



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 129 OF 2007

IN THE MATTER OF THE ESTATE OF NJAGI MWITANJAU (DECEASED)

HARRISON NJIRU KAGANE.....1ST PROTESTER

ABISHAGI KIRIMARI NJAGI....2ND PROTESTER/1ST PETITIONER

VERSUS

MARY GICUKU.....1ST APPLICANT

JANET GATAVI.....2ND APPLICANT

J U D G M E N T

This cause was filed in this court in the year 2007 in respect of the estate of Njagi Mwita Njau. The letters of administration were issued to one Abisagi Kirimari Njagi and Alice Ciumwari Njagi the then surviving widows of the deceased on 8/01/1998 in Principal Magistrate Succession Cause No. 206 of 1997. It appears that this grant was later revoked by the High Court.

The letters of administration intestate in this case 129 of 2007 were issued to Abisagi Kirimari Njagi. The record shows that the applicants are now Mary Gichuku and Janet Gatavi. The two beneficiaries are daughters of the deceased by his second wife and came in place of the co-petitioner Alice Ciumwari after her death.

The applicants applied for confirmation of grant on 12/6/2012 and proposed the following mode of distribution:-

LAND PARCEL NO. GATURI/NEMBURE/7856 to be shared as follows:-

- a. ABISHAGI KIRIMARI NJAGI – WIDOW to have life interest of ½ acre and the same to devise MARY GICHUKU and JANET GATAVI to hold in trust for beneficiaries stated in (b) here below and for themselves.
- b. MARY GICHUKU and JANET GATAVI – to hold 0.78 Ha. on their own behalf and in trust for the following in equal shares
 - i. KELLEN KARIMI
 - ii. PATRICIAH MARIGU
 - iii. JEMIMAH NJOKI
 - iv. TRUPHENA WAWIRA
 - v. EDITH WANJUKI

The 1st protestor Harrison Njiru Kagane filed an affidavit of protest sworn on 2/04/2013 and filed in court on 5/04/2013 proposing that the estate be distributed as follows:-

1. Abishagi Kirimari - 0.38 hectares
2. Mary Gicuku &
Janet Gatavi - 0.40 hectares jointly
3. Harrison Njiru Kagane
(protester) - 0.20 hectares.

Abishagi Kirimari Njagi filed her affidavit of protest dated 20/06/2012 and urged the court to distribute the deceased's estate as per letter of consent filed earlier by herself and the applicants. The amended consent letter signed on 10th January 2012 and filed on 18th January 2012 states that:-

- *That the petitioner/applicant (Abishagi Njagi) to acquire 0.38 ha and the respondents (Mary Gichuku and Janet Gatavi) to acquire 0.60 ha. all resulting from LR. GATURI/NEMBURE/7856 approximate area 0.98 ha.*

This consent was never adopted as an order of the court as shown by the record.

The protest proceeded for hearing by way of *viva voce* evidence on the basis of the directions taken on 21/6/2012.

The case of the first protestor was that he is the son of the deceased with his first wife Abishagi Kirimari Njagi who is still living. The second wife Alice Ciumwari Njagi is the mother of the petitioner Mary Gichuku and Janet Gatavi and has since died. His mother Abishagi who is the 2nd protestor is now of advanced age about 95 years and is not able to come to court and testify but he was seized of her interests in the case.

The 1st protestor testified that the deceased owned two parcels of land Gaturi/Nembure/7856 and Gaturi/Nembure/ 3872. The first parcel Gaturi/Nembure/7856 was as a result of sub-division of the original parcel whereas the sons of deceased including the protestor were given one acre each. The protestor says LR. Gaturi/Nembure/7856 measuring 2½ acres is the parcel where the family of the 2nd wife, himself and his aged mother lives. The protestor claims ½ an acre and he wants his mother Abishagi to also get ½ an acre. The remaining 1½ should be inherited by the applicants jointly. The protestor claims he assisted the deceased to acquire the land which had a land case when it was bought. He said he has planted coffee on the portion he occupies. The protestor says the sharing of the land by giving the 2nd family the whole of LR. 7856 is unfair because all the children in that house are daughters. He said that Mary Gichuku lives on the said land but Janet Gatavi got married.

The applicants Janet and Mary testified that they are children of the 2nd family while the protestor is a child of the first family. The 2nd house has eight children all daughters including Mary Gichuku, Janet Gatavi, Kellen Karimi, Patricia Marigu, Jemimah Njoki, Truphena Wawira and Edith Wanjuki.

The first family were all given shares by their father during his lifetime. The only land in the name of the deceased is LR. Gaturi/Nembure/7856 which the deceased preserved for the 2nd family by registering in his name and that that of the late mother of the applicants. The children of the first family including PW1 were given their shares upon sub-division of the original parcel. The 1st protestor's mother Abishagi Njagi was instructed by the deceased to stay with her grandchild Harry Njiru who was given one acre purposely to settle his grandmother and himself.

The 1st protestor sold his land measuring one acre LR. Gaturi/Nembure/7853 given to him by the deceased. He then disappeared from home and returned later when he moved his mother from Harry

Njiru's home to LR. Gatari/Nembure/7856 where he settled her. This was after the death of the deceased and of the 2nd wife. The 1st protester lives on the land and has planted some crops on the portion he occupies. The remaining land is used by the 2nd family.

The applicants testified that they live on the land and it should be given to them to hold in trust for themselves and their sisters some of whom are married. They further claimed that the 1st protester intimidated their late mother using the area chief and took the original title deed for LR. Gatari/Nembure/7856 from her and that the title remains in his possession to date. It was argued that the 1st protester is not entitled to any share on parcel No. 7856 because he sold his inheritance.

The applicants are not opposed to the 1st protester's aged mother remaining on the land and the applicants will continue looking after her as they have always done.

DW2 Truphena Wawira is a sister to the respondents. She testified that the first family is not entitled to any share of the land having been given their shares during the deceased's lifetime. The remaining parcel of land is for the 2nd family.

The applicants called one Samuel Kinyua DW3 as a witness. He testified that he is the son of the deceased by his first wife Abishagi Njagi and that the 1st protester was his brother. He confirmed that the deceased shared out his land to the first family during his lifetime. He left one parcel resulting from the sub-division Gatari/Nembure/7856 measuring 3 acres. This land was registered in the joint names of the deceased and his 2nd wife Alice Ciumwari Njagi. DW3 said that the 1st protester and himself were each given one acre of land by the deceased. The protester later sold his land and went to occupy parcel No. 7856 where the second family lives.

It was his evidence that his nephew Harry Njiru was also given one acre by the deceased and instructed to stay with his grandmother Abishagi. The witness suggests that the land No. 7856 be distributed to both houses of the deceased.

The parties filed written submissions to support their arguments. The protester contends that although he got a share of land from the deceased during his lifetime, he is still entitled to a share in LR. Gatari/Nembure/7856. The protester further argues that his mother is also entitled to a share of the land contrary to the contention of the respondents.

The applicants argue that the land is jointly registered in the names of the deceased and their late mother Alice Ciumwari Njagi. It is argued that this is reason enough why the protesters Harrison Njiru and Abishagi Njagi should not get any share. The land was reserved for the 2nd family and it should remain as such. However, the applicants have no objection to the 2nd protester remaining on the land and to have life interest on ½ acre.

The record shows that the estate of the deceased comprises of half share of L.R. Gatari/Nembure/7856 considering that the deceased is jointly registered as co-proprietor with the mother of the applicants. The whole parcel measures 0.98 hectares as per the copy of the register produced by the applicants. This translates to 2.4 acres and not 3 acres as DW3 claimed.

It is not in dispute that the first house where the 1st protester belongs were given land during the deceased's lifetime. The 1st protester got LR. Gatari/Nembure/7852 while his brother DW2 got parcel No. 7853. The son of their late sister Harry Njiru was given one acre on which he was to stay with the 2nd protester. All these facts are not in dispute.

It has also been established that the first protester sold his inheritance. It is after the death of the deceased that he came to occupy the estate land and brought his aged mother there.

The applicable law is Section 42 of the Law of Succession Act which provides:-

Where—

- (a) *an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*
- (b) *property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.*

In the case of **SAMUEL MAINA MWANGI & 2 OTHERS VS MUTHONI KAGIRI [2013] eKLR** the Court of Appeal held in a case where the deceased had given the appellants (his sons) gifts *inter vivos* byway of first registration:-

We are of the considered view that the said registrations in favour of the 1st and 2nd appellants were tantamount to gifts given by the deceased during his lifetime.....Therefore, the trial court was correct in holding that the parcels of land that were given to the appellant would be taken into account in distribution of the deceased's estate.

Similarly in the case of **TERESIA WAMBUI MARUHI VS ONESMUS MARUHI & ANOTHER Nairobi Civil Appeal No. 3 of 2002** held that:-

Where the deceased had distributed some assets inter vivos such assets or property, though not forming part of the estate of the deceased ought to be brought to the hotchpotch and taken into account in distributing the estate of the deceased.

In the same case the court cited the **HALSBURY'S LAW OF ENGLAND (4TH ED. VOL.20 Pg.3 Para. 2)** which states:-

A gift inter vivos may be made in three ways:-

1. *By deed or other instrument in writing;*
2. *By delivery in cases where the subject of the gift admits of delivery; or*
3. *By declaration of trust, which is the equitable equivalent of a gift.*

The 1st protestor Harrison Njiru Kagane was given a gift *inter vivos* by the deceased together with his brother DW3 Samuel Kinyua Njagi. Although DW3 was called by the respondents as a witness, he also indicated that he would want a share in the estate. There is sufficient evidence that both the 1st protestor and his brother DW3 were given shares by the deceased during his lifetime. This was admitted in their evidence and corroborated by the applicants. It is trite law that gifts *inter vivos* must be brought to the hotchpotch and taken into account in distribution of the estate. The 1st protestor and DW3 are therefore not entitled to any share in the estate.

If the remaining estate of deceased measuring 2.4 acres was to be divided between all the children of the 2nd family, each would get just but a small portion in comparison with what the children in the first family got from the deceased. The 1st protestor testified that there was no son in the 2nd house save for 8 daughters. The applicants named seven daughters including themselves in Form 9 (r.40(1))1 and this is the number that the court will work with. The law treats all the children of the deceased equally whether sons or daughters, and/or married or unmarried.

It is my considered opinion that the seven daughters of the deceased by his second wife should all be considered as beneficiaries in accordance with the provision of Section 40 of the Act.

The estate of the deceased should be distributed in accordance with the provisions of Section 40 which provides:-

1. *Where an intestate has married more than once under any system of law permitting polygamy,*

his personal and household effect and the residue of the net estate shall, in the first instance be divided among the house according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

2.

The deceased was survived by one spouse Abishagi Kirimari Njagi who resides on LR. No. Gaturi/Nembure/7856. There is no evidence that she was given any share by the deceased during his lifetime. Her grandchild Harry Njiru did not testify to assure the court that he was ready to take care of his grandmother as instructed by the deceased. Despite her advanced age, Abishagi is entitled to her share as an additional unit to the children of the deceased in the second house as per the provisions of Section 40. I do not agree with the respondents that Abishagi should be given life interest in the estate for it would be contrary to the provisions of the relevant law. As an additional unit to the numbers of children Abishagi entitled to a share in the estate.

Having considered all the issues in this cause, I hereby distribute the estate as follows:-

LAND PARCEL NO. GATURI/NEMBURE/7856

1. Abishagi Kirimari Njagi - 0.25 Acre
2. Mary Gichuku - 0.30 Acre
3. Janet Gatavi - 0.30 Acre
4. Kellen Karimi - 0.30 Acre
5. Patricia Marigu - 0.30 Acre
6. Jemimah Njoki - 0.30 Acres
7. Truphena Wawira - 0.30 Acre
8. Edith Wanjuki - 0.30 Acre

The grant is hereby confirmed in the foregoing terms. Certificate to issue.

Each party to meet their own costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF NOVEMBER, 2015.

F. MUCHEMI

J U D G E

In the presence of:-

Mr. Ithiga for for Ndorongo for Applicants

1st protester