed as administrators of the deceased's estate.

By an application dated 6/4/2016, through the firm of Ochweri Ngamate & Co. Advocates, the 2nd petitioner sought leave to object to the grant issued to the 1st petitioner on 15/3/2016 without his knowledge.

When the Chamber Summons application came up for hearing on 30/11/2016, the same was withdrawn by consent and it was further agreed that an application for confirmation be filed.

The 1st petitioner filed the summons for confirmation of grant dated 15/3/2016 and when the same came up for hearing on 24/7/2017, the 2nd petitioner filed an affidavit of protest dated 24/7/2017 and a further affidavit of protest dated 18/8/2017.

Thereafter, directions were taken that the protest do proceed by way of vice voce evidence and the 1st petitioner was granted leave to have her witnesses record statements.

The protestor **Joseph Karanja** testified as PW1. He stated that he is the son of the deceased with Leah Wanjiku and he is the co-administrator of the deceased's estate. He said that he is objecting to the distribution as filed by the 1st petitioner because the deceased left a loan on the land which he paid; that thereafter his sisters came and shared the land, and sold off part of it; that when the deceased died, the correspondence regarding the loan came through his address and he paid Kshs.60,000/=. He produced two receipts P.Ex.No.1(a) & (b) as evidence of payment.

He also stated that the sisters are married and have large tracts of land and should only get ½ acre each of the deceased's estate except Margaret who should get 5 acres because she is unmarried; that the balance of the land to remain with him and his mother. The protestor denied having signed the petition though the signature on it looked like his and that it may have been forged by 1st petitioner.

He also denied that the affidavit of protest suggesting that they share the land equally was not his.

DW1, Leah Wanjiku, the Protestor's mother testified that the deceased had given Margaret Wanjiru 5 acres of his land before his death because she was no longer married; DW1 said that she has subdivided the rest of the land to the other married daughters who have received two acres each while her son, the protestor got 5 acres; that she wants to remain with 9 acres to take care of herself; that she sold cattle to pay off the loan and she is willing to refund the money paid by the protestor to offset the loan on the deceased's land.

DW2 Margaret Wanjiru, 1st petitioner, a sister to the protestor stated that it is her mother (DW1) who filed the petition and she proposed that DW2 and the protestor get 5 acres each while the others got 2 acres each; that the protestor rejected the mode of distribution. She denied any knowledge of any outstanding loan till they came to court. When pressed in cross-examination, she admitted that when they followed up with the loan they found that the protestor had paid it off. On the allegation that the protestor never signed the petition, DW2 told the court that they are in bad terms with the protestor and it was left to the chief to call him to sign the petition.

I have considered the evidence adduced, the pleadings and the rival submissions by counsel.

From the testimony of the witnesses it is not disputed that **Margaret Wanjiru (DW2)** was given 5 acres of land by the deceased before his death. The deceased left 27 acres of land. Since 5 acres had been given to DW2, what is left for distribution is 22 acres.

The protestor told the court that though he was named as one of the administrators, he never signed the petition and was not aware of the issuance of grant. He also alleged that the signature on the petition was not his. DW2 told the court that they all signed the petition before the chief and it was chief who was supposed to call the protestor to go and sign. It means that the protestor never signed the petition with the rest of the beneficiaries.

The protestor has signed other documents filed in the cause and the signatures differ from the one on the petition.

DW2 having admitted that the chief was supposed to call the protestor, I find that there is a possibility that the protestor never signed the petition and may not have been aware of the filing of the petition though he was named as one of the administrators. That must have been what prompted him to file the objection that was later withdrawn.

The issue before the court is one of distribution; whether the court should adopt the distribution done by the 1st petitioner and DW1.

For purposes of the Succession Act, the children of a deceased person include sons and daughters and are entitled to the estate equally and the law does not make a difference between son or daughter. Article 27 of the Constitution also provides for equality of all persons before the law irrespective of race, sex, marital status e.t.c.

The court had occasion to consider Article 27 in ***Peter Karumbi Keingati & 4 others v Ann Nyokabi & 4 others CA.235/2014 (Nairobi). In Rono v Rono (2008) I KLR 803***, the High Court had distributed the deceased's estate to the children of the deceased with the girls getting a lesser share. They appealed and the Court of Appeal relying on Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination Against Women and African Charter on Human and People's Rights, reversed the decision of the High Court and held that both sons and daughters were entitled to an equal share of the deceased's estate.

In this case, DW1 the widow of the deceased is the one who has distributed the estate. It seems the protestor was not involved. DW1 as much as admitted that fact.

DW2 had already been given her share. The other daughters (beneficiaries) are content with what they got i.e. 2 acres each. Based on the **Rono case (Supra)**, there is no basis for the 3rd protestor suggesting that the sisters get ½ an acre each because they are married. The law does not permit discrimination on the basis of sex or of marital status.

The protestor also objects to DW1 holding most of land (i.e. 9 acres) in trust for any of them. According to him, it is a ploy to dispose of the deceased's estate and dispossess him. Although DW1 and the protestor did not disclose it, it is obvious that there is bad blood between the protestor and the petitioner/DW1. The proposed distribution was done by DW1, to the exclusion of the protestor. In her testimony, DW1 averred that she has distributed the estate and that has to stand. The DW1, widow of the deceased must remember that even though she is the mother of the protestor, it is for the administrators of the estate, to administer the estate and all beneficiaries should have been involved in the decision. DW1 should also be aware that the deceased's estate is not her land. She is also a beneficiary. The distribution of the estate by was unilateral, by DW1, though she is not even an administrator.

The court saw DW1 testifying. The court had to take her evidence *deben esse* because she is very old and frail. This court has no idea why she wants to hold 9 acres of the estate in trust. From what happened between the protestor and DW1, the court senses some unfairness and ill intent on the part of the petitioner and DW1. The protestor alleged that part of the land has been sold by DW2 but those allegations were not supported by any evidence. However, DW1's conduct of holding onto 9 acres at her age is suspect and tends to confirm the protestor's allegations and fears.

The protestor told the court that he paid part of the unpaid loan left by the deceased on the said land. The protestor exhibited two receipts paid on 9/9/2015 and 29/12/2015. This is about 15 years after the deceased's death. Though DW2 denied knowing about the loan, she later

admitted in cross examination DW1 was aware of the loan and she quickly said that she was ready to pay back the protestor his money so that the distribution remain.

I am satisfied that the protestor has paid part of the loan and there is really no reason why DW1 should insist on the money being refunded. Florence Wairimu, Jane Waithera, Esther Nyambura and Gladys Wangari Kamu are satisfied with the two acres that they have been allocated. They are married ladies and do not claim any more of the estate. It is likely, as the protestor said that they are landed wherever they are married. Margaret Wanjiru has already been given 5 acres.

In my view, the balance of 14 acres should be shared equally between the protestor and DW1 Leah Wanjiku and I direct that each gets 7 acres of land.

This being a family dispute, I direct that each party do bear its own costs.

Dated, Signed and Delivered at NYAHURURU this 14th day of November, 2018.

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Kaburu holding brief Mr. Ngure

Mbiyu – Court Assistant