



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 596 OF 1989

IN THE MATTER OF THE ESTATE OF ERASTUS KIARIE KAHUKI (DECEASED)

RULING

1. In a judgment delivered on 15th November 2006 Rawal J. directed both parties to file fresh proposals on the distribution of the assets of the estate of the deceased. This followed an order made recognizing the children of Peninah Wanjiru Kiarie – Anne Wambui, Mary Nyambura, Christina Waithira, Zakaria Maina, Kenneth Mwangi and Stephen Muiruri - as survivors of the deceased. The new proposals on distribution were to take these survivors into account.
2. In compliance with the said directions, the parties filed their respective proposals by way of affidavits. The proposals by the administrators were in an affidavit sworn on 26th February 2009 by Mary Wanjiru Kiarie, while the proposals for the protestor's side were comprised in an affidavit sworn by Ann Wambui on 16th February 2009.
3. The administrator proposed that her mother's side of the family share equally Loc 18/Githima/497, 1206 and 1453/7A, and Plot No. 3 on LR No. 336/789 Ruaraka Housing Company Limited. The same family was also to share equally motor vehicle KVT. The shares in Brook Bond Liebig and the East African Breweries Ltd were also to go to the first house. The house of the protestor was allotted one (1) acre out of Loc 18/Githima/497 and Plot No. 20A Turuturu market.
4. The proposals made by the protestors family are that Loc 18/Githima/1208 and motor vehicle KVT Isuzu matatu should be shared equally between the survivors in the house of the administrator's mother; while the children in the family of the protestor should equally share Loc 18/Githima/479, Loc 18/Githima/1453A, Loc 18/Githima/1453B, plot No. 20A Turuturu Market and two (2) acres of land in Agricultural & Industrial Holdings Limited. Plot No. 3 on LR 336 Ruaraka Housing Company Limited is to be shared equally between all the surviving children of the deceased by the administrator's mother and the protestor. The shares in Brooke Bond Liebig Limited and East Africa Breweries Limited, the proceeds of the life policy by Pan Africa Insurance Company Limited and the retirement benefits from the Teachers Service Commission are also to be shared equally between all the children of the deceased.
5. The protestor's children argue that there were other assets that were previously owned by the deceased but appear to have since changed to the hands of members of the second house. They cited five properties, being Makuyu/Kariani/Block 3/23, 27, 162 and 315 and 2 acres of land held by Agricultural & Industrial Holdings Limited under share certificate number 11308. The said properties had allegedly been bought by the deceased from Marema Farmers' Cooperative Society. It is deposed that some of the said plots had been registered in the names of some of the members of the family of the administrators after the judgment of 15th November 2006. It is further averred that the family of the administrator's mother live on Loc 18/Githima/1206, which is said to be 5 acres; the family of the protestor lives on Loc 18/Githima/479, which is about 7 acres, where they occupy about one half of the land while the other half

is occupied by the family of the administrator's mother.

6. Attached to the affidavit of Ann Wambui sworn on 16th February 2009 are copies of green cards in respect of Makuyu/Kariani/Block 3/27, 231 and 162. The said record indicates that Makuyu/Kariani/Block 3/27 was, as 2nd February 1990, registered in the name of the Government of Kenya, but on the same date the said property was transferred to the name of the administrator's mother, Beatrice Wambui Kiarie, and a title deed was accordingly issued. Makuyu/Kariani/Block 3/231 was registered in the name of Marema Farmers' Cooperative Society as at 30th April 2008, it was transferred on 22nd May 2008 to Mary Wanjiku Kiarie and John Kahuki Mwangi, and a title deed issued on 5th June 2008. Makuyu/Kariani/Block 3/162 was similarly registered in the name of Marema Farmers' Cooperative Society as at 30th April 2008 and was transferred to Mary Wanjiku Kiarie and John Kahuki Mwangi on 22nd May 2008, and a title deed issued on 27th May 2008.

7. To the allegations in the affidavit of 16th February 2009 the administrator responded vide an affidavit sworn on 5th March 2009. She deposes that Makuyu/Kariani/Block 3/23, 27, 162 and 315 did not form part of the estate of the deceased, but that the same were in fact property of their mother, Beatrice Wambui Kiarie. She asserts that the deceased never had shares in the Marema Farmers' Cooperative Society. She further deposes that it was the family of Beatrice Wambui Kiarie that had developed Loc 18/Githima/497, and that in fact the family of Peninah was occupying structures that had been put up by the former family. She adds that Loc 18/Githima/ 1453/7A was not in two parts as asserted by the protestor, but it was developed with businesses on it being run by the family of Beatrice Wambui Kiarie. She conceded though that the estate ought to be distributed between the thirteen (13) children of the deceased. There is attached to that affidavit a letter alleged to be from Marema Farmers' Cooperative Society Limited, dated 22nd April 2002, indicating that it was Beatrice Wambui Kiarie, rather than the deceased, who had shares in the latter cooperative society.

8. It is not clear when directions were given on the disposal of the application, the subject of this ruling, but both sides did file their respective submissions in 2009. The administrator's submissions are dated 24th March 2009 and were filed herein on 25th March 2009. The protestor's submissions are similarly dated and were filed in court on similar date. The administrator does not refer to any law, but merely urges the court to distribute the estate as per the proposals given by the administrator. Similarly, the protestor does not point the court to any statutory provisions or case law, she merely urges the court to decide the matter as per the proposals that she has placed before the court.

9. In distributing an estate, the court takes into account three (3) principal factors – the identities of the persons who are entitled to share in the estate of the deceased, the assets that make up the estate, and the manner in which the estate ought to be distributed. I will consider each of the three factors in turn.

10. Regarding the survivors of the deceased, both sides are in agreement that the estate ought to be shared out between the thirteen (13) surviving children of the children. Beatrice Wambui Kiarie's children are Joseph Mwangi, Mary Wanjiru, James Njoroge, Esther Njeri, Peter Kahuki, John Kiruru and Julius Maina; while Peninah Wanjiru Kiarie's children are Anne Wambui, Mary Nyambura, Christina Waithira, Zakaria Maina, Kenneth Mwangi and Stephen Muiruri.

11. There is no agreement on the assets that the deceased died possessed off. The administrator, who is a child of Beatrice Wambui Kiarie, talks of eight (8) assets: being Loc 18/Githima/497, 1206 and 1453/7A, Plot No. 3 on LR No. 336/789 Ruaraka Housing Company Limited, motor vehicle KVT, the shares in Brook Bond Liebig and the East African Breweries Ltd, and Plot No. 20A Turuturu market. The protestor's side of the family has identified twelve (12) assets: being Loc 18/Githima/1208, motor vehicle KVT, Loc 18/Githima/479, Loc 18/Githima/1453A, Loc 18/Githima/1453B, plot No. 20A Turuturu Market, two (2) acres of land in Agricultural & Industrial Holdings Limited. Plot No. 3 on LR 336 Ruaraka Housing Company Limited, shares in Brooke Bond Liebig Limited and East Africa Breweries Limited, the proceeds of the life policy by Pan Africa Insurance Company Limited and the retirement benefits from the Teachers Service Commission.

12. The parties are on all fours so far as Loc 18/Githima/497, 1206 and 1453/7A, Plot No. 3 on LR No. 336/789 Ruaraka Housing Company Limited, motor vehicle KVT, the shares in Brook Bond Liebig and the East African Breweries Ltd, and Plot No. 20A Turuturu market are concerned. There is no consensus on the existence of Loc 18/Githima/1453B, two (2) acres of land in Agricultural & Industrial Holdings Limited, the proceeds of the life policy by Pan Africa Insurance Company Limited and the retirement benefits from the Teachers Service Commission. And also on Makuyu/Kariani/Block 3/23, 27, 231, 162 and 315.

13. The protestor's family made allegations with regard to Makuyu/Kariani/Block 3/23, 27, 231, 162 and 315; that the same were previously owned by the deceased. Yet, no proof was provided to support the assertion. The documents provided by both sides appear, in my view, to support the claim by the family of the administrator that these assets had actually been the property of their mother. There is also no proof of the existence of the two (2) acres of land in Agricultural & Industrial Holdings Limited, and also that Loc 18/Githima/1453/7A was in two parts. He who alleges must prove. It was incumbent on the protestor's side of the family to prove the allegation concerning these assets.

14. From the material before me, it is my conclusion that the assets available for distribution are those set out in the proposals by the administrator, that is to say - Loc 18/Githima/497, 1206 and 1453/7A, Plot No. 3 on LR No. 336/789 Ruaraka Housing Company Limited, motor vehicle KVT, the shares in Brooke Bond Liebig and the East African Breweries Ltd, and Plot No. 20A Turuturu market.

15. On how the estate ought to be distributed, the parties are not in agreement. The proposal by the administrator is that the bulk of estate should devolve upon the family of Beatrice Wambui Kiarie, with the family of Peninah Wanjiru Kiarie getting just a token. The proposal by the family of Peninah Wanjiru Kiarie seeks a sharing that approaches equal distribution.

16. The law on distribution of the estate an intestate who is survived by children but no spouse is section 38 of the Law of Succession Act, Cap 160, Laws of Kenya, which provides as follows: -

'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.'

17. From the wording of the above provision it is quite plain that the estate ought to be shared equally amongst the surviving children of the deceased. The spirit of that provision is echoed in other provisions of Part V of the Law of Succession Act, such as section 35(5), which states that:-

'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 state shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.'

18. Going by the two provisions above, the estate of the deceased in this cause ought to be shared out equally amongst the surviving children of the deceased, the thirteen (13) of them. The assets that are not disputed, that is to say - Loc 18/Githima/497, 1206 and 1453/7A, Plot No. 3 on LR No. 336/789 Ruaraka Housing Company Limited, motor vehicle KVT, the shares in Brook Bond Liebig and the East African Breweries Ltd, and Plot No. 20A Turuturu market – ought to be divided in that manner. Even the rest ought to be dealt with similarly so long as it is established that they exist or form part of the estate of the deceased.

19. It would appear from the averments on record that the family of Beatrice Wambui Kiarie lives on Loc 18/Githima/1206, which is said to be 5 acres; the family of Peninah Wanjiru Kiarie lives on Loc 18/Githima/479, which is about 7 acres. That fact ought to be taken into account in distribution.

20. In the end, I order that the estate of the deceased shall be distributed in the following terms: -

- a. **Loc 18/Githima/1206 – to the children of Beatrice Wambui Kiarie in equal shares;**
- b. **Loc 18/Githima/479 – five (5) acres to the children of Peninah Wanjiru Kiarie in equal shares, with the balance being shared equally between the children of Beatrice Wambui Kiarie;**
- c. **Loc 18/Githima/ 1453/7A – to be shared equally among all the thirteen (13) children of the deceased;**
- d. **Plot No. 3 on LR No. 336/789 Ruaraka Housing Company Limited - to be shared equally among all the thirteen (13) children of the deceased;**
- e. **Motor vehicle KVT Isuzu matatu - to be shared equally among all the thirteen (13) children of the deceased;**
- f. **The shares in Brook Bond Liebig and the East African Breweries Ltd - to be shared equally among all the thirteen (13) children of the deceased; and**
- g. **Plot No. 20A Turuturu market - to be shared equally among all the thirteen (13) children of the deceased.**

21. Should the parties been unable to agree on how to share out the assets in (c), (d), (e), (f) and (g) above equally between them, then the same shall be sold and the proceeds of sale thereof be distributed equally amongst the thirteen (13) surviving children of the deceased.

22. Each party shall bear their own costs.

23. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 3RD DAY OF JUNE, 2016.

W MUSYOKA

JUDGE