



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 284 OF 2004

In the matter of the Estate of NJAGI KARUGU (Deceased)

TARACISIO NDWIGA NJAGI.....PETITIONER

VERSUS

MARGARET RWAMBA NJAGI.....OBJECTOR

AND

ESTHER GICUKU NJAGI.....APPLICANT

RULING

1. This is a ruling on an application dated 25/7/2016 seeking for orders that the Deputy Registrar be authorized to execute all necessary documents to effect the transfer and sub-division of Ngandori/Kirigi/12798 to the beneficiaries and that the Officer Commanding Station (OCS) Manyatta Police station be authorized to provide security during the subdivision. The application is supported by the affidavit of Esther Gicuku Njagi.

2. In the affidavit, it is stated that the petitioner and objector were issued with letters of administration of the estate of the deceased on 21/6/2007 and the grant was confirmed through a certificate dated 10/2/2009. The parcel of land was sub-divided according to the grant but the petitioner Taracio Ndwiga Ngagi representing the applicant's house caused himself to be registered as the owner of the resultant parcel No. 12798 allocated to his mother's house. He has refused the land to be sub-divided among the beneficiaries who are all entitled to it.

3. The petitioner/respondent in the replying affidavit stated that he was registered as the proprietor of the resultant parcel Ngandori/Kirigi/12798 measuring 0.40 ha after the subdivision of the parcel of land belonging to the estate of the deceased. He holds the said parcel in trust for the 1st house of the deceased and not absolutely as alleged by the applicant.

4. It is contended that the mode of distribution proposed by the applicant is unfair to the petitioner and his brother as the applicants and their two other sisters Virginia Kiini and Flora Wanja are married and do not need the land. He stated that his other sister Jacinta Kanini indicated she is not interested in her share in the parcel of land. The petitioner claims that has extensively developed 0.20 Ha. of the portion allocated to their family and it is his source of livelihood. Their brother Elias Njeru has already sold 0.05 Ha. out of his entitlement. James Muturi should not inherit directly from the estate as a grandchild as his mother is still alive.

5. On 19/9/2016 Elias Njagi denied in open court that he supports the petitioner in the affidavit sworn on the 14/9/2016 and he asked the court to strike out the said affidavit.

6. Section 38 of the law of succession act provides that;

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 shall be equally divided among the surviving children.

7. **CHRISTINE WANGARI GACHIGI VS ELIZABETH WANJIRA EVANS & 11 OTHERS [2014] eKLR** where the court held that;

Under section 38 of the Act; all that one needed to establish in this cause was to show that they were either children or grandchildren of the deceased. Matters of failure to participate actively in the litigation proceedings should not have been a disentitling consideration in respect of the 2nd, 3rd and 4th cross appellants, in the absence of their renunciation of respective claims to the estate.

8. Article 27 of the Constitution provides that;

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2)

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

9. The grant was in this case confirmed on 10/01/2009 following a ruling by Wanjiru Karanja, J. in the following terms:-

(i) That Wilson Muchangi who was a purchaser be given 0.30 Ha out of Ngandori/Kirigi/557.

(ii) The remaining land was to be shared equally between the two houses of the deceased.

10. It appears that the first house of the deceased chose the respondent herein Tarasisio Ndwiga Njagi to be registered as proprietor to hold the share of the first house in trust for himself and the following beneficiaries:-

1. Jacinta Kanini Njagi
2. Virginia Kiini Njagi
3. Esther Gichuku Njagi
4. Florence Wanja Njagi
5. Elias Njeru Njagi
6. James Muturi Njagi

11. One Margaret Rwamba Njagi was registered as proprietor of the resultant parcel whose number is not given measuring 0.605 Ha. to hold in trust for herself and her siblings from the 2nd house as follows:-

1. Martin Mbogo Njago
2. Patrick Muchangi Njagi
3. Joseph Ndwiga Njagi
4. Alex Muriithi Njagi
5. Mercy Murugi Njagi
6. Nicholas Muturi Njagi

12. The respondent herein was reluctant to sign the necessary documents for implementation of the grant which led to Margaret Rwamba to obtain orders for Deputy Registrar to execute them on his part. The 2nd house seems to have sorted out themselves since obtaining the orders and Margaret Rwamba being registered proprietor of the portion for the 2nd house.

13. The respondent is the driver of the first house but seems to have refused to share the portion with the other beneficiaries. This has prompted one of the beneficiaries to file this application.

14. The respondent raises issues of his two sisters Virginia Kanini and Flora Wanja married women who have settled in their matrimonial lands. He argues that they should not get portions from the share of the first house for the land is his only source of livelihood.

15. The record is clear that the issues of inheritance were sorted out in the ruling of W. Karanja, J. The shares of each beneficiary were to be sorted out within the houses after each house got their share. This is what the first family has failed to do for selfish reasons of the respondent.

16. If he wished to object to his married sisters getting shares from the land given to the first house, the respondent should have raised those

issues during the confirmation of grant which he failed to do. The court in its ruling had in mind all the beneficiaries who are siblings of the respondent and children of the deceased. The respondent has no choice now but to give the respective beneficiaries their respective shares.

17. The law does not allow him to convert to his own use and ownership the property which is the entitlement of his siblings. The constitution and the Law of Succession Act does not discriminate against married women in issues of inheritance. It treats all children of deceased equally.

18. The application of the applicant names six beneficiaries including the respondent and the applicant. The respondent opposed to one James Muturi Njagi getting a share arguing that he is a grandchild. His mother is one Jacinta Kanini Njagi who is a beneficiary in the estate. A grandchild has no right to inherit if his/her parent is getting a share. However, in this case, the name of the mother Jacinta Kanini Njagi is missing from the list proposed by the applicant.

19. This confirms that there is no double benefit to one beneficiary. The beneficiaries are seven as it was originally indicated in the cause. James Muturi Njagi is taking the share which should have gone to his own mother Jacinta which is in order. If the mother who is said to be alive has chosen to have her share go to her son, that is her choice which must be respected. The respondent did not produce any evidence to show that his sister Jacinta has relinquished her share to him.

20. The two married sisters Virginia and Flora have not communicated to the court that they do not need their shares. The applicant was therefore right to include them for they are rightful heirs.

21. The applicant prays for orders that the Deputy Registrar executes all the necessary documents to facilitate sub-division of Ngandori/Kirigi/12798 and bequeathing of the respective shares to the beneficiaries. The second prayer is for provision of security by the OCS Manyatta police station since the environment on the ground is likely to be hostile.

22. The applicant has set out the shares of each beneficiary as 0.10 ha which places all the beneficiaries on equal footing.

23. I have considered the arguments of both parties in this application and the applicable law. I find the application merited and allow it as prayed. The proposed mode of the distribution in the applicant's affidavit is hereby adopted.

24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF NOVEMBER, 2016.

F. MUCHEMI

J U D G E

In the presence of:-

Ms. Ndorongo for E.K. Njagi for petitioner

Applicant present