



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HIGH COURT SUCCESSION CAUSE NO. 343 OF 2015

IN THE MATTER OF THE ESTATE OF

CYPRIANO IMANYARA IMIRU.....DECEASED

-AND -

PETER M. MURUNGI.....1ST PETITIONER

EDITER NKUENE MANYARA.....2ND PETITIONER

-VERSUS -

ENID GATUNE MWONGERA.....1ST RESPONDENT

GODFREY KIMATHI.....2ND RESPONDENT

JUDGMENT

1. Cypriano Imanyara Imiru (“the deceased”) died on 17th January, 1992. He was survived by the following:-

- (a) Virginia Karimi Kiriimi – daughter
- (b) Veronica Curubi Muthuri – daughter
- (c) Peter M. Murungi – son
- (d) Editer Nkuene Manyara – daughter
- (e) Catherine Kaari Josphat – daughter
- (f) John Kaburu Imanyara – son
- (g) Jane Gatune Teresio – daughter in law

2. Jane Gatune Teresio is the widow to Teresio Mwangera Imanyara who was the deceased’s eldest son who had however died before the deceased. On his death, the deceased left LR NO.Mwimbi/Chogoria/40 as the only asset to his estate. In or about December, 2011, Peter M. Murungi and Editer Nkuene Manyara petitioned for grant of letters of administration intestate which was duly issued to them on 16th April, 2012.

3. On 7th October, 2013, Editer Nkuene took out summons for confirmation of that grant. In that summons she proposed to distribute the only asset of the estate as follows:-

(a) Editer Nkuene Manyara 1.01 Acres jointly

Virginia Karimi Kirimi

(b) Veronica Curubi Muthuri 1.01 Acres jointly

Catherine Kaari Josphat

(c) Jane Gatune Teresio - 1.01 Acres

(d) John Kaburu Imanyara - 1.01 Acres

(e) Peter M.Murungi - 1.01Acres

On 7th January, 2015, Jane Gatune Mwongera and one Geoffrey Kimathi Mwongera protested against the proposed distribution. Directions were made that the protest be determined by way of affidavit evidence on which the deponents were to be cross-examined. The protestors paraded three (3) witnesses.

4. PW1 was M'Marete M'Meru. He told the court that he was the brother of the deceased. That before his brother died, he had distributed his land among his children and had put boundaries represented by big trees. That except Editer Nkuene and Catherine Kaari who were still living on a portion of the land where the deceased was living, the rest of the daughters of the deceased were happily married and were living with their husbands. That the deceased had showed him the respective children's portions after he had distributed the land to them. That he had reserved 1.01 acres for his daughters. He further told the court that John Kaburu got a small portion of 0.40 acres because he had been given some other land belonging to his mother measuring 3 acres in Timau. In cross-examination, he stated that he did not know other respective shares of the beneficiaries. That even after the deceased had passed on, the beneficiaries continued occupying their portions until the present dispute arose in 2010. PW2 was Kanampiu Karuku. He told the court that he was the current general chairman of RUKINGA CLAN to which the deceased and his beneficiaries belong. That this dispute had been submitted to the general Rukinga Clan by the Chogoria sub-unit of the clan whereby after deliberations, it was confirmed that since the deceased had already distributed his land during his lifetime, the same should not be interfered with. He produced the minutes of a meeting that was held on 25th October, 2012. In cross examination, he stated that the distribution that the clan confirmed was unequal as the daughters were given one point something acres. He further confirmed that Editer Nkuene and Catherine Kaari were living on the portion left by their deceased father.

5. PW3 Peter M. Murungi testified that the deceased had shared his land to his children during his lifetime and had declared that the portion he was occupying was to belong to his daughters whether married or not. That a surveyor whom the family had commissioned had identified the measurements of the land distributed by the deceased and as occupied by the beneficiaries as follows:-

a) Peter Murungi - 1.60 Acres

b) Teresio Mwongera - 1.90 Acres

c) John Kaburu - 0.40 Acres

d) Editer Nkuene and the other daughters – 1.10 Acres

He stated that the distribution should remain as had been undertaken by his father and confirmed by the surveyor.

6. For the 2nd petitioner, three (3) witnesses testified. RW1 Editer Nkuene testified that she was a daughter of the deceased; that she left her matrimonial home in 1975 and her father showed her where to live where she had been living to date. That Catherine Kaari left her matrimonial home in 1984 long before the deceased died and he also showed her where to live. That the other two (2) sisters were living where they had been married. That the Chogoria Unit of the Rukinga Clan led by Benson Kinyua RW3 had with the help of Kanampiu Karuku PW2, put beacons on the estate land. She denied that the deceased had formally or otherwise sub-divided his land to his beneficiaries. That the deceased was not suffering from any chronic ailment and did not intimate to anyone how he wished to divide his property. She contended that the mode of distribution proposed by the protestors was unfair and unconstitutional. She denied that John Kaburu was given any land in Timau. In cross-examination, she admitted that the general clan of Rukinga had met and decided on the property of the deceased. That the deceased had showed each one where to cultivate. That the portion he had set aside for himself and his wife was her portion. That at a family meeting presided over by the clan, it was decided to distribute the estate as per her proposal. That the 1st protestor did not attend that meeting.

7. RW2 Catherine Kaari, a daughter of the deceased, told the court that the deceased died intestate but he had shown every child where to cultivate. That the clan subdivided the deceased's land equally amongst the beneficiaries and advised them to petition for succession. She supported her sister's (Editer Nkuene) proposed distribution. In cross-examination, she told the court that she returned from her matrimonial home in 1983 and continued to live on the portion of land occupied by her father. That the deceased had shown everyone where to cultivate except two (2) of his daughters who were still married. RW3 Benson Kinyua testified that he was the chairman of the Rukinga clan since 2008. That the deceased had never called the clan nor given indication that he wanted to subdivide his land to his children. That in 2010 the 2nd petitioner complained to the general clan about the deceased's land whereby the general clan shared the land into five (5) equal portions. In cross examination, he admitted that he was only the chairman of the Chogoria unit of the Rukinga clan. That the general clan under the chairmanship of PW2 had decided that each child's portion be ascertained as had been bequeathed to them by the deceased during his lifetime.

8. The respective counsels filed written submissions which they hi-lighted. Mr. Kijaru for the 2nd petitioner submitted that the deceased died intestate and therefore sections 32 to 42 of the Act applied; that section 31 was not applicable as there was no evidence that the deceased settled his children in contemplation of his death. That in the premises the principle of *donati Mortis Causa* is not applicable. That under Article 27 of the Constitution, there should be no discrimination. Counsel relied on the cases of *Peter Kiiru Gathemba & others .v. Margaret Wanjiku & Ano NBI HCCA NO. 167 of 1994, In the Matter of Mary Wanjiku Thairu (deceased) NBI HCSC 1403 of 2003 and In the Matter of Ellah Wame Nthawa (deceased) NBI HCSC NO.971 of 2001* in support of the submission that in succession, there is no male or female, and that there should be equal distribution. Counsel further relied on the cases of *John Gitata Mwangi & 3 others .v. Jonathan Njuguna Mwangi and 4 others [1999] eKLR* and *Mary Wangari Kihika .v. John Gichuhi Kinuthia & 2 others [2015] eKLR* for the proposition that the court should consider the circumstances of the dependants in making an order under Section 28 of the Act. Counsel urged that the proposed distribution by the 2nd petitioner be upheld and the protest be dismissed.

9. On his part, Mr Mugo for the protestors submitted that since the deceased had divided his land amongst his children and as confirmed by the general Rukinga Clan, the court should adopt the distribution proposed by the protestors. That there was only one daughter (Editer Nkuene) of the deceased who was unmarried. That the court should not therefore disturb how the deceased had shared his estate while alive. Counsel urged that the protest be upheld.

10. From the testimonies of the witnesses and the submissions of counsel, the issues that arise for determination are; did the deceased give any gift to his children in contemplation of his death? did the deceased distribute his property before death? how should the estate be distributed?

11. On the issue of whether the deceased gave any gift to his children in contemplation of his death, counsel for the 2nd petitioner submitted that there was no evidence to prove this fact. Under Section 31 of

the Act, a gift made in contemplation of death is valid if the person making the same contemplates the possibility of death as a result of present illness or imminent danger, and makes such a gift in circumstances that show that he intends the gift to revert back to him once the danger is over. In the present case, there was no evidence that the deceased gifted any of his children while contemplating his death. Indeed I did not understand the protestor's case to be that the property that the deceased gave to them was in contemplation of death. In this regard, I do not think that section 31 of the Act is applicable to this case.

12. The second issue is whether the deceased had divided his property amongst his children before he died. According to RW1 the deceased had not divided his property but had only shown each of his children where to cultivate. RW3 on the other hand told the court that the deceased had not divided his land because he had not called the Rukinga clan to advise them of such fact. This court finds that there was no evidence to show that in his social set up or culturally it was mandatory for the deceased to call his clan and declare that he had divided his property to his children. In any event, RW3 became a chairman of the Chogoria Unit of the Rukinga clan only in 2008 while the deceased died way back in 1992. RW3 did not tell the court the basis for his assertions. In any event, the said witness contradicted himself in his testimony in court when compared with what he had stated in his affidavit evidence. This court found it difficult to believe him.

13. The evidence by PW1, PW2, PW3 and RW2 was that before he died, the deceased had physically shown his children their portions where they were to cultivate. That after being shown his/her portion each continued to use his/her own portion during the lifetime of the deceased. That the sons had been shown and were cultivating their own portions. The evidence on record shows that Editer Nkuene left her matrimonial home and settled in the deceased's portion in 1975. Catherine Kaari (RW2) also returned home in 1983 and settled on the deceased's portion. The two continued to utilize that portion as shown to them by the deceased. Likewise the sons of the deceased, the late Teresio Mwongera, Peter Murungi and John Kaburu each continued to occupy and utilize their own portions undisturbed. Of the three (3) sons of the deceased, John Kaburu had the smallest portion. According to PW1 and PW2, John Kaburu was given a smaller portion because he had been given another property belonging to the wife of the deceased at Timau. According to PW3, the deceased was showing his children their portions as they grew up and not at the same time. Each of them occupied his portion as and when he was shown the same. That the deceased had identified the boundaries by planting trees.

14. In view of the foregoing, this court's finding is that the deceased had three (3) sons and four (4) daughters. Although all his daughters were married, two (2) of them Editer Nkuene and Catherine Kaari returned home and he accommodated them. That while alive, as the sons became of age, the deceased showed each of them at different times their own portions which they took possession of and continued to cultivate. That he accommodated his two (2) daughters who had separated with their husbands in his and his wife's portion which later turned to be 1.10 Acres. According to the plan drawn by a surveyor and produced in the Affidavit of protest sworn on 7th January, 2015, the deceased had parceled his land as follows:-

- a) Teresio Mwongera (deceased) - 1.90 acres
- b) Peter Murungi - 1.60 Acres
- c) John Kaburu - 0.40 Acres
- d) Portion occupied by the deceased and used by Editer Nkuene and Catherine Kaari - 1.10 Acres

15. The court finds that at no time did anyone of the children complain on how the deceased had settled them. All was peaceful during the deceased's lifetime and even for seventeen (17) years after his death. Problems only arose sometimes in 2010 when the children of the eldest son of the deceased trespassed onto and picked the tea belonging to Editer Nkuene which provoked the Succession Cause and the consequent dispute as to the sharing of the estate.

16. This court agrees with the submission of counsel for the 2nd petitioner that under Article 27 of the Constitution of Kenya as well as Section 38 of the Act, no one is to be discriminated on account of sex or any other basis. Indeed there is no male or female when it comes to distribution of an intestate estate of the deceased. This is clearly set out in the cases cited by Mr Kijaru of **Peter Kiiru Gathemba & others .v. Margaret Wanjiku & Anor (supra). In the matter of the Estate of Mary Wanjiru Thairu (deceased) (supra) and In the matter of the Estate of Ellah Wame Nthawa (supra)** among many others. Indeed when it comes to distribution, the daughters cannot be discriminated on the basis that they are married.

17. These principles of non-discrimination and equity (equality) are applicable in an intestate estate. The question that arises is, will the court apply the same where a deceased has already expressed his intention by dividing his property and settled his children in his lifetime? Where a deceased has actually advanced a gift during his lifetime, I do not think such a gift can be subject to the said principles of equity or equality. Inheritance is not a right. It is a privilege. One can deal with his property as he wishes during his lifetime including giving it out to charity or anyone he wishes. The right to claim as a beneficiary only arises after one has died and still has free property to his estate. If a person has settled (given) the whole or any part of his property during his lifetime and no one has questioned his actions during his lifetime, such a person or beneficiary cannot turn around after the demise of the person who has already settled his property and claim that there should have been equality. A parent may decide to give any of his children a greater portion of his property than the others depending on the relationship he/she has with his children.

18. In my view, to attempt to disrupt what a deceased person has settled during his lifetime which remained unchallenged will be a recipe for chaos in society. In the present case, the family of the deceased was settled way back in the 1970s through 1980s. Each of the deceased's children was shown where to occupy and cultivate. All took possession thereof and have been in peaceful occupation thereof for over 30 years. One cannot now turn around and claim that they should have been settled equally. To my mind, once the deceased had settled his family in his lifetime, the same cannot be subject to be disrupted after his death. The deceased expressed his wish by planting trees to mark the boundaries. PW1 and PW2 were independent witnesses whose evidence this court believed. I find that the decisions in **John Gitata Mwangi & 3 others .v. Jonathan Njuguna Mwangi & 4 others (supra) and Mary Wangari Kihika .v. John Gichuki Kinuthia & 2 others (supra)** not to be applicable to this case. In the said cases, the courts were dealing with an application by dependants. In the present case, it is the beneficiaries who have claimed that the court upsets the settlement made by the deceased. The deceased expressed the intention that his daughters both married and unmarried do occupy the portion he was occupying. They were not to disturb the sons.

19. In view of the foregoing, I find that the protest has merit. I allow the same. The estate of the deceased, Mwimbi/Chogoria/40, is to be distributed as follows:-

- a) John Kaburu Manyara - 0.40 Acres
- b) Editor Nkuene Manyara ,
Catherine Kaari Josphat, 1.10 Acres
Virginia Karimi Macharia,
Veronica Ncurubi Zaverio
- c) Peter M. Murungi - 1.60 Acres
- d) Jane Gatune Mwangera Teresio - 1.90 Acres

This being a family dispute, I make no orders as to costs.

It is so decreed.

Dated and delivered at Chuka this 1st day of September, 2016

A.MABEYA,

JUDGE