



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 152 OF 2004

In the matter of the Estate of MURAKO NYATHIKA (Deceased)

ELIAS KIURA NJERU.....PROTESTER

VERSUS

SAMUEL IRERI.....PETITIONER

J U D G M E N T

1. INTRODUCTION

The petitioner Samuel Ileri filed this cause in 2004 seeking for letters of administration intestate in the estate of Murako Nyathika who died at Kyeni hospital on the 25th August 1992 in his capacity as the son of the deceased. He was issued with letters of administration intestate on the 7th July 2005. The summons for confirmation of grant were filed on 14th November 2005. The summons for confirmation of grant were filed on 14th November 2007 by the petitioner's counsel Morris Njage & co. in which the petitioner declared himself the sole heir in rest of the estate of L.R. Ngandori/Nguviu 2235.

2. THE PROTESTORS CASE

The protestor filed an affidavit protest against confirmation dated 19/08/2005 and summons under Section 26 of the Act. In the filed documents, he claimed the right to inherit L.R Ngandori Nguviu/2235 arguing that the deceased had bequeathed the land to him. He claimed that he was brought up by the deceased from the time he was less than one year old. This was after the death of his mother Rwamba Nyathika who was a deceased sister. That he grew up in the home of the deceased together with the petitioner and his two brothers. The deceased in his lifetime subdivided his land Ngandori/Nguviu/1690 into four parcels No. 2532, 2533, 2534 and 2535. He transferred No. 2532 to the petitioner and No. 2533 to one Hanny Mwaniki. Parcel No. 2535 was to be transferred to him. However, the deceased died before the transfer was effected.

The other sons of the deceased had been given other parcels of land by the deceased during his lifetime. The petitioner now wants to disinherit the protestor by declaring himself the sole heir of the deceased's land L.R 2335. The protestor further claimed that the deceased had given him the original title deed of the land during his lifetime. He said that at all material times since he was less than one year old, the deceased had treated him as his children and as such he has the right to inherit from him. The deceased had entrusted the responsibility to sub-divide his land into the protestor.

It was the protestor's evidence that the land of the deceased was ancestral land given to him by his clan known as "Andu a Mbugi" which is also the protestor's clan.

The protestor had an older brother who was an adult during land consolidation who was given land by the clan. At the material time, the protestor was still a child. After the deceased gave the portion of land to the protestor, he started cultivating it but he was later chased away by the petitioner and deprived of possession of the land.

3. THE PETITIONER'S CASE

The petitioner testified that the protestor is his cousin born by his father's sister. He said that the deceased left seven acres of land whose reference number he could not remember. He said the deceased did not give the protestor any land. He only gave Hanny Mwaniki 1¼ acres. As for the petitioner he denied that the deceased gave him any land and that he occupies the one (1) acre portion left by his father.

All his brothers have their own land and he is the only one without land. He admitted that the protestor was brought up by the deceased. That when he (petitioner) was born, he found the protestor living in their home where he stayed until 1966 when he differed with the deceased. The petitioner said he knows that the protestor is in possession of the original title for his father's land but he does not know how he came to be in possession of the document.

DW2 was the elder brother of the petitioner. He testified that the deceased has six sons:-

- a. Francis Njogu
- b. Dionisio Nyaga
- c. Patrick Gakono (DW2)
- d. Samuel Ileri (Petitioner)
- e. Sylvester Kithinji
- f. Hanny Mwaniki

The last two sons are now deceased. All the sons except Hanny Mwaniki and the petitioner had their own land. For that reason, the deceased gave Hanny Mwaniki three acres and the petitioner two acres. He then asked them to look for money for sub-division of the main parcel. Hanny paid for sub-division of his portion and it was transferred to him. The petitioner had no money to facilitate sub-division and transfer of the portion and it remains in the name of the deceased.

He further testified that although the protestor lived in the home of the deceased with his other children, he is not a son of the deceased and therefore not entitled to inherit. He also said he has no knowledge of how the protestor got the original title of the land of the deceased.

4. EXHIBITS

At the close of the case, the court directed the protestor to produce copy of the original title. He said the original was his possession and copies of registers for L.R Ngandori/Nguviu 2532, 2533, 2534 and 2535. The exhibits were produced within the seven days granted by the court and marked as PExh 1, 2, 3,4, 5 and 6.

5. THE NATURE OF THE PROTEST

On perusal of the affidavit of protest and the summons filed in support of Section 26 of the law of succession Act, the court found the contents of both documents almost similar. The subject was his right of inheritance as an adopted child of the deceased as opposed to provision of dependency. It also dealt with an identified share entrusted to him by the deceased L.R Ngandori/Nguviu/2535.

6. THE UNDISPUTED FACTS

It was not in dispute that the protestor was the nephew of the deceased whose mother was sister of the deceased and that she passed on when the protestor was a child of tender years. The deceased took the protestor in his care at the age of less than one year and lived with the protestor in his home and brought

him up together with his sons as his own child. These facts were admitted by the petitioner and his witness DW2 in this evidence. With this undisputed evidence, the court will begin on the premise that the protestor was an adopted child of the deceased.

7. THE ISSUES

The issues for determination in this case are two fold:-

- a. *Whether the protestor is a beneficiary in the deceased's estate;*
- b. *The identification of the assets for distribution and the shares for the beneficiaries.*

8. THE LAW

The deceased died intestate in this case having left no will. Section 3(2) of the Act gives the identification of a "Child" of the deceased. It provides:-

References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

Section 29 defines "dependant" in three categories:-

For the purposes of this Part, "dependant" means—

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*
- (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and*
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.*

Its important to refer to case law with comparable facts relating to who is an adopted child. In the ***Re Estate of Cecilia Wanjiku Ndung'u (Deceased) [2013] eKLR*** the court observed:-

It will be noted that section 29(a) a and (b) refer exclusively to the estate of deceased male persons and that only a child that had been taken into the family of a male person and treated as his own will be regarded as a dependent of such male person.

The protester, by virtue of the above provisions qualify as a child of the deceased. I come to the conclusion that he is a beneficiary of the estate of the deceased and is entitled to inherit a share.

The elder brothers of the petitioner have their own land some given by the clan and some by their father during his lifetime. None of them claimed a share in the estate and were all in agreement that the petitioner is the only heir. The court has therefore identified the petitioner and the protestor as the only heirs of the estate. Section 38 is applicable in the distribution of the estate. It provides:-

“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”.

9. THE ANALYSIS OF THE EVIDENCE

The petitioner gave L.R No. Ngandori/Nguvio/2535 as the only asset available for distribution. The copy of register shows that the land measures 0.45ha (1.115 acres). He also told the court that he was not given any land by the deceased and that only his brothers Hanny Mwaniki and Silvester Kithinji were given land. The protester on the other hand said Hanny's portion was transferred to him but that of the petitioner L.R. 2535 was not transferred to him during the lifetime of the deceased. He was given the original title to keep by the deceased which was in his possession during the hearing. He produced a copy of the registers four parcels after sub-division of the deceased's land Ngandori/Nguvio/1690 which demonstrate ownership as follows:-

L.R. Ngandori/Nguvio/2532 - Murako Njathika (Deceased)

L.R. Ngandori/Nguvio/2533 - Hannay S. Mwaniki

L.R. Ngandori/Nguvio/2534 - Hannay S. Mwaniki

L.R. Ngandori/Nguvio/2535 - Murako Njathika

The subdivisions was done and titles of the new parcels issued on 24:11:90 Hanny sub-divided his share to form 2 parcels 2533 and 2534.

The protestor said that parcel No. 2532 was earmarked for the petitioner and it is still in the name of the deceased. Surprisingly, the petitioner did not present this parcel for distribution in this case. He only declared No. 2535 which was earmarked for the protestor. It is not known what the petitioner intended to do with L.R 2532 as her pursued No. 2535 as the sole heir. This was concealment of a material fact relevant to the case which would justify revocation of grant under Section 76 of the Act.

The petition told the court that his brother Kithinji was given land by the deceased. This was confirmed by his witness DW2 who said that all the sons of the deceased have land except the petitioner. On perusal of the copies of register it appears the land of DW2, Kithinji and the other sons except Hanny was not from the sub-division. The court believed the protestor who said that only three children of the deceased were to get land from the sub-division parcels namely that is, the petitioner, Hanny and himself protestor. His evidence that only Hanny parcels were transferred to him was corroborated by the evidence of DW2 when he said that Hanny is the only one who was in a position to pay for sub-division and transfer.

The court found the petitioner an untruthful and dishonest witness in that he told the court that he could not remember the land reference number of the only asset (No. 2535) which he had presented to the court for distribution. His failure to exclude one parcel in the list of assets further demonstrated of the petitioner's dishonesty.

I believe that his plot was all intended to accomplish his mission of blocking the protestor from inheriting any share from the deceased's estate. During cross examination he admitted that he occupies and cultivates parcel No. 2535. The protestor claims to have been forcefully evicted from the land which he had been using for many years.

10. THE DISTRIBUTION

From the documents presented to this court it is evident that there are two parcels of land which have been identified for distribution in the deceased's estate namely L.R Ngandori/ Nguvio/2532 and 2535.

All considered the said assets will be distributed to the only beneficiaries as follows:-

1. *L.R. Ngandori/Nguvio/2532 – Samuel Ireri*
2. *L.R. Ngandori/Nguvio 2535 – Elias Kiura*

The grant is hereby confirmed in the afore stated terms and a certificate of confirmation to issue.

Each party to meet their own costs of this protest.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF MAY, 2015.

F. MUCHEMI

J U D G E

In the presence of:-

1. **The applicant**
2. **The respondent**