



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.671 OF 2012

IN THE MATTER OF THE ESTATE OF JOSEPH MBUGUA NDITIKA (DECEASED)

PATRICK KAHURA MBUGUA.....1ST PETITIONER

SAMUEL GITHII MBUGUA.....2ND PETITIONER/PROTESTOR

VERSUS

JOHN KINYAJUI MBUGUA.....RESPONDENT

JUDGMENT

Joseph Mbugua Nditika died on 1st January, 1991. A grant of letters of administration was issued on the 6th March, 2012.

By way of a summons for confirmation of grant, the petitioners seek that grant be confirmed and that costs be in the cause.

That summons elicited two (2) affidavits of protests one by the 2nd petitioner sworn on the 20th April, 2012 and another by the protestor filed on 20th April, 2012..

Directions were given that the matter be disposed off by way of oral evidence.

In his evidence, the protestor testified that he is a son to the deceased. The deceased had two (2) wives namely Elizabeth Ngina Mbugua and Kibui Mbugua. Elizabeth had seven (7) children. Kibui had 8 children. The protestor belongs to the 2nd house. He said the deceased owned 49 acres of Land at Matindiri (plot 198) 2 acres at Kipise Settlement Scheme, a 50 x 100 plot at Matindiri and 13 acres of land at Rumuruti.

The deceased did not distribute his property when alive. He denied knowledge of any written wishes by his father. He proposed that each member of the family gets an equal share. He added that both widows of the deceased are deceased. Initially the protestor and their house lived in Narok. They were then settled on 10 acres of land that the other house was not using.

On cross-examination, he denied knowledge of any will by his father. The only agreement he was aware about was on grazing area. He denounced the document shown to him purporting to distribute the land stating that the same was not signed by Njuguna Kibuba and Gitau Njuguna the purported makers.

In his evidence, the petitioner testified that in the house he belongs to there are nine (9) survivors. The

other house has seven (7). Rosemary Njeri Maria Wambui and Margaret Wangari are deceased. They left behind children.

He exhibited to court a document dated 10th September, 1998 which he said was given to him by his mother. He said he was not present when the contents were discussed.

She added that the 2nd house settled on a designated area and the area was clearly marked by posts. The entire land was 69 acres. The deceased sold 10 acres. The house he belongs to uses 39 acres. The other house uses 20 acres. His father had apportioned a large share to the 1st house on the basis that the 1st wife had developed the land with him for long. He urged that the sub-divisions be as per the wishes of their father.

On cross-examination, he stated that the purported will was never taken to court when a cause was filed at Nyahururu. The letter from the chief does not indicate that there was a will.

On further cross-examination, he stated that four (4) of his sisters are deceased viz Rosemary Njeri, Maria Wambui, Margaret Wangari and Jane Wangui. Apart from Maria Wambui, all the others are buried at their husband's homes.

He added that during the purported sub-division, the 2nd family was not present. Their mothers were not present. Only witnesses were there. David Mbugua Gitau was a witness.

Six (6) documents were produced by consent, namely:

1. A purported will dated 10th September, 1998.
2. The clan's meeting minutes of 20th February, 1994.
3. The wishes of Ngina in document dated 5th June, 2002
4. Copy of sale agreement for the Narok plot dated 6th July, 1990.
5. Share Certificate - Maundu ni Meri Company.
6. Allotment letter from Sabugo plot (All marked Exhibit 1-6)

David Mbugua Gitau testified that he was called by the deceased who was his friend on the 10th September, 1998. He was in Company of his (D.W.2's) father and one Njuguna Kibuba. The deceased wanted to sub-divide his land. David took the record. He identified the record he made. The deceased indicated how he wished his land sub-divided between the 2 houses.

On cross-examination, he stated that the handwriting on the record was his. He did not sign the document. The document does not give the reference number of the land. There is no mention of any other property in the document. Family members were not present. He added that he did not know where the 2nd family was living then.

Both parties filed written submissions through their respective counsel.

I have had occasion to consider the pleadings, the affidavits, the oral evidence and submissions on record. Of determination are two issues:

1. Did the deceased leave behind discernable wishes on how his estate was to be sub-divided.
2. What is the mode of distribution of the estate herein.

For the wishes of a deceased to be protected, respected and preserved, there must be an expression of the

wishes and intention in a clear manner and steps taken to ensure the wishes are effected.

The purported will (wishes) as seen in the document dated 10/9/1988 and marked herein as exhibit is ambiguous. It does not indicate what property was the subject of the said wishes. It does not state the acreage each house was to get. It follows then that the wishes and intention if ever made was not in a clear manner.

Even assuming that such wishes existed, the same can be ignored when wishes may work injustice to other beneficiaries. Makhadia, J. - Nyeri H.C. Succession Cause No.253 of 2000 (**In the matter of the Estate of Josiah Macharia Thangu** (Deceased) in addressing this issue stated:

“Again if we were to go by the wishes of the deceased as claimed by the Protestor, she will end up getting a Lion's share of the estate. I think that for the ends of justice to be met in the circumstances of this case, the wishes of the deceased if true as alleged by the Protestor ought to be ignored, as, if implemented, may work injustice to the members of other household.”

In our instant case, it is manifestly unequitable to have the 1st house to secure 39 acres out of the parcel of land plot No.198 - Matindiri which is approximately 48.7 acres leaving the 2nd house with slightly less than 10 acres. Yet the 2nd house has more beneficiaries eight (8) as opposed to seven (7) in the 1st house as per the chief's letter dated 23rd February, 2012.

The mode of distribution stemming from the purported wishes and as seen in the affidavit in support of the summons for confirmation of grant also omits three (3) daughters of the 1st house with no explanation and/or their consent.

The purported will (wishes) by the deceased have not been proved on the balance of probability and even if same existed, they are bound to be ignored the same having the effect of working injustice against some beneficiaries.

So, what then is the mode of distribution applicable to the estate herein?

The deceased died intestate after the commencement of the of the **Law of Succession Act (Cap 160 L.O.K.)**.

The applicable law in distribution of the estate herein will be found in **Section 40** thereof which makes provision for the distribution of the net estate where the deceased had married more than once. **Section 40(1)** provides:

“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.”

He was survived by:

1ST HOUSE

1. JOHN KINYANJUI MBUGUA
2. PATRICK KAHURA MBUGUA
3. PETER NJOROGE MBUGUA
4. ROSALINE NYAKIRINGA MBUGUA

5. ANASTACIA MUTHONI MBUGUA
6. REGINA WANJIRU MBUGUA
7. JOSEPH MBUGUA MUKONYO

2ND HOUSE

1. SAMUEL GITHII MBUGUA
2. JOHN KINYANJUI MBUGUA
3. DAVID NJOROGE MBUGUA
4. DANIEL MAINA MBUGUA
5. GRACE WAIRIMU MBUGUA
6. MARGARET WARINGA MBUGUA
7. MARY NJERI MBUGUA
8. MIRRIAM WANGARI MBUGUA

The suggestion by counsel for the 1st administrator that customary law is applicable in the distribution of the estate herein is not based on the law. The deceased died on 1st January, 1991 when the Law of Succession Act was already in force. **Section 2(1)** the said Act provides as follows:

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the Administration of estates of those persons.”

Certainly then, Kikuyu Customary Law is not applicable as it is not any “*other written law*” as envisaged in the Act.

The mode of distribution applicable therefore will be as provided for in **Section 40(1)** of the **Law of Succession Act Cap 160 Laws of Kenya**. Both widows of the two (2) houses are deceased. The ratio applicable taking each child as a unit will be 7:8.

Accordingly, the net estate of the deceased being:

- a) Plot No.198/Matindiri/Nyandarua
- b) Plot No.1391 Narok CIS-Mara Kipise
- c) Shares with Kienyere Farmers Company Limited
- d) Shares with Maundu ni Meri Company
- e) Plot No.16 Sabugo Township
- f) Account No.[particulars withheld] National Bank of Kenya, Nakuru
- g) Ordinary Shares with KCB Account No.[particulars withheld]

h) Plot No. Maundu ni Meri (Form 38) shall be divided equally among the two (2) houses according to the number of children in each house.

Where land is involved, efforts shall be made to ensure that parties retain portions where they could have buried their kin. Where land is indivisible due to size or for other reasons, the same to be sold and proceeds shared equally to all beneficiaries.

Dated, Signed and Delivered at Nakuru this 11th day of May, 2016.

A. K. NDUNG'U

JUDGE