



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.424 OF 2012

IN THE MATTER OF THE ESTATE OF THE LATE MWANGI GATHENYA WACHIRA (DECEASED)

HANNAH WANJIRU GATHENYA.....PETITIONER

VERSUS

ESTHER NYAWIRA GATHENYA.....PROTESTOR

JUDGMENT

BACKGROUND

1. Hannah Wanjiru Gathenya (hereinafter the petitioner) obtained a grant of letters of administration in respect of the estate of Mwangi Gathenya Wachira (deceased) on the 25th November, 2013.
2. Vide an application for confirmation of grant dated 26th May, 2016, the petitioner sought confirmation of the said grant detailing the mode of distribution.
3. This application elicited an affidavit of protest sworn on 20th July, 2016 by Esther Nyawira Gathenya.
4. Directions were given that the summons for confirmation of grant be disposed off by way of written submissions and both parties duly complied.

THE PETITIONER'S CASE

5. The petitioner has detailed the preferred mode of the distribution of the estate in paragraph four (4) of the supporting affidavit as follows:

a) Land known as Nyandarua/Ol-joro-Orok Salient 1828 measuring approximately 2.2HA to be shared equally among:

- i. ESTHER NYAWIRA GATHEYA
- ii. JOHN NJOROGE GATHENYA
- iii. SALOME WANGARI
- iv. ISAAC KINYUA (Deceased) to be represented by his widow
- v. PATRICK NGURE (Deceased) to be represented by his widow
- vi. JOHN WACHIRA (Deceased) to be represented by his widow
- vii. MURAGU GATHENYA (Deceased) to be represented by his widow

b) Land known as Baringo/Ravine/102/74 measuring approximately 4.4 HA to be registered in the name of Hannah Wanjiru Gathenya (The only surviving widow) and held in trust of the following:

- i. HANNAH WANJIRU GATHENYA
- ii. JAMES MWAMBURA GATHENYA
- iii. SOLOMON MARIANJUGU GATHENYA
- iv. GEORGE GATHENYA
- v. JECINTA MWERU KINYANJUI
- vi. PRISCILLA WANGARI NJOROGE
- vii. LISTER WACHIRA (Deceased) to be represented by the widower
- viii. HENRY KINYA (Deceased) to be represented by his widow
- ix. MUTHONI GATHENYA (Deceased) to be represented by the widower
- x. SUSAN WANJIKU (Deceased) to be represented by the widower
- xi. RICHARD WACHIRA GATHENYA (Deceased) to be represented by his widow
- xii. NANCY WANGARI GATHENYA
- xiii. JULIUS GATHENYA
- xiv. BRENDA GATHENYA
- xv. HARRISON KINYUA GATHENYA
- xvi. HOSEA GATHENYA

c) Land known as LR NO.448/12 and premises thereon to be registered in the joint names of:

- i) GEORGE GATHENYA
- ii. JOHN NJOROGE GATHENYA
- iii. HARRISON KINYUA (BEING REPRESENTATIVES OF EACH HOUSE) and held in trust of all the beneficiaries and rent collected from the premises to be divided in three (3) equal parts and shared among the three houses.

THE PROTESTOR'S CASE

6. The protestor counters the mode of distribution proposed by the petitioner specifically stating:

1. That the land known as Nyandarua/Ol-joro-Orok Salient 1828, had been allocated to some of the beneficiaries by the deceased before his death. The land is therefore not available for distribution.
2. That the protestor's family had no trust on the individuals named as potential trustees on the land known as Baringo/Ravine/102/74. She proposed that the property be shared among the three (3) houses equally. She prays that the court to appoint any two persons to hold the interest of each household She preferred that she and JOHN NJOROGE GATHENYA to hold the property in trust of other siblings in her household.
3. That the land known as LR NO.448/12 and the premises thereon, was the matrimonial home of her mother one MARY WANJIRU GATHENYA, who was one of the widows. She suggests that since each household had a matrimonial home, the said parcel of land be bequeathed to her household.
4. That there were three properties marked as A, B, and C, opposite the Catholic Church in ELDAMA RAVINE. That plot number A was grabbed leaving B and C forming part of the estate of the deceased but one GEORGE GATHENYA claimed number B as his.

7.The protestor also seeks that the administrator does account for all rents collected from LR 448/12 since the death of the deceased.

THE PETITIONER'S SUBMISSIONS

8. It is submitted for the petitioner that the deceased expressed his wishes on how his three (3) houses would be settled and actually settled

them as per his wishes prior to his death. The first house was settled on Nyandarua/Ol-joro-Orok Salient 1828 and the other two (2) houses were settled on Baringo/Ravine/102/74 where each widow held a matrimonial home.

9. It is submitted that the titles annexed to the affidavit in protest indicating that the deceased had passed title to some of the beneficiaries namely Joseph Kimani Kinyua, Daniel Mwangi Isaac and Salome Wangari Kamau cannot stand as at the time of the alleged transfer, the deceased was critically ill and couldn't understand the nature of the transaction.

The said titles may have been fraudulently obtained through coercion by some beneficiaries. Title No.Nyandarua/Ol-Jor-Orok Salient 1828 is therefore available for distribution. I am referred to the case of **Soti Kigen**, Succession Cause No.115 of 1996.

10. It is denied that the deceased owned three (3) properties opposite the Catholic Church at Eldama Ravine. No documents of title have been annexed. Counsel makes reference to the decision in Re:**Eugenio Njagi Chabari** (deceased), Succession Cause No.685 of 2015 (Chuka).

11. On who should inherit Baringo/Ravine/102/24, it is urged that the deceased expressed his wishes and settled his three (3) houses as per his wishes before his death. The 1st house was settled on Nyandarua/Ol-Joro-Orok Salient 1828 and the other two (2) houses were settled on Baringo/Ravine/102/74. It is the later who occupy Baringo/Ravine/102/74 where each widow has a matrimonial home and they should inherit this land and they are in agreement over the same to the effect that the same be registered in the names of the petitioner to hold in trust for sixteen (16) beneficiaries of the 2nd and 3rd house. The 1st house should be excluded from this property as they received a fair and equitable share.

12. On who should inherit LR No.448/12, it is submitted that the same is a commercial property. It fetches rent and the same should be registered in the joint names of George Gathenya, John Njoroge Gathenya and Harrison Kinyua (being representatives of each house) and held in trust for other beneficiaries. The rent collected should be divided in three (3) equal parts and shared among the three (3)houses.

THE PROTESTOR'S SUBMISSIONS

13. The protestor submits that land transferred before death of the deceased is not available for distribution. Reference is made to the decision in **Evans Edward Michoma V. James Machuka Michoma** (2013) eKLR.

It is urged that the property transferred before the death of the deceased ceased to be the property of the deceased and was not available for distribution. Therefore property known as Nyandarua/Ol-Joro-Orok Salient 1828 is not available for distribution.

14. The protestor submits that the court has powers to appoint separate trustees of the property passing to each house where valid polygamous marriages have created more that one house (**Section 84 Laws of Succession Act**).

15. It is submitted that the Matrimonial home of the late Mary Wanjiru Gathenya should be allocated to her surviving children.

16. On accounts, it is the protestor's case that, the administrator being a trustee stands in a fiduciary relationship in respect of the property and the beneficiaries. As a trustee, she is bound to account for her administration of the estate. The court is urged to order her to tender an account to court of her administration of the estate.

ANALYSIS AND DETERMINATION

17. I have had regard to the summons for confirmation of grant and the supporting affidavit, the affidavit in protest and submission by counsel.

18. The issues for determination crystalize into:

- a) What property of the deceased is available for distribution.
- b) Did the deceased validly express his wishes on how his three (3) houses should be settled and settled them as per his wishes prior to his death?
- c) Based on the answers to (b) above, what should be the mode of distribution of the deceased's net estate.
- d) Who should inherit property known as LR NO.448/12 which is a commercial property generating rent and how should it be managed going forward.
- e) Should the administrator render accounts to court of her administration of the estate?

19. As to what property constitutes the estate of the deceased, I note the disputed property is only LR No.Nyandarua/Ol-Jor-Orok Salient/1828. The protestor indicates that the land had been allocated to Joseph Kimani Kinyua (0.60HA), Daniel Mwangi Isaac (0.69HA) and Salome Wangari Kamau (0.97HA).

This is as seen in the title deeds exhibited as annexures ENG 1(a) (b) and (c) of the affidavit of Esther Nyawira Gathenya. On her part, the petitioner annexes a title deed in the names of the deceased for 4.4HA issued on 22nd January, 1990

20. The deceased died on 10th December, 2007. The title deeds to Joseph, Daniel and Salome (above) were issued on 21st February, 2003, 18th April, 2002 and 13th February, 2003 respectively. All these dates are certainly before the death of the deceased.

21. Other than Salome Wangari Kamau who could be the Salome Wangari listed as a beneficiary in paragraph 2(a) of the affidavit by the petitioner sworn on 26th May, 2016, Joseph Kimani Kinyua and Daniel Mwangi Isaac appear to be strangers to the estate herein.

22. The protestor has shown that subdivision and issuance of new titles was effected before the death of the deceased in respect of title No.LR Nyandarua/Ol-Jor-Orok Salient/1828. The burden shifts to the petitioner to demonstrate that the title was intact at the time of the death of the deceased. Not much effort has been put in that direction.

23. In essence then, this land is not a property of which the deceased was legally competent freely to dispose during his lifetime.

24. It is submitted for the petitioner that the beneficiaries to the new titles of the land did not file any protest to the confirmation of grant and that at the time of death, the deceased was critically ill and could not soundly understand the nature of the transaction he was entering into.

This assertion is hollow and does not aid the petitioner's case. The owners of the new titles needed not file any protests as they hold titles free of any encumbrance. Secondly, there is no evidence that the transactions took place when the deceased was ill and unable to transact.

Indeed, the titles are shown to have been issued four (4) and five (5) years before the death of the deceased.

25. In the case of **Evans Edward Michoma V. James Machuka Michoma**, [2013] eKLR, one of the issues for determination was whether land parcel LR NO.71293, LR NO.13838 formed part of the deceased's estate. The court laid emphasis on the definition of Free property under **Section 3** of the **Law of Succession Act** to mean:

“In relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.”

26. Placing reliance on the case of **Estate of Mwangi Kibirigwe (deceased)**, [2012] eKLR where evidence was adduced that though property was registered in the names of the deceased, he (deceased) had sold the same to the objector's father and the court found that the said property did not constitute part of the deceased's estate, I am satisfied that property transferred before the death of the deceased does not form part of the estate.

27. It is noteworthy that in the above suit the property was still registered in the name of the deceased. In our instant suit, the property is already sub-divided and titles issued to 3rd parties. This property is certainly not available for distribution.

28. The protestor indicates that there were three (3) properties opposite the Catholic Church in Eldama Ravine marked A, B, and C. Plot A was grabbed and the two (2) others are the property of the deceased. The petitioner denies knowledge of such property.

29. The protestor fails to prove existence of the stated properties by way of documents of title or otherwise. It is not enough to state that some property forming part of the deceased's estate exists. There must be clear evidence of such existence otherwise the court would be reluctant to give orders on distribution of unascertained property.

30. Consequently the estate available for distribution in view of the above analysis is Baring/Ravine.102/74 and LR 448/12.

31. Did the deceased conclusively express his wishes on how his three (3) houses should be settled and did he settle them as per his wishes? No evidence to prove this has been forthcoming. It now emerges one of the properties where the petitioner alleges the 1st house should have been settled did not form part of the deceased's estate at his death.

32. It was upon the petitioner to prove on a balance of probability that what the deceased's wishes were and whether he actualized them.

33. What then should be the mode of distribution? Guided by **Section 40** of the **Law of Succession Act**, the distribution of the deceased free property should be in accordance to equitable shares to each child as a unit with any surviving widow being an extra unit.

34. It is important to note, however, and the parties appear agreed on this that the property known as L.R. 448/12 by its very nature is not practically divisible as per paragraph 33 above.

35. I have also factored in the size of the LR NO. Baringo/Ravine/102/74 which is 4.4 Ha. Having already made finding that LR NO. Nyandarua/Ol -Joro-orok Salient/1828 was not available for distribution for reasons that it was not the free property of the deceased at his death, it follows that LR. NO. Baringo/Ravine/102/74 is the available land to be shared as per **Section 40** of the **Law of Succession Act**.

36. The Protestor proposes that LR. NO. Baringo/Ravine/102/74 be shared equally among the 3 houses of the deceased. The petitioner is of the view that this land should be shared out between the 2nd and 3rd house as the 1st house was given LR. NO. Nyandarua/Ol-Joro-Orok Salient/1828.

37. There has not been evidence to show that the change of ownership of LR. NO. Nyandarua/Ol-Joro-Orok Salient/1828 during the life of the deceased was for the benefit of the 1st house.

38. The size of parcel LR. Baringo/Ravine/102/74 is 4.4 Ha. None of the parties proposes that each beneficiary get their individual share. I think this is reasonable given the high number of beneficiaries for the 3 houses.

39. It is my considered view that LR. NO. Baringo/Ravine/102/74 should be shared equally among the 3 houses of the deceased. This would be less 0.04 Ha which should be set for a common grave yard for the members of the 3 houses.

40. As stated earlier LR. NO.448/12 is not divisible to each individual given its very nature. This is an income generating property which should be held in trust for the 3 houses by representatives for each house. I am in agreement with the petitioner that the same be held in trust for all beneficiaries by John Njoroge Gathenya, George Gathenya and Harrison Kinyua representing the 1st, 2nd and 3rd houses respectively. I see no solid ground on which the protestor basis mistrust on any of the three (3).

41. Should the administrator render accounts to court of her administration of the estate. The administrator is not opposed to this and just as well since the Law requires her in her fiduciary position so to do. It is directed that the administrator herein furnishes this court with a detailed account of the going ons, and transactions involving the estate indicating but not limited to rent collected since the death of the deceased.

42. With the result that orders shall flow in the following terms;

i. L.R. NO. Baringo/Ravine/102/74 be shared out equally among the 3 houses and each share of a house to be held in trust by John Njoroge Gathenya, George Gathenya and Harrison Kinyua for the 1st, 2nd and 3rd houses respectively less 0.04 ha to be set aside for a common graveyard for all the members of the 3 houses.

ii. L.R. NO.448/12 is to be held in trust by John Njoroge Gathenya, George Gathenya and Harrison Kinyua for the 1st, 2nd and 3rd houses respectively.

iii. John Njoroge Gathenya, George Gathenya and Harrison Kinyua to collect and bank all receivable rent from LR No.448/12 in the joint account said by the petitioner to exist and in the event that one does not exist, they forthwith open a bank account agreeable to the them for the said purpose. They shall be under a duty to share out the proceeds of rent to their respective houses not later than 10th of every subsequent month.

iv. The administrator to render a full and accurate account of the going-ons and transactions including but not limited to rent collected since the death of the deceased.

v. This being a family matter each party to bear its own costs.

Dated, Signed and Delivered at Nakuru this 1st day of February, 2017

A. K. NDUNG'U

JUDGE