



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 154 OF 2007

IN THE MATTER OF THE ESTATE OF GEOFFREY KIARIE WAIHARO (DECEASED)

NJEHIA KIARIE

ANDREW KIARIE APPLICANT/PETITIONERS

V E R S U S

JAIRUS WAIHARO KIARIE

CHRISTOPHER KIARIE WAIRIMU PROTESTORS

R U L I N G

1. The deceased to whose Estate these proceedings relate is Geoffrey Kiarie Waiharo, who died on 22nd October, 2004 while domiciled in Kenya. Letters of Administration intestate of all his Estate were issued to his sons Njehia Kiarie, and Andrew Kiarie (hereinafter the Applicants/Petitioners) on 3rd March 2011. On 15th February 2012 the Petitioners filed Summons for the Confirmation of Grant.
2. Jairus Waiharo Kiarie (hereinafter the Protestor) swore an affidavit of protest dated 25th June 2013 in which he stated that he is the eldest son of the deceased who owned five (5) acres in L.R. No. 164/2 and that the deceased's estate was not distributed equitably, contrary to the wishes/directions of the deceased. The Protestor avers that in the suit land there are graves and the Administrators have already disposed of part of this land which he opposes. He proposes the distribution as follows:-

Jairus Waiharo Kiarie	075 acres absolutely
Andrew Kiarie	075 acres
Njehia Kiarie	075 acres
Hannah Nyambura Kamau	075 acres
Alice Njeri	075 acres
Janet Wambui	0.58 acres

Judy Wanjiru

0.58 acres

Christopher Kiarie &

0.58 acres

Faith Wangui

**absolutely to hold as Tenants in
common in equal shares.**

Njehia Kiarie

Andrew Kiarie

Jairus Waiharo Kiarie

**0.25 acres to hold in trust for and
For all other beneficiaries of the
Estate of the deceased. This land
is family cemetery.**

3. In reply to the Protestor's affidavit, the two Applicants/Petitioners filed a replying affidavit sworn on 18th November 2013 and averred that they are a family of four (4) sons and five (5) daughters, and that the deceased had two pieces of land namely Ngenda Nyamangara Parcel No. 2160 and L.R. No. 164/2. They deponed that the deceased gave Ngenda Nyamangara 2160 to Stephen Ndungu Kiarie the only son of the deceased's first wife to and the protestor being the eldest son of the second wife to share equally. That the deceased gave the parcel of land known as Ngenda Nyamangara 2160 to these two sons to share equally.
4. It is further deponed that the Protestor later sold his share of the said land to one Josphat Kimani Njuguna and did not share the proceeds of the sale with any of the beneficiaries. He was later given a share by his late mother in L.R. No. 164/2 in equal shares with the rest of the beneficiaries. The Applicants/Petitioners further aver that the Protestor was in agreement with the mode of distribution on the confirmation before the demise of their late mother.
5. Mr. Mwaura Shairi learned counsel for the Protester, filed brief submissions stating that the only asset comprising the estate of the Deceased is L.R. No. 164/2, which measures five (5) acres or thereabouts. He observed that the difference between the mode of distribution proposed by the Applicants/Petitioners and the Protestors is not a major one but that while the Protestor's proposal distributes the whole of L.R. No. 164/2 to the beneficiaries entitled thereto, the Applicants/Petitioner's proposed distribution leaves out a portion measuring 1¹/₂ acres which is not shared out to any beneficiary. He submitted that the Applicant's/Petitioner's proposed distribution is therefore prejudicial to the Protestor and other beneficiaries.
6. Mr. Mwaura Shairi submitted that the Protestor's proposal is that 0.25 acres be reserved as the family cemetery and the said plot be registered in the names of the Administrators of the estate of the Deceased to hold in trust for the entire family of the deceased. He contended that the Applicants/Petitioners' proposal that the graveyard be shared out between the beneficiaries would inevitably necessitate the exhumation of the bodies of the six (6) deceased persons buried in the plot measuring 0.25 acres and that the process would traumatize the family of the Deceased and cause disharmony.
7. Mr. Shairi opined that the distribution proposed by the Protestor is fair as it shares out the estate of the Deceased equally between the children of the Deceased and the grandchildren of the Deceased.
8. In reply Mr. M. A. Khan learned counsel for the Administrators, also filed brief submissions

stating that the Applicants/Petitioners herein had sought the confirmation of grant of letters of administration issued to them on the 3rd March 2011, setting out the beneficiaries to the estate and proposing equal distribution of the estate amongst the beneficiaries.

9. Mr. Khan contended that while the Applicants/Petitioners had proposed the distribution of the remaining and available asset of the estate equally amongst all the beneficiaries, the Protestors on the other hand have proposed a truncated distribution in which the Protestor and four beneficiaries would receive a bigger share than the rest, and a portion of the property sought to be distributed would be set aside as the site of the graves of amongst others, the Deceased, the Protestor's mother, siblings, wife and child. Mr. Khan submitted that no explanation is given by the Protestor in the affidavit of protest as to the inequitable division.
10. Mr. Khan urged that the Protestor is already the beneficiary of another asset from the estate which he has since disposed of or is still holding on to, but the Petitioners have, nevertheless, sought to overlook this and proposed an equal distribution of the estate amongst the beneficiaries. Mr. Khan submitted that this is the most equitable way of distributing the estate and that the positioning of the grave sites is a logistical issue that can be resolved with the graves of the Protestor's wife and child being positioned on his share of land while the other graves can be positioned to the satisfaction of all the beneficiaries.
11. From the application, the affidavits in support and in reply and the submissions of the respective counsels the facts that emerge are that the Deceased had two wives and owned two properties namely; Ngenda Nyamagara Parcel Number 2160 and Land Reference 164/2. The first property, Ngenda/Nyamagara Number 2160 was bequathed intervivos to the Protestor and Stephen Ndungu Kiarie the only son of the first wife by the Deceased, to share equally. It was not disputed that the Protestor has since sold his share of that property and the other beneficiaries have not claimed any part of the proceeds.
12. The Applicants/Petitioners have proposed to distribute the estate equally among the beneficiaries and no plausible reason has been given by the Protestor as to why any of the beneficiaries should get a bigger share of the estate than the others.

It is therefore ordered that:

- i. the whole of the remaining asset being L.R. No. 164/2 be shared equally among the nine beneficiaries who are the children of the Deceased.
- ii. The allocation of the portions should take into account the existing graves so that those in which the Protestor's wife and child were interred, can be positioned on his portion. It will not be necessary to exhume the bodies already interred to bury them elsewhere, because I doubt that the dead have any quarrel with whose portion they will come to rest in when the distribution is done and the rest of the family has no issues in that regard.
- iii. If there are grandchildren among the beneficiaries of the estate, their shares shall devolve through their respective parents.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **6th day of July 2015.**

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L. A. ACHODE

JUDGE