



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. SUCCESSION CAUSE NO. 283 OF 2002

IN THE MATTER OF THE ESTATE OF DANIEL RURIGA KARUBA (DECEASED)

ANDREW KITHINJI.....1ST PROTESTER

NANCY C. MWANIKI.....2ND PROTESTER

VERSUS

ABIUD D. NJERU.....ADMINISTRATOR/RESPONDENT

R U L I N G

1. The protesters filed separate affidavits sworn on 26/11/2014 and 2/12/2014 respectively. For the purposes of this protest, Andrew Kithinji will be referred as the 1st protester and Nancy Mwaniki as the 2nd protester. The protests were against the mode of distribution in the summons for confirmation of grant filed by the administrator Abiud D. Njeru dated 28/10/2014 and filed on 30/10/2014.

2. The deceased Ruriga Karumbi died on 12th March 1989 and was survived by the following children:-

- (i) Abiud D. Njeru - Son
- (ii) Andrew Kithinji Nyaga - Son
- (iii) Antony Njiru Ruriga - Son
- (iv) Doris Wambogo Ruriga - Daughter
- (v) Augusta Wanjira Ruriga - Daughter

Antony Njiru later passed on leaving his widow Nancy C. Mwaniki and children.

3. Doris Wambogo is also deceased and is survived by her four children:-

- (a) Duncan Wachira Wambogo
- (b) Dickson Muchoki Wambogo
- (c) Justus Kithinji Wambogo
- (d) Beatrice Wanja Wambogo

4. This cause No. 8 of 1994 was filed in Embu Principal Magistrate court and was later transferred to this court thereby acquiring a new number High Court Succession Cause No. 283 of 2002.

5. The case of the 1st protester was that the administrator Abiud Njeru was given land by the deceased L.R. Ngandori/Nguvio/848 measuring 1.62 ha. (4 acres) and was therefore not entitled to benefit from the only parcel of land left by the deceased L.R. Ngandori/ Kiriari/320 measuring 3.3 ha. (8.25 acres).

6. The protester testified that the deceased had shown the beneficiaries their respective portions of land with different acreages for cultivation. The 1st protester proposes the following mode of distribution for L.R. Ngandori/Kiriari/320:-

- (i) Nancy G. Mwaniki - 2.5 acres (1.00 ha.)
- (ii) Augusta Wanjira Ruriga - 1.25 acres (0.5 ha.)
- (iii) Andrew N. Kithinji - 3.2 acres (1.3 ha.)
- (iv) (a) Duncan Wachira Wambogo
- (b) Dickson Muchoki Wambogo 1.25 acres (0.5 ha.)
- (c) Beatrice Wanja Wambogo
- (d) Justus Kithinji Wambogo

7. The 2nd protester agreed with the 1st protester's testimony that the administrator was given his own land by the deceased and should not share in L.R. Ngandori/Kiriari/320 for it had been formally given to the other beneficiaries. The 2nd protester went further to state that the clan elders met to resolve the dispute and proposed sharing of the land between deceased's children as follows:-

- (a) Andrew Kithinji - 3.10 acres
- (b) Anthony Njiru - 3.10 acres
- (c) Augusta Wanjira - 2 acres jointly
- (d) Doris Wambogo

8. The 2nd protester preferred mode of distribution slightly differs with what she said the elders proposed. It reads as follows:-

- (i) Andrew Kithinji - 3.10 acres
- (ii) Nancy C. Mwaniki - 3.10 acres
- (iii) Augusta Wanjira - 1.00 acres

9.(iv) Children of Doris Wambogo

- Duncan Wachira Wambogo
- Dickson Muchoki Wambogo 1.00 acres jointly in
- Beatrice Wanja Wambogo equal shares
- Justus Kithinji Wambogo

10. The issues for determination in this cause are threefold:-

(1) Whether Abiud D. Njeru was given a gift *intervivos* by the deceased.

(2) In the event that the court finds he was given, whether he is entitled to a share in L.R. Ngandori/Kiriari/320

(3) The identification of beneficiaries and their shares in the estate.

11. The 1st protester's evidence is that the administrator received a gift from the deceased during his lifetime and that gift ought to be taken into consideration during distribution. The proposal by the protesters is that the administrator retains his whole four (4) acre parcel Ngandori/Nguvio/848 as his inheritance and keeps off the only asset available for distribution in the estate of L.R. Ngandori/Kiriari/320.

12. The 1st protester proposes he gets 3.2 acres which is the biggest share. He offers to the 2nd protester 2.5 acres and his younger sister Agusta Wanjira 0.65 acres. The four (4) children of the protester's deceased brother, is slated for 0.65 acres. No reasons were given for the unequal distribution and for the 1st protester wanting bigger share than the other children.

13. The administrator is said to have lived on his land at Nguviu since 1974. PW1 says Abiud was a minor in 1960s when the land was given to him and therefore the title could not be issued until he attained the age of majority.

14. The evidence of the 1st protester PW1 was corroborated by his witness PW2 who testified that he was a member of Marigu clan where the deceased was the leader. He was entitled to twelve acres of land from the land he chose to give to the administrator who was the deceased's first born son. The deceased gave the name of his son Abiud Daniel Njiru to be entered in the clan record to benefit from the four (4) acre portion.

15. The witness further stated that the deceased was left with eight acres which now form L.R. Ngandori/Kiriari/ 320 registered in his name. From this land the deceased had given his children portions for cultivation but had not done any formal sub- division.

16. The administrator testified that he bought the land Ngandori/Nguviu/848 using funds earned from casual labour in the 1960's.

17. PW4 a clan elder was called as a witness by the 2nd protester. He testified that he belongs to the clan of the deceased. He further said he was called by the children of the deceased to help resolve the succession dispute. A meeting was held on the land of the deceased on 25/07/1998. The meeting resolved on how the land ought to be shared which was reduced in writing. The two sons of the deceased Andrew and Anthony were given each 3.10 acres while the daughters were to get lesser shares. PW4 corroborated the 2nd protester's case on the input of the elders.

18. From the evidence on record, it is not in dispute that the deceased died intestate. Apart from showing his children portions to cultivate on L.R. Ngandori/Kiriari/ 320, he did not carry out any sub- division. There's no evidence that the deceased even marked any clear boundaries.

19. The evidence of the two protesters and PW4 was that the administrator was given a gift *intervivos* by the deceased and that this ought to be considered in distributing the estate.

20. The administrator said he was born in 1938 but there was no evidence to support this statement. He went on to say that his identity card shows that he was born in 1943. The official date of birth is therefore 1943. In the year 1960, he was only 17 years old. The court takes judicial notice that during those pre-independence years, the education sector was not so developed and did not favour Kenyan citizens. Children used to start school late even sometimes at the age of 10 years. There is no evidence that the administrator was an exception to the then prevailing circumstances.

21. In cross-examination, he said he was a primary school pupil in 1958-1960. He testified that he was doing casual labour from 1958-1960, that is from the tender age of 15 years. He did not give evidence as to how much he earned to facilitate him in buying the said land. This was crucial for his case because he claimed to have bought the land. The source and the use of the funds ought to have been explained in a more comprehensive manner.

22. During cross-examination, the administrator changed his story and said that he was of age in 1958-1960 and that he used to take minutes for the clan and that is the clan that gave him the four (4) acre portion. The administrator further stated that he bought the land in 1974 and occupied it.

23. The copy of register for Ngandori/Ngoviu/848 shows that the administrator was the first registered owner of the land Daniel Njeru Alias Daniel Ruriga Alias Ruriga Karumbi. These names appear in the copy of register for deceased's own land L.R. Ngandori/Kiriari/320.

24. The documentary evidence rules out the claim that the land was bought from any person and confirms it originated from the deceased. No evidence of buying land was adduced as I have already indicated.

25. The evidence of the 1st protester was supported by that of PW3 a member of the "Marigu" clan of the deceased that the land now registered in the name of Abiud D. Njeru was part of his father's entitlement during land demarcation.

26. The copy of register shows that the land was first booked in the name of the deceased Njeru Daniel alias Ruriga Karumbi, was registered in 1969 and title issued in the name of Abiud Njeru in 1970.

27. It is my considered opinion that the protesters have established that the land L.R. Ngandori/Nguviu/848 was a gift *intervivos* by the deceased to his eldest son Abiud Njeru.

28. Section 42 of the Law of Succession Act is applicable herein. It provides:-

Where-

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

29. It was held ***In the matter of TERESIA WAMBUI MARUHI VS ONESMUS MAINA MARUHI & ANOTHER Nairobi High Court Civil Appeal No. 3 of 2002, Kamau J.*** that:-

Where the deceased had distributed some assets intervivos such assets or property, though not forming part of the estate of the deceased, ought to be brought to the hotchpotch and taken into account in distributing the intestate estate of the deceased.

30. By virtue of Section 42 of the Act and the foregoing case, I find that the administrator benefited from the deceased and is not entitled to a share in L.R. Ngandori/Kiriari/320.

31. The deceased was survived by five children and no spouse. It is noted that only four of them will benefit from the distribution. Two of the deceased's children have since died. The first is Doris Wambogo Ruriga and is survived by four children. There is no objection that the four children take up their mother's share which arrangement is in compliance with the law.

32. The wife of the late Anthony Njiru namely Nancy C. Njiru is the 2nd protester and will take her late husband's share. Her children did not feature in this protest but the court learnt from the evidence that

she has children who are also beneficiaries of their late father's share.

33. Distribution in this case is guided by section 38 of the Act. It provides:-

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.

34. It was held ***in the matter of the Estate of MARY WANJIRU THAIRU (DECEASED), Nairobi High Court Succession Cause No. 1403 of 2002, Anga'wa, J.*** that:-

Under Section of the Law of Succession Act, all children of the deceased including daughters, are entitled equally to the estate of the deceased parent. The daughters, if they are not interested in the estate, should file a disclaimer or renunciation of their rights to the estate.

35. The above case demonstrates that the provisions of Section 38 treats all children of the deceased equally. It does not matter that during the deceased's lifetime, he had given some children a bigger portion for their use that was bigger than those of others. All that is required to be established is that the deceased died intestate, left behind property for distribution and that the beneficiaries are more than one for Section 38 to apply.

36. The 1st protester and the administrator claim to have paid during the deceased lifetime a loan borrowed by him from Agricultural finance Co-operation (AFC) whose details were not given. It is my considered opinion that the payment of the loan during the lifetime of the deceased was a private arrangement between the parties and does not affect the distribution of the estate.

37. I therefore proceed to distribute the deceased's land L.R. Ngandori/Kiriairi/320 measuring 8.25 acres(3.3) ha.) as follows:-

- (i) Andrew Kithinji - 2.0625 acres
- (ii) Nancy C. Mwaniki - 2.0625 acres
- (iii) Augusta Wanjira - 2.0625 acres
- (iv) Doris Wambogo Ruriga's children
 - (a) Duncan Wachira Wambogo
 - (b) Dickson Muchoki Wambogo 2.0625 acres jointly
 - (c) Beatrice Wanja Wambogo in equal shares
 - (d) Justus Kithinji Wambogo

39. The grant is in the name of Abiud D. Njeru herein confirmed in the foregoing terms. If the single administrator fails to execute the grant within sixty (60) days, the Deputy Registrar is hereby authorized to sign the necessary documents on his behalf for ease of distribution.

40. Each party to meet his/her own costs of the cause.

41. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF APRIL, 2017.

F. MUCHEMI

J U D G E

In the presence of:-

- 1. Mr. J. Kariuki for 1st protester**
- 2. 2nd protester present in person**
- 3. Administrator/Respondent present in person**