



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 768 OF 2012

IN THE MATTER OF THE ESTATE OF FRIDAH WAIRIMU WANGUHU (DECEASED)

RUTH MARY WANGUI OBJECTOR

VERSUS

PETER DAVID KAIME

WILFRED MANYARA WANGUHU

ALEX MWAURA WANGUHURESPONDENTS

JUDGMENT

1. Fridah Wairimu Ng'ang'a died on 27/3/2012. By a consent of the parties Peter David Kaime, Winfred Manyara Wanguhu and Alex Mwawa Wanguhu were appointed the administrators of the estate. Such grant was issued vide the orders of Court of 13/2/2014.
2. A summons for confirmation of grant was taken out and filed on 2/2/2016. In the said summons the administrators proposed to share the net assets of the deceased in equal shares.
3. Ruth Mary Wangui (Protestor) filed an affidavit in opposition to the proposed distribution of the estate. It is her case that land reference number 6295/1 situate East of Nakuru Municipality in Nakuru County and LR. No. 9428 Kitale did not form part of the estate of the deceased. It is urged that in regard to LR. No. 6295/1, the deceased executed an indenture in favour of the Protestor but the same was not registered.
4. As regards LR. No. 9428 situate at Kitale, it is the Protestor's case that the said land belonged to Shah Plantations Limited and not the deceased.
5. The Protestor thus urges that the 2 properties aforesaid do not constitute part of the estate of the deceased.
6. The Protestor adds that she took care of the deceased for many years and hence she is entitled to a larger portion of inheritance.
7. The protest was opposed and Alex Mwaura Wanguhu, one of the administrators with authority of the other administrators, has sworn a replying affidavit the gist of which is that it is admitted that the title deed for the Kitale property is in the name of Shah Plantations limited and that in respect of the property LR No. 6295/1, the indenture relied on by the Protestor has never been registered and no stamp duty has been paid on the same.
8. The administrator called attention to the fact that the indenture is dated 4/11/2011 while the power of attorney annexed in dated 7/10/2002 but registered on 2/12/2010.
9. It is urged that the above clearly shows that the Protestor who was supposed to be the Attorney of the deceased at the time took advantage of her position to try and transfer properties belonging to the deceased, who was senile at the time, to herself.
10. The Power of Attorney is said to have been revoked by the deceased and was incapable of effecting any legal transaction. The revocation is exhibited.
11. It is the administrators' case that the Protestor lays claims over property that she had in this same succession cause listed as forming part

of the estate of the deceased. This fact is borne out of P & A 5 form filed in Court by the Protestor and 2 others on 13/11/2012 and a deposition on oath by the Protestor in her affidavit sworn on the 7/2/2013 where at paragraph 7 thereof she states;

“That the Respondent has again started cultivating on another land belonging to the deceased's estate LR No. 9428 and claiming the same to be his own even before the confirmation of grant has been done and the estate distributed accordingly.”

The letter by Chief Francis Kariuki dated 14/9/2012 and filed in Court on 13/11/2012 also lists the subject properties as belonging to the deceased.

12. The Protestor is accused of forging signatures of Grace Kamau, Peter David Kaime, Margaret Muthoni Kinuthia and Nimrod Waweru Wanguhu and affidavits of the named persons are annexed.

13. It is urged that all the siblings took care of their mother and in any event it is an obligation to look after ones parents in old age and this is not pegged on expectation of being rewarded upon their demise.

14. It is the administrator's case that they had proposed to share out the estate equally.

15. Both parties called oral evidence in support of their respective cases.

16. The Protestor testified that according to a return of allotment from the 30th of February 1987 to a date not indicated (Form 213), the shareholders of Shah Plantation Limited were herself (301 shares), Alex Mwaura Wanguhu (32 shares), Victor Kamau Wanguhu (32 shares) and Fridah Wairimu Wanguhu (32 shares).

17. She adds that LR No. 7493 and 9428 bear titles in the name of Sher Plantations Limited. The 2 pieces of land are separated by a road. Dividing the land equally would be oppressive to the Protestor. She asserts that she has worked there since 1967 and has been paying debts for example a debt of Kshs. 300,000. Her view is that deceased owned 32 shares.

18. She states that the deceased gave her an indenture in respect of LR No. 6295/1 and this asset should be distributed to her. She adds that she was working with the mother to get the 'things'.

19. On cross examination by Mr. Osiemo she acknowledges that in Succession Cause No. 768 of 2012 she listed the Kitale land as part of the deceased's estate. She said there were minutes that gave her the kitale land. She paid money at the companies registry. She was not given a share certificate. She paid Kshs. 300,000/=. She had no receipt for it.

20. Further cross-examined, she acknowledges that the form CR 12C exhibited showed the shareholders of Shah Plantation Limited as Alex Mwaura Wanguhu, Frida Wairimu Wanguhu, Lalji Nangpar Shah and Nimrod Waweru David. The first 2 were non-share holding directors. She admits that according to this document, she is not a shareholder.

21. She further acknowledges on cross examination that Nimrod was required by a consent order to transfer parcels LR 9428/7493 and LR No. 6295/1 to the deceased. She confirms that by the time Nimrod died, he had no interest in the land.

22. Further cross-examined, the Protestor acknowledges that the Power of Attorney she had was dated 7/10/2002 but registered in December 2010. this is 8 years down the line.

23. Questioned further, she said she paid Kshs. 5 million for this land.

24. She asserted that she should get a bigger share of the land for taking care of the deceased. She acknowledges, though, that other children took care of the deceased when she was sick and in Nairobi.

25. Questioned by the Court, the Protestor stated she claims as a contributor and beneficiary. She claims 24 acres as an owner and for the Kitale land as a beneficiary.

26. Merciline Nafula Lubia, an Assistant registrar from the Business Registration office gave testimony. She acknowledged the CR 12 form exhibited by the administrators as genuine and from their records. She disowned the returns exhibited by the Protestor. She confirmed that the Protestor has never been a shareholder or director at Shah Plantation Limited.

27. When recalled on 25/4/2017 to give further clarity, she stated that one Jemima from their office had made irregular returns and once this was discovered she was ordered to issue another CR 12 recalling the one issued on 1/2/2017 and reverting the position of the record of directors as Lalji Nangpar and Nimrod.

28. For the administrators, Charles Kamau Wanguhu testified that in 2013 a meeting of the entire family was called to decide on distribution of the estate to the children of the deceased and grandchildren. Only the Protestor and Wilfred Manyara failed to attend. The Protestor's 3 children were present. Discussions were held and balloting took place. The 3 children of the Protestor chose their portion by ballot and the eldest son of Wilfred Manyara did the same.

29. Alex Mwaura Wanguhu testified and reiterated the averments in his affidavit which I summarised earlier on in this judgment and I need not restate the same here.

30. When cross-examined by Mr. Kimatta, he stated that the Kitale land is owned by Shah Plantation Limited. Lalji Shah and Nimrod Waweru are the 2 shareholders. The 2 are deceased. The property has not been transferred in the names of Fridah Wairimu Wanguhu, the deceased.

31. When re-examined by Mr. Osiemo, Alex clarified that the share held by Nimrod was in trust. A Court judgment was passed that Nimrod should transfer the relevant portion to deceased. This is annexure "AMW2" to his affidavit.

32. At the close of evidence, both parties filed written submissions.

33. I have had occasion to consider the petition, the Summons for Confirmation of Grant, the protest lodged, affidavits on record, the oral evidence and submissions by counsel.

34. The issues for determination revolve around establishing the net estate of the deceased and how the same should be distributed to the beneficiaries and I summarise them into 2;

1. Do the properties known as LR. No. 9428 and LR No. 6295/1 form part of the deceased's estate?

2. What should be the mode of distribution of the net estate.

35. I would start with answering the question relating to LR No. 6295/1 as in my view and from the material on record, the answer is readily available.

36. The Protestor states that LR No. 6295/1 was by an indenture made to her by the deceased given to her.

37. The evidence on record points to the contrary;

i. The indenture is not registered.

ii. At the time the indenture is purported to have been made, the Protestor held a Power of Attorney donated by the deceased casting doubts as to her real intention at the material time as deceased was senile.

iii. When she petitioned for grant, the Protestor listed the property in the form P&A5 as belonging to the deceased.

38. This land is in the name of the deceased. The claim laid by the Protestor is of the weakest nature. There is no evidence that this title had passed to her at any time. The said land forms part of the estate of the deceased.

39. As regards LR No. 9428, the Protestor states she holds 301 shares at Shah Plantations Limited and thus she owns a substantial share of the land and the same should not be distributed equally.

40. The available evidence points to a totally different picture.

i) The Assistant Registrar of companies has debunked this myth. She has demonstrated attempts by the Protestor to manipulate the records of shareholding at the Business Registration Centre to show she is a shareholder.

ii) The official records at the centre show she is not a shareholder.

iii) In the Form P & A 5 she lodged in Court when taking out a petition for letters of administration in respect of the estate herein, she dutifully listed LR No. 9428 as part of the estate.

iv) In a sworn deposition on oath in her affidavit sworn on the 7/2/2013, at paragraph 7 thereof, she readily acknowledges that the land belonged to the deceased.

v) The letter by Chief Francis Kariuki dated 14/9/2012 and filed in Court on 13/11/2012 further buttresses the fact that the land belonged to the deceased.

41. The million dollar question, then is at what point in time did the Protestor awaken to the fact that she owned LR No. 9428?

42. She has not led any tangible evidence in support of that claim. To that extent, the property does not belong to the Protestor.

43. Having made that finding, the next question is if the said property forms part of the assets of the deceased.

44. The shareholding as per CR 12 produced in evidence shows that the shareholders were Nimrod Waweru Wanguhu and Lalji Nangpar Shah. Vide consent orders of Court in Kitale land case number 12 of 1983, Nimrod was ordered to transfer his shareholding to the deceased

herein.

45. The administrators of the estate of the deceased have all along been aware of the Court orders relating to the requirement that Nimrod transfers the shareholding to deceased. There is no evidence of the said orders being given effect.

46. Until and unless the administrators give effect to the orders of Court in Kitale Land Case Number 12 of 1983, the deceased's proprietary rights to the shares cannot legally accrue. The administrators, perhaps, may consider persuading the legal representative(s) of Nimrod to give effect to the orders.

47. The Protestor's claim over a larger share of the estate on the basis that she took care of the deceased is not anchored on any law and more importantly she has not established that she gave the care in total exclusion of the contribution from other siblings.

48. Certainly, quantification of such care would be, in my view, a nightmare for any Court of law. In the absence of the recipient of the said care to confirm it, such a claim is so elusive that it would be an uphill task to achieve.

49. And, while I appreciate that in some instances, a beneficiary may demonstrate such care to a departed person, it is not for the alleged care giver to quantify what to get from the estate as compensation for the care. That should be left to the discretion of the Court. The ideal situation, and this in my view should be the adopted practice, would be for the deceased to during his/her lifetime recognise the outstanding care given to him/her by the beneficiary and reward the said beneficiary during the lifetime of the deceased by way of a complete gift *inter vivos*.

50. It would certainly be near impossible for this Court to take the word of the beneficiary for it at this stage when the view of the deceased on the alleged care given cannot practically be obtained.

51. Notably the Law of Succession Act which governs intestate and testamentary succession and the administration of estates of the deceased persons post 1st July 1981 in Kenya makes no provision for any preference to be given to a beneficiary arising from alleged care given to a deceased person during his lifetime.

52. From the foregoing and for the reasons above stated, the protest herein is dismissed.

53. I have looked at the proposed distribution by the administrators of the deceased estate. The same is fair and equitable save that the inclusion of LR. No. 9428 Kitale as part of the estate of the deceased was in error as the shareholding of this property remains in the names of Nimrod Waweru Wanguhu despite a Court order in Kitale Law Case Number 12 of 1983.

54. The administrators ought to have moved to gather this asset by ensuring execution of the orders of Court requiring Nimrod to transfer the shareholding to the deceased. This they have not done and must do if the property LR No. 9428 is to form part of the deceased's estate.

55. With the result that there shall be partial confirmation of grant and the estate be distributed as follows;

ASSET	SHARE OF BENEFICIARIES
LR. NO. 7493 KITALE	a) PETER DAVID KAIME b) RUTH MARY WANGUI c) WILFRED MANYARA WANGUHU d) MARGARET MUTHONI KINUTHIA e) GRACE WANGECI KAMAU f) JANE WANGUI NG'ANG'A g) DAVID GITHIOMI KAMAU h) ALEX MWAURA WANGUHU (IN EQUAL SHARES)
PIECES OF LAND IN NAKURU LR. NO. 6295/1	a) PETER DAVID KAIME b) RUTH MARY WANGUI c) WILFRED MANYARA WANGUHU

d) MARGARET MUTHONI KINUTHIA

e) GRACE WANGECI KAMAU

f) JANE WANGUI NG'ANG'A

g) DAVID GITHIOMI KAMAU

h) ALEX MWAURA WANGUHU

(IN EQUAL SHARES)

PLOTS IN NAKURU KNR/BL/13/192 AND NKR/BL/13/193 a) PETER DAVID KAIME

b) RUTH MARY WANGUI

c) WILFRED MANYARA WANGUHU

d) MARGARET MUTHONI KINUTHIA

e) GRACE WANGECI KAMAU

f) JANE WANGUI NG'ANG'A

g) DAVID GITHIOMI KAMAU

h) ALEX MWAURA WANGUHU

(IN EQUAL SHARES)

56. Costs be borne out of the estate.

Dated and Signed at Nakuru this 23rd day of May, 2018.

A. K. NDUNG'U

JUDGE