



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2377 OF 2008

IN THE MATTER OF THE ESTATE OF BERNARD NJONJO RUBIA (DECEASED)

RULING

1. The application dated 1st March 2016 is brought at the instance of Brian Mwituria, one of the administrators of the estate of the deceased. He seeks confirmation of the grant of letters of administration intestate made to him and Elizabeth Rubia on 29th April 2013. It is grounded on two affidavits, one sworn by his advocate, Joseph Makumi, on 1st March 2016, and the other by himself sworn on 12th April 2011. The applicant is a son of the deceased, while Elizabeth Rubia is the widow, but not the mother of the applicant. The applicant proposes that the property be distributed strictly in accordance with section 35 of the Law of Succession Act, Cap 160, Laws of Kenya, so that the widow takes the personal and household effects absolutely and a life interest in the net intestate estate, and upon termination of the life interest the estate to devolve upon him in terms of section 35(5) of the Act.

2. The co-administrator, Elizabeth Wanjiru Njonjo Rubia, swore an affidavit on 15th April 2016. She grudgingly acknowledges the applicant as a son of the deceased, but asserts that he never used to visit the deceased and was in any event raised and taken care of by his own mother's husband. She opposes the proposed mode of distribution of the estate of the deceased, particularly over LR No. 13790/6 Karen, which she submits was their matrimonial home. The land was allegedly given to them by the deceased's father as a wedding gift, and then they jointly proceeded to develop it. She asserts that the same should devolve upon her absolutely. She proposes that the rest of the assets be shared out equally between her and the applicant.

3. When the matter came up for hearing on 26th July 2016, the parties consented to have the application allowed partially, save for distribution of LR No. 13790/6 Karen in respect of which the matter was to go for full trial. The consent was recorded in those terms and the grant was partially confirmed. A certificate of partial confirmation of grant was duly issued on 26th July 2016.

4. The hearing on LR No. 13790/6 Karen was conducted on the same date. The applicant was the first to take the witness stand. He stated that he was in contact with the deceased during his life time, and once or twice visited the matrimonial home. He said that he was never introduced to the widow, and he never asked to be so introduced. He was aware that the property was gifted to the deceased by his father, but he could not tell the circumstances under which the gift was made. He proposed that the widow be given a life interest in the property. He said that he was close to the widow before the matter went to court, but lamented that she did not consult him before she petitioned for representation, and that he only got to hear of the matter from one of his uncles.

5. On her part the widow, she testified that the property had been given to her and the deceased by her father-in-law as a wedding gift. She said that she never obtained from the court a determination of the ownership of the subject property as between her and the deceased. She testified that she did not have any

children with the deceased. She said the property was in the name of the deceased. She said that she did not have documents to prove that she contributed to the improvement of the property. She stated that the applicant was the only known child of the deceased. She asserted that the property ought not to be shared equally as it was the only home she knew.

6. At the conclusion of the formal hearing, the parties were directed to file written submissions, to be highlighted. There has been compliance with the said directions for both sides did file written submissions. Their submissions were highlighted on 21st November 2016. I have taken note of the arguments made in the respective submissions, inclusive of the authorities cited.

7. A copy of the certificate of title in respect of LR No. 13790/6 Karen is on record. It indicates that it was registered in the name of the father of the deceased in 1994. It was subsequently transferred to the name of the deceased in 1997. From this it is quite clear that it formed part of the estate of the deceased. The material before me clearly indicates that the same was in fact the matrimonial home for the deceased and the widow. However, the marriage automatically ended with the death of the deceased, and the property is matrimonial home no more. It is available for distribution as any other property of the deceased. An issue arose as to whether the widow contributed to the development of the property. She made that allegation but placed no material before me as proof. I have no basis therefore to hold whether or not she immensely contributed to the putting up of the premises which stand on the property. However, I am alive to the fact that the deceased had set up a matrimonial home on the property.

8. The applicant is not a child of the deceased with the widow, but rather with another woman, now married to someone else. The deceased apparently had no other wives nor children. He died after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force. He died intestate and therefore the estate falls for distribution in accordance with Part V of the Act, and in particular section 35 thereof.

9. The relevant portions of section 35 are subsections (1) and (5) which state as follows:-

'(1). Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to –

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole of the residue of the net intestate estate;

Provided that, if the surviving spouse is a widow that interest shall determine upon her remarriage to any person.

(5). Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate, shall on the death, or, in the case of a widow, remarriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.'

10. I have considered the pleadings filed herein, the oral testimonies of the parties and the submissions by counsel. I do not feel that I was convinced to depart in any way from the provisions in section 35 for any reason. I note that the two immediate survivors of the deceased agreed to share the bulk of the estate equally between them, but were unable to agree on LR No. 13790/6 Karen. I have it prime in my mind that the deceased had left the widow on this property, and therefore in distributing the property I should take that into account. To take care of her interests it may not be just to have the property shared out equally between her and the applicant, instead the property shall devolve upon the widow during life interest, and upon determination of life interest to the applicant absolutely.

11. For avoidance of doubt I shall make the final orders:-

(a) That LR No. 13790/6 Karen shall devolve upon Elizabeth Wanjiru Njonjo Rubia during life interest, and thereafter to Brian Mwituria absolutely;

(b) That the certificate of confirmation of grant dated 26th July 2016 shall be amended accordingly; and

(c) That each party shall bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 12TH DAY OF MAY, 2017.

W. MUSYOKA

JUDGE