



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 219 OF 2013

IN THE MATTER OF THE ESTATE OF NAHASHON GICHANGI MWANIKI (DECEASED)

AND

MERCY NANCY WANJA GICHANGI.....PETITIONER

VERSUS

MERCY NJOKI.....1ST PROTESTOR

DOUGLAS NDUBI.....2ND PROTESTOR

JUDGMENT

1. This judgment relates to the estate of the late **Nahashon Gichangi Mwaniki** (deceased) who died intestate on 12th November, 1996 domiciled in Kirinyaga County. The petition for letters of administration intestate was presented jointly by Mercy Nancy Wanja Gichangi and Esther Njoki Gichangi in their capacity as the daughters of the late Nahashon Gichangi Mwaniki (hereinafter to be referred to as the deceased in this cause). Both the petitioners were granted the letters and appointed joint administratrixes on 18th February, 2013 by this hon. Court.

2. The properties comprising the estate in this cause were listed as follows:

- a. NGARIAMA/NGIRIAMBU/1689.
- b. NGARIAMA/NGIRIAMBU/1690
- c. NGARIAMA/NGIRIAMBU/1691
- d. NGARIAMA/NGIRIAMBU/1692
- e. NGARIAMA/NGIRIAMBU/1693

3. On 21st March, 2014, Mercy Nancy Wanja Gichangi took out Summons for Confirmation of grant issued on 18th February, 2013 and proposed to have the estate distributed as follows:

- a. **NGARIAMA/NGIRIAMBU/1693** -to go to Douglas Ndubi Gichangi.
- b. **NGARIAMA/NGIRIAMBU/1691** - Albert Mwangi Gichangi.
- c. **NGARIAMA/NGIRIAMBU/1690** - Robert Wambugu Mwaniki.
- d. **NGARIAMA/NGIRIAMBU/1689** -Peter Chomba Ndubi.
- e. **NGARIAMA/NGIRIAMBU/1692** - to be shared as follows:
 - i. Diana Wambui Gichangi to have 0.40 ha

The remaining portion to be shared equally among the following:

- ii. Mercy Nancy Wanja Gichangi.
- iii. Esther Njoki Gichangi
- iv. Marion Njeri Gichangi
- v. Philis Kuthii Gichangi and
- vi. Nancy Njoki Menja.

4. Esther Njoki, the co-administratrix and Douglas Ndubi a son and beneficiary filed protests to the proposed mode of distribution vide a joint affidavit sworn on 16th June, 2015. In their affidavit of protest, the protestors deponed that the deceased in this cause was married to 2 wives namely:-

- i. Jane Muthoni (1st house) and
- ii. Virginia Wanjira (2nd house).

The 1st protestor, Esther Njoki stated in evidence before this Court that Jane Muthoni (1st wife) also deceased had the following children with the deceased namely:

- a. Douglas Ndubi; and
- b. Esther Njoki, while Virginia Wanjira the 2nd wife also deceased had the following children with the deceased namely:
 - a. Nancy Njoki
 - b. Philis Kuthii
 - c. Albert Mwangi
 - d. Diana Wambui
 - e. Marion Njeri
 - f. Mercy Nancy Wanja

5. The protestors further deposed that the deceased in this cause had one parcel of land known as NGARIAMA/NGIRIAMBUR/424 which he later sub divided into 5 portions resulting into **NGARIAMA/NGIRIAMBUR/1689 - to 1694**. The 1st protestor added in her evidence in court that the deceased sold parcel No. 1694 in his lifetime. She further added that the deceased also gave the following parcels to the following persons as gifts:

- a. **NGARIAMA/NGIRIAMBUR/1689** – measuring 0.61 ha to Peter Chomba (brother to the deceased).
- b. **NGARIAMA/NGIRIAMBUR/1690** – measuring 0.61 ha to Robert Wambugu (brother to the deceased)
- c. **NGARIAMA/NGIRIAMBUR/1691** – 0.61 ha to Albert Mwangi (son to the deceased from 2nd house).
- d. **NGARIAMA/NGIRIAMBUR/1693** – measuring 0.61 ha to Douglas Ndubi (son to the deceased from the 1st house).
- e. **NGARIAMA/NGIRIAMBUR/1692** – measuring 1.62 ha was gifted to the two wives to the deceased Jane Muthoni and Virginia Wanjira.

6. The protestors' position was that the two widows were to share plot No. 1692 which measured approximately 4 acres with each widow getting 2 acres each to share with their respective daughters. This position was supported by the evidence of APHAXAD MURIUKI MBUI a witness called by the

protestors to testify to support their cause.

7. **Mercy Nancy Wanja**, one of the petitioners and the joint administratrix in this cause partly agreed with the protestors that the deceased in this cause had actually given out all the parcels to the respective beneficiaries as listed above except Plot No. **NGARIAMA/NGIRIAMBU/1692** which she disputed that it was to be divided according to the number of houses. In her view the remaining property should be divided equally among all the children who did not benefit from any share given out by the deceased himself in his lifetime. She however, added that Diana be given a larger share (one acre) because she is the only daughter who is unmarried in the family.

8. What came out clearly at the hearing of the protest herein is that the deceased in this cause had on his own volition, sub divided his property into six portions - (1689 to 1694) and sold Plot No. **NGARIAMA/NGIRIAMBU/1694** to a 3rd party. He then gave his two brothers a portion each measuring approximately 0.61 ha. The petitioner and protestors are in agreement upto that point. The point of disagreement is the distribution of the remaining portion (Plot No. 1692) which the deceased left behind for his two wives and children. It also came out that the two widows died later after the demise of the deceased in 1996. The protestors prefer that the property be divided equally between the two houses meaning that the property should be divided into two halves of two acres each with two acres going to the 1st house and the remaining two acres going to the 2nd house for the children of each house to divide amongst themselves. The petitioner Mercy Nancy Wanja prefers that Diana be given one acre and the remaining portion be divided equally among all the daughters as the two sons benefitted from gifts *inter vivos* from the deceased.

9. The protestors' proposal was backed by a witness who told this Court that he was a clan member in the family of the deceased. It is presumed therefore that the position is in accordance with the customs of the deceased herein. The provisions of **Section 2 (1) of Law of Succession Act** however, provide that the provisions of the **Law of Succession Act** rather than customary law shall apply in cases where a deceased person died after the commencement of the **Law of Succession Act Cap 160**. And the commencement date given is 1st July, 1981. The deceased in this cause died after the commencement of the Law of Succession Act and so the law applies. The provisions of **Sections 38 and 42** of the Act provides that where an intestate has left children with no spouse then the net estate shall be divided equally among the surviving children. **Section 42** of the Act caters for gifts given to beneficiaries by the deceased during his lifetime. The two brothers of the deceased Peter Chomba and Robert Wambugu and the two sons Albert Mwangi and Douglas Ndubi shall formally get their respective shares as gifted to them by the deceased.

In the premises, this Court finds that the properties forming the estate shall in accordance with the law be distributed as follows:-

- a. **NGARIAMA/NGIRIAMBU/1689** shall go to Peter Chomba Ndubi.
- b. **NGARIAMA/NGIRIAMBU/1690** shall go to Robert Wambugu Mwaniki.
- c. **NGARIAMA/NGIRIAMBU/1691** shall go to Albert Mwangi Gichangi.
- d. **NGARIAMA/NGIRIAMBU/1693** shall go to Douglas Ndubi Gichangi.
- e. **NGARIAMA/NGIRIAMBU/1692** shall be shared equally among the following:
 - i. Esther Njoki Gichangi.
 - ii. Mercy Nancy Wanja Gichangi.
 - iii. Marion Njeri Gichangi.
 - iv. Diana Wambui Gichangi.
 - v. Philis Kuthii Gichangi and
 - vi. Nancy Njoki Menja

The costs of surveyor shall be paid by Albert Mwangi Gichangi, Douglas Ndubi Gichangi, Peter Chomba Ndubi and Robert Wambugu Mwaniki as this Court was told that these beneficiaries owed the deceased a he-goat and some small payments which Douglas Ndubi admitted that they were to pay but the deceased passed on before they managed to pay. As this is a family matter I shall not make any order as to costs in order to promote harmony and reconciliation in the family.

Dated and delivered at Kerugoya this 12th day of July, 2016.

R. K. LIMO

JUDGE

12.7.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Mercy Nancy Wanja present

Esther Njoki present

Douglas Ndubi present

COURT: Judgment signed, dated and delivered in the presence of Mercy Nancy Wanja petitioner and Esther Njoki and Douglas Ndubi

R. K. LIMO

JUDGE

12.7.2016