



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PROBATE & ADMINISTRATION CAUSE NO. 302 OF 2010

(IN THE MATTER OF THE ESTATE OF MACHARIA KARIA ALIAS MACHARIA S/O KARIA)

JANE WAMUYU MAINA.....PETITIONER/APPLICANT

VERSUS

JAMES NDONYO NJOGU.....PROTESTOR

JUDGMENT

This succession cause is in respect of the estate of Macharia Karia alias Macharia s/o Karia who died on 21st January, 2009 and who, as at the time of his demise, was domiciled in the Republic of Kenya and his last known place of residence was at Kaguyu sublocation.

On 11th May 2010, the applicant petitioned for letters of administration intestate of his estate. She described herself in the affidavit in support of the petition as the daughter of the deceased. Apart from herself, there are 14 other persons who are named in that affidavit as having survived the deceased. Of these survivors, one is named as the deceased's widow, nine are his children, including the petitioner, while the rest are the deceased granddaughters. For clarity, it is necessary to list them here as listed in the affidavit.

1. Tabitha Muthoni Macharia (daughter)
2. Lydia Wambui Muraya (daughter)
3. Virginia Njeri Maina (daughter)
4. Esther Wangui Wamai (daughter)
5. Juliana Wairimu (daughter)
6. Mary Wanjiru Karumi (daughter)
7. Joseph Murimi Macharia (son)
8. James Ndonyo Njogu (son)
9. Lucy Wandia Macharia (daughter)
10. Jane Wamuyu Maina (daughter)

11. Tabitha Nyaguthii wanjiku (granddaughter)
12. Beatrice Wambui Wanjiku (granddaughter)
13. Virginia Njeri Wanjiku(granddaughter)
14. Agnes Wairimu Wanjiku(granddaughter)
15. Agnes Muthoni Macharia(granddaughter)

As at 11th May, 2010 when the petition was filed the youngest of the survivors was aged 19 meaning that they were all adults at the time material to this succession cause. The deceased's widow was then aged 87.

Listed as the inventory comprising the deceased's estate were the following assets:

- 1. Title No. Iriaini/Kaguyu/442** (measuring approximately 5.98 acres)
- 2. Title No. Iriaini/Gatundu/559** (measuring approximately 0.68 ha)
- 3. Title No. Iriaini/Gatundu/898** (measuring approximately 0.2325 ha)

All these assets were estimated to be worth Kshs. 500,000/=. The deceased had no liabilities.

The applicant obtained the grant on 11th August, 2010 and on 9th March, 2011 she filed a summons of even date for confirmation of the grant. In the affidavit in support of the summons for confirmation of grant, she proposed to distribute the estate as follows:

1. Title No. Iriaini/Kaguyu/442

To be shared amongst the deceased's children and his grandchildren in the following shares:

- (i) Each of the deceased's children to get 0.544 of an acre;
- (ii) All the deceased's grandchildren except Agnes Muthoni Macharia to share 0.544 of an acre.
- (iii) Agnes Muthoni Macharia to get 0.544 of an acre.

2. Title No. Iriaini/Gatundu/559

To be shared as follows:

- (i) Agnes Muthoni Macharia to get 0.405 acres
- (ii) Jane Wamuyu Maina to get 0.215 acres

3. Title No. Iriaini/Gatundu/898

To be registered in the name of Agnes Muthoni Macharia apparently as the absolute proprietor.

A consent filed alongside the summons for confirmation of grant shows that six of the deceased's children together with two of his grandchildren were agreeable to this proposed distribution. The rest did not sign the consent. One of those children who did not sign the consent was James Ndonyo Njogu; he protested against the confirmation and in an affidavit, he filed in that behalf, he swore that he was protesting together with the deceased's grandchildren Tabitha Nyaguthii Wanjiku, Beatrice Wambui

Wanjiku and Virginia Njeri Wanjiku on whose behalf he had also sworn the affidavit of protest.

According to the protester, the proposed distribution does not conform to the deceased's oral will which he claimed was made on 14th January, 2009. The will, so he alleged, was to the effect that the estate should be distributed in four equal portions so that the protester and his brother Joseph Murimi Macharia will get one part each while the other two parts would go to Juliana Wairimu and the deceased's four grandchildren excluding Agnes Muthoni Macharia respectively. The four granddaughters are the children of Nancy Wanjiku while Agnes Muthoni Macharia is the daughter of Juliana Wairimu. As a matter of fact, the deceased had allocated each of these parties their share which, according to the protester, they had extensively developed.

In any event, so the protester swore, the petitioner's proposed distribution of the estate is inequitable and unfair because Agnes Muthoni Macharia has been allocated a larger share of the estate than is only a grandchild of the deceased and thus she does not rank prior to the deceased's own children.

At the hearing of the protest, the protester reiterated the contents of his affidavit but added that Nancy Wanjiku was also one of the deceased's daughters but she died in 2008 and she was survived by four children who are the deceased's granddaughters. He also testified that one of the deceased's son, Joseph Murimi Macharia, had also died in the year 2010 and was survived by a widow whom he named as Alice Njeri Murimi. His mother, the deceased's widow also passed on in the year 2010.

One of the persons who is alleged to have been present when the deceased made his oral will and whom the protester called as one of these witnesses was **Peter Muriuki Ngure (PW2)**; he testified that the deceased died six to eight months after he made his oral will. The other witness, **Japheth Nyaga Gathu (PW3)** who is also alleged to have been present at the material time testified that he could not remember the exact date the will was made but it was two years before the deceased died.

The petitioner testified that her mother died while the succession cause was pending. She reiterated that she wanted the deceased's estate to be distributed in accordance with her proposal which, it was her evidence, reflected the wishes of the deceased. She also confirmed that the deceased's son Joseph Murimi Macharia and one of his daughters, Nancy Wanjiku had passed on.

The protesters protest against the proposed distribution of the deceased estate is two-pronged; first he alleges that there is a will the basis upon which the estate should be distributed and second, even if there was no will, the proposed distribution is inequitable and unfair to some of the deceased's survivors.

The question whether the deceased made any oral will on how he wished his estate to be distributed can be disposed of fairly easily. The evidence of the protester's own witnesses leads to the conclusion that no such will ever existed and if it did, it was not valid. Their evidence was contradictory as to the period between the date of the oral will and the date of the deceased's; one testified that it was between 6 to 8 months while the other one testified the deceased died two years after the will had been made. Irrespective of who between them was right, it is clear that the deceased died outside the three months' period within which he ought to have died after he made the oral will for the will to be valid. This is what section 9 of the law of succession act provides; it states:

9. (1) No oral will shall be valid unless –

(a) it is made before two or more competent witnesses; and

(b) the testator dies within a period of three months from the date of making the will:

Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.

Subsection (1) (b) is more to the point; it is also by and large self-explanatory and I need not belabour the

point that if the deceased ever made any oral will then it was rendered invalid by virtue of the fact that he died outside the limitation period. It follows that intestacy provisions of the Law of Succession Act apply to the distribution of the deceased's estate and the pertinent provision in this regard would be Section 38 of that Act which states as follows:

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

The deceased left a surviving spouse but she died before the administration of her late husband's estate was complete and therefore section 38 of the Act rather than section 35 thereof is the appropriate applicable law in determination of the protestor's second concern- whether the distribution of the deceased's estate was equitable and fair. This section is again clear that the estate should be shared equally amongst the deceased's children.

Both the petitioner and the protestor were in agreement that the deceased was survived by nine children; one of these children, Joseph Murimi Macharia died after the deceased's death. The petitioner acknowledged, and I did not hear any evidence to the contrary, that he was survived by his spouse Alice Njeri Murimi.

It was also common ground that Nancy Wanjiku was also one of the deceased's daughters but she was not named in the petition as such apparently because she predeceased the deceased. She, however, left behind four children who, as noted, were aptly named in the petition as the deceased's granddaughters.

In view of the fact that the deceased's two deceased children left behind survivors who would ordinarily be entitled to the respective estates, they ought to be considered in the distribution of the deceased's estate. Their share would constitute their estate to which their respective survivors or beneficiaries to their estate would ordinarily be entitled to.

As far as Agnes Muthoni Macharia is concerned, her mother, Juliana Wairimu, is benefitting from the estate and she will presumably inherit her mother's estate if she survives her. Suffice it to say, I cannot find any basis in law upon which she, as the deceased's granddaughter can lay claim on his estate when her mother, the deceased's daughter has been allocated her share.

If I proceed from these established facts and apply the law as it is, I would direct that the deceased estate be distributed as follows:

1. Title No. Iriaini/Kaguyu/442

Shall be divided into equal shares of approximately 0.543 acres each; each share shall be transmitted to and registered in the following names as absolute proprietors:

I. Deceased's children:

- (a) Tabitha Muthoni Macharia (daughter)
- (b) Lydiah Wambui Muraya(daughter)
- (c) Virginia Njeri Maina(daughter)
- (d) Esther Wangui Wamai(daughter)
- (e) Juliana Wairimu(daughter)
- (f) Mary Wanjiru Karumi(daughter)

- (g) Alice Njeri Murimi
- (h) James Ndonyo Njogu(son)
- (i) Lucy Wandia Macharia(daughter)
- (j) Jane Wamuyu Maina(daughter)

II. The deceased's grandchildren (Nancy Wanjiku's children):

- (a) Tabitha Nyaguthii wanjiku
- (b) Beatrice Wambui Wanjiku
- (c) Virginia Njeri Wanjiku
- (d) Agnes Wairimu Wanjiku

(To be registered as proprietors in common in equal shares of one share of approximately 0.543 acres)

2. Title No. Iriaini/Gatundu/559

Shall be transmitted and registered in the following names as proprietors in common:

- (a) Tabitha Muthoni Macharia (daughter)
- (b) Lydiah Wambui Muraya(daughter)
- (c) Virginia Njeri Maina(daughter)
- (d) Esther Wangui Wamai(daughter)
- (e) Juliana Wairimu(daughter)
- (f) Mary Wanjiru Karumi(daughter)
- (g) Alice Njeri Murimi
- (h) James Ndonyo Njogu(son)
- (i) Lucy Wandia Macharia(daughter)
- (j) Jane Wamuyu Maina(daughter)
- (k) Tabitha Nyaguthii Wanjiku

Tabitha Nyaguthii Wanjiku to hold her share in trust for herself and for her sisters:

- (a) Beatrice Wambui Wanjiku
- (b) Virginia Njeri Wanjiku
- (c) Agnes Wairimu Wanjiku

3. Title No. Iriaini/Gatundu/898

Shall be transmitted and registered in the following names as proprietors in common:

- (a) Tabitha Muthoni Macharia (daughter)
- (b) Lydia Wambui Muraya(daughter)
- (c) Virginia Njeri Maina(daughter)
- (d) Esther Wangui Wamai(daughter)
- (e) Juliana Wairimu(daughter)
- (f) Mary Wanjiru Karumi(daughter)
- (g) Alice Njeri Murimi
- (h) James Ndonyo Njogu(son)
- (i) Lucy Wandia Macharia(daughter)
- (j) Jane Wamuyu Maina(daughter)
- (k) Tabitha Nyaguthii Wanjiku

Tabitha Nyaguthii Wanjiku to hold her share in trust for herself and for her sisters:

- (d) Beatrice Wambui Wanjiku
- (e) Virginia Njeri Wanjiku
- (f) Agnes Wairimu Wanjiku.

The grant of letters of administration made to the petitioner/applicant on 11th August, 2010 shall be confirmed in the foregoing terms. I make no orders as to costs.

Signed, dated and delivered in open court this 31st day of March, 2017

Ngaah Jairus

JUDGE