



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 374 OF 2011

IN THE MATTER OF THE ESTATE OF SIMON GITONGA GATHIRUA-DECEASED

NAOMI WANGECHI

MUNENE.....PETITIONER

VS

**JOSEPH NDIRITU GITONGA.....1ST
PROTESTOR**

DORCAS WANJIRU GITONGA.....2ND PROTESTOR

JUDGEMENT

Simon Gitonga Gathirwa (herein after referred to as the deceased) died intestate on 16th March 2009 leaving behind 5 daughter and one son. On 27th day of April 2011, **Naomi Wangechi Munene**, a daughter to the deceased (hereinafter referred to as the petitioner) took out citations and served **Joseph Nderitu Gitonga** (herein after referred to as the first protestor). The first protestor filed an entry of appearance to the said citation on 20th June 2011. Interestingly, and while fully aware of the existence of the said citation, on 7th July 2011 the first protestor petitioned for letters of administration to the deceased's estate in A separate cause being succession cause number 444 of 2011 prompting the petitioner herein to file a caveat in the said cause on 8th August 2011.

Meanwhile on 22nd July 2011, the petitioner petitioned for letters of administration in these proceedings and ultimately the two causes were consolidated on 5th December 2011 and both the petitioner herein and the first protestor were appointed joint administrators to the deceased's estate. On 1st October 2012, the petitioner applied for the grant herein to be confirmed. The petitioner named all the five daughters and one son as the persons beneficiary entitled to the deceased's estate. These are:-

- i. *Dorcias Wanjiru Gitonga*-----*Daughter*
- ii. *Angelica Wairimu Muhuhu*-----*Daughter*
- iii. *Charity Kagure Njoroge*-----*Daughter*
- iv. *Naomi Wangechi Munene*-----*Daughter*
- v. *Catherine Wakarima Mwenda*-----*Daughter*
- vi. *Joseph Ndiritu Gitonga*-----*Son*

These proceedings are against the petitioner and three of her sisters on one hand and their brother and

sister the first and second protestors respectively.

The petitioner proposed distribution as follows; **Thegenge/Kianjogu/375** and **500 Shares in Kenya Airways Limited** to be shared equally among all the beneficiaries, **Thegenge/Kianjogu/113** to be inherited by the second protestor **Dorcas Wanjiru Gitonga** absolutely, Plot number **15A & 15B** Giakanja to be inherited by **Angelica Wairimu Muhuhu** and the first protestor **Joseph Ndiritu Gitonga** respectively, and **278** Shares in **Tetu Housing Co-operative Society Limited** to be inherited by the protestor **Joseph Ndiritu Gitonga**.

On 28th January 2013, the first protestor herein filed an affidavit of protest in which he objected to the mode of distribution proposed by the petitioner and averred that the deceased had in his life time in the presence of his two brothers directed how his property would be distributed upon his demise and that after the deceased's death, himself and his sisters met in the presence of clan elders and the local area chief and it was agreed that the estate be shared as per the deceased's wishes. The annexure to the affidavit of protest in support of the said averment shows that the first meeting was planned after a directive from the area District Commissioner, Tetu District and that four family member out of the six siblings did not attend.

The protestor in his affidavit of protect proposed distribution as follows:-

- a. **Dorcas Wanjiru Gitonga**....One acre out of **Thegenge/Kianjogu/375**.
- b. **James Gitonga Muhuhu, Anthony Gitonga Njoroge, Simon Gitonga Munene and Simon Gitonga Mwenda**2 acres in equal shares out of the said land.
- c. **Joseph Ndiritu Gitonga**.....5.4 acres out of the said land.
- d. **Dorcas Wanjiru Gitonga** to be registered as absolute proprietor of **Thegenge/Kianjogu/113** absolutely.
- e. Plot numbers **15A** and **15B** to be registered in the name of **Dorcas Wanjiru Gitonga** and **Joseph Ndiritu Gitonga** respectively.
- f. **500** Shares at Kenya Airways Ltd to be inherited by all the six siblings in equal shares.
- g. 287 shares in Tetu Housing Co-operative Society Ltd and monies in account number KRUMO0550009371, Post Bank Limited to be inherited by the first protestor **Joseph Ndiritu Gitonga**.

In a further affidavit filed on 8th May 2014, the petitioner denies that herself and four of her sisters are going against the wishes of the deceased and strongly opposed the mode of distribution proposed by the first protestor.

The second protestor filed an affidavit of protest on 23rd September 2015 supporting the mode of distribution proposed by the first protestor and insisted that the deceased's policy was that married daughter would not inherit his property, but nevertheless, the deceased gave 2 acres to all the sons of his daughters bearing his name and insisted that her sisters are married and have properties at their respective matrimonial homes but herself she is not married. She also annexed to her affidavit an document entitled a memorandum of understanding between herself and her father the contents of which state that her father gave her **4** acres out of **Thegenge/Kianjogu/375**.

In reply to the said affidavit, the petitioner, reiterated her earlier position and averred that it was not the wish of the deceased that the married daughters do not inherit his properties but the wish of the protestors.

At the hearing of the protest, the first protestor testified that the main dispute is on the mode of distribution of the deceased's estate, particularly on title number **Thegenge/Kianjogu/375**. He insisted that the deceased told his brothers how he wished his properties to be distributed and that after the burial they met as a family on 29th August 2009 and discussed the issue and all agreed. His evidence was largely a repeat of his affidavit of protest particularly on the mode of distribution. He insisted all his sisters except the second protestor had agreed to the proposal but started disputing the mode of distribution after one of their uncles died.

The second protestor in her evidence insisted that the proposed mode of distribution by the first protestor is what the deceased desired. She also testified that during her fathers' life time, he gave her **0.9** acres piece of land at Kianjogu, and 4 acres out of parcel number **375** where she lives, but her father did not manage to transfer the land to her before he died.

In support of the protestors case is the testimony of **Solomn Ndungu Waihura** who stated that the deceased had told him his wishes and that that he did not give his married daughters land because they did not care for him and that they were married and had land jointly with their husbands.

The petitioner's case was that the deceased treated all his children equally, that deceased was aged 88 years at the time of his death, and prior to his death he was hospitalized for a long time, and that the deceased had problems with the first protestor. She denied knowledge that her father had been to an advocates office with the second protestor where he signed the alleged memorandum of understanding and that she only knew of title number **113** which was to be given to the second protector. She insisted that she was not aware of the alleged oral will. She also insisted that she went to the offices of Gathara Mahinda & Co advocates with her sister and the advocate was clear that her father never made any oral will.

As for the meeting held on 29th August 2009, the petitioner was clear that the alleged oral will was not mentioned and that his father had on several occasions mentioned that his land belonged to his children. She maintained that Angelicah's husband contributed to developing Plot number **15 B** and that Dorcas was given title number **113**. She also maintained that the deceased never at any one time wished that his grand children inherits title number **375**.

Angelicah Wairimu Muhuhu testified that the deceased asked her to develop plot number **15A**, and that he allowed her to use the title to secure her borrowing to finance the development, and that she occupied it for some time but in 1975 or thereabouts she moved out and they agreed to share the rent equally with the deceased. She also stated that with the deceased's permission, she constructed an extra house at the back from which she has been collecting the rent.

The issue that falls for determination is whether the deceased made an oral will as alleged or whether he distributed his properties during his life time. It is alleged that the deceased called two of his brothers and gave instructions orally on how his property would be distributed upon his demise.

Section 9(1) of the Law of Succession Act^[1] provides that no oral will shall be valid unless-

(a) It is made before two or more competent witnesses and

(b) The testator dies within a period of three months from the date of making of the oral will.

Thus, for an oral will to be valid, it must be made before two or more competent witnesses and the testator must die within a period of three months from the date of making the will.

The protestors witness, **Solomon Ndungu Waihura** states in his witness statement which he adopted in court that "*before he died, the deceased told me that if he died, his house on **L.R. No. Thengenge/Kianjogu/375** would go to **Dorcas Wanjiru**." The witness proceeds in his statement to explain how the other properties were to be shared. It is not clear whether or not the statement attributed to the deceased was made before two or more competent witnesses or whether the deceased died three months from the date of making the alleged statement.*

Similarly, the first protestor states in his witness statement as follows; "*Before he died, the deceased told me if he died, his house on **L. R. No. Thengenge/Kianjogu/375** would go to **Dorcas Wanjiru** and she would get 4 acres of the land where the house stands..." Again, this testimony does not show whether there were two or more competent witnesses and more important, it does not indicate even in the slightest manner when the statement was made and whether or not the deceased died three months after making the statement. This crucial evidence was never brought out at all. From the evidence presented before me, it*

is clear that the evidence tendered on the alleged oral will does not satisfy the test laid down in Section 9 (1) cited above, hence it cannot be said that the deceased made a valid oral will.

It is also important take cognizance of the provisions of rule 13(1) of the probate and administration rules. It provides:-

“13(1) An application for proof of an oral will or of letters of administration with a written record of the terms of an oral will annexed shall be by petition in form 78 or 92 and be supported by such evidence on affidavit in form 4 or 6 as the applicant can adduce as to the matters referred to in rule 7, so far as relevant together with evidence as to-

(a) The making and date of the will.

(b) The terms of the will.

(c) The names and addresses of any executors appointed.

(d) The names and addresses of all the alleged witnesses before whom the will was made.

(e)

(f)

No application for proof of oral will was filed in this court as provided under the above rule.

A person's capacity to dispose of his property by will whether oral or written is affected by a number of factors. Most obviously a would be testator will need to be of full age and capacity and of a sound disposing mind. To avoid an attack on the testator's mental capacity, it is a wise precaution for the will to be made before two or more competent witnesses as provided by Section 9 (1) cited above.

Even if the testator's mental capacity is not in doubt, it is important for the party alleging the existence of the will to convince the court that the testator fully and freely intended the dispositions proposed. The testator should be seen to be acting on his or her own especially where the testator is elderly or infirm. The evidence tendered did not satisfy this threshold. No evidence was tendered to show that if at all the deceased made the alleged oral will, he did it fully and freely intended the proposed dispositions. I am not persuaded that the evidence tendered proved on a balance of probabilities even in the slightest manner that the deceased made an oral will and if at all he did, whether it was made freely. It was upon the protestors to adduce cogent evidence to prove this point beyond to the required standard.

Cases are decided on evidence and the law applicable. This court in *Lewis Karungu Waruiro Vs Moses Muriuki Muchiri*^[2] citing authorities held that:-

"All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in Rhesa Shipping Co SA vs Edmunds^[3] *remarked:-*

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

*Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*^[4] :-*

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person.

It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed.^[5] The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*,^[6] **Lord Denning** said the following about the standard of proof in civil cases:-

‘The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability....if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

Also on record is the Memorandum of Understanding produced as Exhibit no 3 by **Dorcias Wanjiru Gitonga**. The said document was not mentioned in the family meetings held on 28th April 2011 and 29th August 2009 raising doubts as why such an important document did not feature in the said meetings. Also, it cannot escape the court's attention that these proceedings were filed on 27th April 2011, yet the said document was not mentioned at all in all the documents filed in court and it was only introduced as late as 23rd September 2015 as an attachment to the affidavit of **Dorcias Wanjiru Gitonga** raising doubts as to where it was all this time if at all it existed. No explanation was offered as to why it took 6 years for such a key document to be introduced in the court record if at all it was in existence.

I take the view that since the document and its contents were disputed, it would have been prudent for protestors to call the advocate who allegedly made and attested the document as a witness to shed light on its existence, contents and the condition of the deceased at the time he is alleged to have made the document. In absence of such crucial independent evidence, and considering that no explanation was offered as to why the document was introduced in court six years after the case was filed, I find it difficult to attach serious evidential weight to the said document.

Also, only a copy of the said document was produced. Even though its production was not objected to, it was prudent for the second protestor to explain the whereabouts of the original if at all it existed.

While it is possible for a person to distribute properties during his/her lifetime, there are certain elements which must be demonstrated as prove that indeed the deceased gave out a gift *inter vivos*. This brings into play the provisions of Section 42 of the Law of Succession Act^[7] which seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. They are to honoured and effected.^[8]

Section 42 provides that during the distribution of the estate, previous benefits or gifts *inter vivos* be taken into consideration when determining the share of each child. My understanding of this provision is that whatever property belonged to the deceased, and which had not yet been transferred to the individual children during the deceased's lifetime, had to be subject to the provisions of this **Act** and the court would then take cognizance of the gifts given during the deceased's lifetime. If indeed the deceased had already given the other beneficiaries their share, then that would be taken into account at the time of distribution. But it must be proved beyond doubt that indeed the deceased gave out the property or gift during his/her life time.

In *Halsburys Laws of England* [9] it is authoritatively stated that if a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do. Several conditions must be met for a gift *inter vivos* to be valid[10] among them it must be demonstrated that the donor's objective was to make a gift.[11] It must be shown that the action was voluntary. The act in question must be shown to be immediate, unequivocal and irrevocable, even if the donee can only benefit from it at a later date.[12]

It is also important to consider whether the deceased took any steps or made any formalities to communicate his intentions in a clear manner. Such formalities include either orally or in writing communicating his wishes. No evidence was adduced to show that the above formalities were followed and the evidence of PW2 in this area is totally wanting.

I find that no evidence was adduced to show that the deceased made any will whether written or oral or shared his property during his life time. Accordingly, I find that the deceased died intestate. Section 34 of the Act provides that:-

"A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect."

Even if we were to accept the said document and the alleged oral will as alleged by the protestors to constitute the deceased's wishes, the court will have to subject the said wishes to the test proposed by **Makhandia J** in *Paul Kiruhi Nyingi & Another vs Francis Wanjohi Nyingi*,[13] where he held as follows:-

*"Unless it can be demonstrated that those wishes of the deceasedwere **illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected in my view.** Nothing has been brought to my attention that remotely suggests that the deceased's **was biased, unfair and or discriminatory against any of the beneficiaries** in the manner he wanted his estate shared out on his demise....."*

My understanding of the above is that the proposal ought not to be discriminatory or biased against any or some of the beneficiaries nor should it be unfair or unjust. The proposal contained in the said document or the alleged oral wishes of the deceased is totally discriminatory against the deceased daughters and to that extent it violates the constitution. Daughters have a right to inherit their fathers properties. This position has been reiterated in numerous decisions including the case cited above.

This court finds that excluding girls from inheriting their parents estate amounts to discrimination which would be contrary to **Article 27** of the **Constitution** which specifically prohibits discrimination of any person on the basis of race, sex, marital status or culture. The protestors case is that the daughters in question are married and own properties with their husbands in their respective matrimonial homes. To me, this is not a basis to exclude them from inheriting their fathers estate. **Article 27(3)** of the **Constitution** specifically provides that *"women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres."*

In the present case, this court does not see any reason why the **Law of Succession Act**[14] should not be applied in the distribution of the estate of the deceased. In that regard, **Section 29(a)** of the **Law of Succession Act**[15] recognizes **"children"** of the deceased as dependants. It does not state that such children are sons or daughters, either married or unmarried. Any practice that discriminates between the male and female children of a deceased person is retrogressive and cannot supersede the **Constitution** and the **Law of Succession Act**. [16] This court agrees with the holding of **Makhandia J** (as he then was) in *In Re Estate of Solomon Ngatia Kariuki (deceased)*[17] at page 8 where he stated as follows:-

"The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In

seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family."

On the question of distribution, the starting point is to refer to the relevant applicable law. Section 38 of the Law of Succession Act[18] provides that:-

"Where an interstate 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"

In my view, the spirit of Part V of the Law of Succession Act[19] is equal distribution of the estate amongst the beneficiaries of the deceased. My reading of these provisions is that they envisage equal distribution. The word used in Section 35 (5) and 38 is "equally" as opposed to "equitably." [20] This is the plain language of the provisions. The provisions are in mandatory terms-"the property shall.....be equally divided among the surviving children." Equal distribution is envisaged. Guided by the above provisions I find that all the children of the deceased are entitled to equal shares of the deceased's estate.

I find the protests by both protestors have no merits. I accordingly dismiss the protests and allow the mode of distribution proposed by the petitioner which I find to be more equitable and realistic considering the circumstances of this case and the relevant law and therefore I order as follows:-

- a. ***That Thengenge/Kianjogu/375*** measuring approximately **4.61 Ha** be sub-divided into six equal portions among the following:-
 - i. Dorcas Wanjiru Gitonga.....0.768 Ha. approximately.
 - ii. Angelica Wairimu Muhuhu..... 0.768 Ha. approximately.
 - iii. Charity Kagure Njoroge.....0.768 Ha. approximately.
 - iv. Naomi Wangechi Mwenda.....0.768 Ha. approximately.
 - v. Catherine Wakarima Mwenda.....0.768 Ha. approximately.
 - vi. Joseph Ndiritu Gitonga.....0.768 Ha. approximately.
- b. ***That Thengenge/Kianjogu/113*** to be inherited by **Dorcas Wanjiru Gitonga** absolutely.
- c. **500 Shares in Kenya Airways Limited** to be share equally among all the beneficiaries, namely:-
 - i. Dorcas Wanjiru Gitonga
 - ii. Angelica Wairimu Muhuhu
 - iii. Charity Kagure Njoroge
 - iv. Naomi Wangechi Mwenda
 - v. Catherine Wakarima Mwenda
 - vi. Joseph Ndiritu Gitonga
- d. Plot number **15A**, Giakanja to be inherited by **Angelica Wairimu Muhuhu** absolutely.
- e. Plot number **15B**, Giakanja to be inherited by **Joseph Ndiritu Gitonga** absolutely.
- f. **278 Shares in Tetu Housing Co-operative Society Limited** to be inherited by **Joseph Ndiritu Gitonga** absolutely.
- g. No orders as to costs.

Right of appeal 30 days

Signed, Delivered and Dated at Nyeri this 11th day July of 2016

John M. Mativo

Judge

[1] Cap 160, Laws of Kenya

[2] Hcc No. 106 of 2012

[3]{1955} 1 WLR 948 at 955

[4] {2007} 4 SLR (R) 855 at 59

[5]Koinange and 13 others vsKoinange {1968} KLR 23

[6]{1947} 2ALL ER 372

[7] Cap 160, Laws of Kenya

[8] See the Judgment o A. Mabeya J. in **Succession Cause No.43 of 2002, In the matter of the Estate of Noah Wanjala Kimawachi-Deceased**

[9] 3rd Ed. Vol. 18 Par 755

[10] Bruce ZIFF, *Principles of Property Law*, 2nd ed., (Toronto, Carswell, 1996), p. 140-142; Mary Jane MOSSMAN and William F. FLANAGAN, *Property Law - Cases and Commentary*, (Toronto, Emond Montgomery Publications, 1998), p. 471-472; Derek MENDES DA COSTA, Richard J. BALFOUR and Eileen S. GILLESE, *Property Law - Cases, text and materials*, 2nd ed., (Toronto, Emond Montgomery Publications, 1990), 5:55-5:62.

[11] *Thomas v. Times Book Co. Ltd.*, [1966] 1 WLR 911 (High Court of England).

[12] Supra note 4

[13] {2009} eKLR

[14] Supra

[15] Ibid

[16] Ibid

[17] {2008} eKLR

[18] Cap 160, Laws of Kenya

[19] Ibid

[20] See Musyoka J in Succ Cause No 399 of 2007, In the Estate of John Musambayi Katumanga-Deceased.