



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 872 OF 2007

IN THE MATTER OF THE ESTATE OF KARIUKI GATHENGE (DECEASED)

JOHN KARANJA KARIUKI.....1ST PETITIONER

VERSUS

KARANJA KARIUKI.....PROTESTOR

RULING

1. These proceedings concern the estate of the late Kariuki Gathenge (hereinafter referred to as the deceased) who died intestate on 4th September, 1996 at Nakuru County. His estate comprised on land parcel No. Nyandarua/Kahuru/205, funds in account number 118-01-6085 at Kenya Commercial Bank, Engineer and a tea kiosk at Engineer town.

2. The deceased was polygamous in his lifetime and was survived by the following beneficiaries; in the first house-

- a. Mary Wangu Kariuki.....1st wife (deceased)
- b. Margaret Wanjiru.....married daughter
- c. Hannah Nyambura.....married daughter
- d. Lucy Wangari.....married daughter
- e. Jane Mukami.....married daughter
- f. Ester Wanjiku.....married daughter
- g. John Karanja.....adult son
- h. Peter Hika.....adult son
- i. James Ruga.....adult son

3. In the second house, he had the following beneficiaries

a. Julia Wangari Kariuki.....2nd wife (deceased)

b. Karanja Kariuki.....adult son

4. A grant of letters of administration intestate was issued to Mary Wangu Kariuki and Karanja Kariuki on 5th March, 1998 by the Principal Magistrate's Court at Nyahururu in Succession Cause No. 96 of 1997. The grant was confirmed on 27th June 2002 on the terms that the entire estate of the deceased would be divided equally between the two administrators.

5. Peter Hika Kariuki and John Karanja Kariuki filed summons for revocation of this grant in the High Court vide Miscellaneous Application No. 116 of 2003. The grant was revoked by Hon. D. Musinga, J by his ruling delivered on 31st March, 2006 for among other reasons, want of jurisdiction of the lower court and failure to comply with the procedure set out in the Law of Succession Act when granting and confirming the letters of administration.

6. Thereafter, the lower court succession cause was transferred to this court and is now the one currently under consideration. John Karanja Kariuki, for the 1st house, (the 1st Petitioner) and Karanja Kariuki, for the 2nd house, (the protestor) were issued with a grant of letters of administration intestate by this court on 26th July, 2012 with the consent of all the beneficiaries.

7. The dispute between the parties is with regard to the mode of distribution of the estate of the deceased. On the one part, the members of the 1st house proposed that the estate should be divided equally between all the surviving children of the deceased. This was the proposal of the Petitioner in his affidavit sworn in support of the summons for confirmation dated 5th February, 2013. All the children of the 1st house consented to this proposal and signed the general form 37 filed on 21st February, 2013.

8. On his part Protestor proposed that the estate should be divided according to the number of houses in accordance with the Kikuyu Customary Law. In his Replying Affidavit sworn on 2nd May, 2013 he deposed that the deceased married under the Kikuyu Customary Law. In addition the suit property falls outside the ambit of the Law of Succession Act as it was agricultural property. Therefore it was his submission that the Kikuyu Customary Law is applicable to the estate of the deceased. If this law was applied, then the property would be divided equally between the first and second houses and he would get a larger share than the other beneficiaries.

9. The parties filed written submissions in support of their respective cases which I have duly considered.

10. As stated above, the sole issue for determination by this court is with regard to the mode of distribution of the estate of the deceased.

11. Section 2(1) of the Law of Succession Act provides that the provisions of the Act shall apply to all cases of intestate or testamentary succession to the estates of deceased persons dying after its commencement and to the administration of the estates of those persons. The deceased died on 4th September, 1996 when the provisions were in force and his property is therefore subject to this Act. Also see the holding of Koome, J **In the Matter of the Estate of Njuguna Nyamaundu (deceased)**, Nairobi High Court Succession Cause No. 571 of 1999 [U/R].

12. Section 32 provides that the provisions of Part V on which provides for the administration of the property of a person who died intestate shall not apply to agricultural land, crops thereon or livestock situated in the various Districts set out in the schedule. Section 33 provides that this property shall be distributed in accordance with the law or custom applicable to the deceased's custom or tribe as the case may be.

13. The deceased's parcel of land is Nyandarua which is not one of the Districts that has been exempted by section 32 of the Act. Accordingly this property must be distributed in accordance with the provisions

of the Law of Succession Act and not Kikuyu Customary Law.

14. The deceased was polygamous and had two houses. Therefore, his property should be distributed according to section 40 (1) and (2) which provide:

“40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

15. By the above provision, the estate of an intestate is first distributed according to the number of units in each of the houses and then within each house in accordance with section 35 to 38. In this case, there were two houses, the first house has 8 units and will therefore get 8/9 of the estate and the second house with only one unit will get 1/9 of the estate. In the first house, where the deceased was only survived by his children and no spouse, the property should be divided equally among the children as required by Section 38 of the Act. The Protessor was the sole survivor of the intestate in the 2nd house and should receive the entire 1/9. This will in essence result to division of the property equally among all the beneficiaries.

16. This is the mode of distribution that was proposed by the 1st Petitioner in his affidavit sworn in support of the summons for confirmation of the grant dated 5th February, 2013. The beneficiaries of the first house consented to it and signed the general form 37 that has been attached to the summons for confirmation.

17. Accordingly, I find that the objection has no merit and it is hereby dismissed. The Grant of Letters of Administration issued on 26th July, 2012 shall be confirmed in terms of the mode of distribution proposed in the general form 37. That is to say the property known as **Title No. Nyandarua/Kahuru/205** shall be shared equally among all the beneficiaries.

18. Being a family matter each party shall bear its own costs.

Dated, Signed and Delivered at Nakuru this 10th day of February, 2016.

A. K. NDUNG'U

JUDGE