



In re Estate of Jason Njerera Kavangua (Deceased) (Succession Cause 627 of 2013) [2022] KEHC 10637 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10637 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 627 OF 2013
LM NJUGUNA, J
MAY 25, 2022**

BETWEEN

SAMMY MWIRIA PETITIONER

AND

LUCA NYAGA NJERERA OBJECTOR

JUDGMENT

1. The protestor herein filed a protest dated August 29, 2016. The protest is pursuant to the proposed mode of distribution dated August 8, 2016 by his co – administrator. In his affidavit of protest against the confirmation of grant, he faulted his co-administrator for having failed to obtain his consent on the mode of distribution prior to filing the summons for confirmation of grant and further that, the proposal is not only unfair but also oppressive. He stated that Luca Nyaga Njerera was in 1957 allocated six acres of land that is Kyeni/ Kigumo/541 by the Kina clan while he was allocated an 1/8 of an acre, which is Kyeni/Kinthithe/T 52. He stated that by the time the allocations were being made, the said Luca Nyaga was 17 years and that for one to be allocated land, he had to be a clan member and further, one had to contribute financially, provide the committee with transport and food or other logistics. It was his case that there is no way Luca Nyaga could have contributed given the fact that he was still in school. That one had to be an elder and further, the respondent was not in possession of the knowledge on land acquisition that could have been useful to the survey team. It was his case that Luca Nyaga did not contribute anything to get the land and that he could have equally benefitted but since his uncle was not allocated any, the deceased opted to give six acres to his uncle on an understanding that the protestor would get a share from the deceased estate herein. It was his contention that the deceased had instructed that the estate herein be inherited by him and his late brother Eparaphas Njeru who is survived by two children given the fact that his sisters are since married and as such, should not lay claim on the estate herein. In a nut shell, he urged this court to apply the Kina customary law in determining this matter.



2. The respondent on the other hand is opposed to the estate of the deceased being devolved under the Embu customary practices given that the practices are discriminatory in nature; she has proposed that the estate be divided equally amongst all the children of the deceased who are recognized by law as beneficiaries. She submitted that after having built a house on (LR No. Kyeni/Mufu/1350), the protestor chose to live in the very house and the respondent has urged this court to consider this in distribution of the estate. That Luca Nyaga was allocated land L.R. No. Kyeni/Kigumo/541 which is in his name and the same does not form part of the estate of the deceased and as such, he urged this court to exclude the said property from the estate of the deceased. It was the respondent's case that the protestor has opened a new co-operative society account number New Kyeni 4458 in his own name different from the deceased's account number BC 92 and that he has contracted a shamba boy who sells the harvested coffee berries and deposit the proceeds in the said account. That the protestor has taken over and is cultivating the entire land to exclusion of other beneficiaries and by locking all other siblings from accessing the homestead. As a result, this court was urged to invoke its power under rule 73 of *P & A Rules* and make appropriate orders. The respondent argued that the protestor has not provided any evidence on how the amount of money was allegedly used in the management of the farm. That the protestor having admitted that he has been selling the coffee berries, he has never rendered an account on the same since 2010 and in that regard, he should be compelled to do so. It was submitted that the beneficiaries of the estate of Epapharas Njeru Njerera have been ascertained and therefore, their portion be held in trust by Luca Nyaga until they attain the age of maturity. In the end, this court was urged to dismiss the protest, find the protestor as an intermeddler and thereafter compel the protestor to render an accurate account of all the income he has received on behalf of the estate since the year 2010.
3. The respondent filed a further affidavit wherein she deposed that the deceased showed him where to build his house. That in the year 1971, he built the house on the deceased's parcel of land and that is a clear show that had the deceased never wanted him to inherit the estate herein, he would not then have allowed him to build thereon. That when the land was surveyed, he helped the survey team in their work and as a result, he was given six acres and given that the protestor never actively involved himself in the process, he was only given an 1/8 of an acre. That his distant uncle namely Maina who also belonged to the Kina clan was also allocated a plot in the town ship since he never participated in assisting the survey team. Maina having been older than the deceased and upon his death, the deceased herein inherited the same plot given that he had taken care of Maina until his death. He proceeded to state that, it is not true that the deceased bought the land owned by Maina but the same was simply inherited. He deposed that the Kina clan is never biased against any gender and as such it would only be fair to let the sisters inherit the estate too. In the end, it was prayed that the protest herein be dismissed with costs.
4. He averred that the fact that the clan gave him land, that should not be a reason to deny him a chance to inherit from the estate herein. Further, he deposed that the protestor has never provided any proof to deserve the reimbursement of the sum Kshs, 48,000.
5. I have considered the application herein together with the viva voce evidence and the submissions by the respondent and in my view, this court has been called upon to determine whether the application herein is merited.
6. *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR the court stated as follows;

“The primary duty of the probate court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they



must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation.“

7. In my view, I find that the main issue that I have to deal with first is whether the six acres of land allocated to the respondent by Kina clan should be considered in the devolvement of the estate herein and whether he should further benefit from the estate herein. The protestor specifically pointed out that the respondent had already benefitted from the six acre land that he was allocated by the Kina clan and as such, the estate herein should be shared between him and Eparaphas Njeru (deceased) family. In his view, it would be fair and just that all the assets be laid on the table and that the same be distributed equitably and reasonably taking into account what the beneficiaries already have.
8. Section 42 of the *Law of Succession act* is instructive on this as it provides that:
Where:-
 - (a) An intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate. That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child, grandchild or house.
9. Section 42 provides that during the distribution of the estate, previous benefits be taken into consideration when determining the share of each child. The protestor submitted that the respondent had already been allocated six acres by Kina clan; he supported this ground by stating that there is no way the clan could have allocated the said land to the respondent given that the respondent was only 17 years and at that time, the respondent neither had the money nor the knowledge on land acquisition that he could have offered the survey team. In the same breadth, the respondent during cross examination stated that he was allocated the land by the clan given that he was an active member of the land consolidation exercise; further, he contended that the land was given to him by virtue of being the deceased's son and as at that time, he was in form two but was still an active member of the clan. That he used to join the group during the holidays and so for him, this was land that was allocated to him since he deserved and the same should not hinder him from benefiting from the estate of the deceased. Having examined these competing positions, it is important to note that the litigants acknowledge the fact that the parcels of land they hold although in different portions, were allocated to them by their clan and the estate before this court for determination belongs to the deceased herein.
10. In regards to Eparaphas Njeru, it was contended by the protestor that the deceased had helped him acquire 1/8th of an acre (Kyeni/Kinthithe/T.51) from a relative who was selling his land. The respondent in his further affidavit deposed that the deceased had inherited a plot from Maina given that he had taken care of him and that it is not true that the deceased bought the land from Maina as the same was inherited. Since not much has been presented before this court on how the land that Eparaphas Njeru (Deceased) acquired, in the given scenario, I am inclined to believe that the land acquired from Maina (Deceased) could be the land that the protestor referred to by stating that Eparaphas Njeru (Deceased) by the help of the deceased was given land that had been acquired from a relative. In all, it is quite evident that the deceased played a role in helping Eparaphas Njeru (Deceased) acquire his land.
11. Coming back to the issue whether the respondent should inherit in the same measure as the protestor and the other beneficiaries having in mind that one beneficiary by the name Esther has since renounced her right to benefit from the estate, the only question that this court asks itself is whether the six acres, one eighth of an acre and that of Eparaphas Njeru (Deceased) acquired by the protestor, respondent and Eparaphas Njeru (Deceased) respectively could have been possible without the input of the deceased herein? Could the clan just allocate land to the parties and specifically the respondent given



the fact that at that time, the respondent being the senior of all the sons was still in school and did not possess the necessary knowledge that he alleges he had which could have been useful to the Survey team in as much as this court is alive to the fact that it is the estate of the deceased herein which is for determination? Could the said allocations have happened if the deceased never played a role given that he was an important elder in the said clan? In my view, I hold that the allocations would not have been possible without the deceased playing a role either directly or indirectly.

12. The respondent contended that though he benefitted from the six acres allocated by the clan, the same should not bar him from benefiting from his father's estate (which allegedly comprises of coffee trees and a land measuring approximately 4.9 acres per the protestor) while the protestor urges this court to allow himself and the estate of Eparaphas Njeru (Deceased) to benefit from the estate herein in equal shares to the exclusion of all other beneficiaries. In the given premises and the fact that this court is a court of equity, would it be fair and just for the sons to further benefit from the estate herein alongside the other beneficiaries? [See *In re estate of Joseph Mubwabi Sabayi (Deceased)* [2021] eKLR].
13. The protestor has contended that his sisters should not inherit the estate given that they are all married and have their respective lands in matrimonial homes. That the Kina clan and equally Embu customary law only allows sons and unmarried daughters to inherit land from their parents. The *constitution* provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. This therefore translates to the fact that all the beneficiaries as recognized by law have a right to benefit from the estate. [See article 27 of the *constitution* also See *In Re Estate of Lorionka ole Ntutu (Deceased)* Succession Cause 1263 of 2000] but considering the respondent herein was given a big parcel of land by the clan courtesy of his father just like the protestor and the late Epapharas Njeru got their 1/8 share of land from the same clan, it would be unfair for the respondent to benefit again by getting a share from the estate of the deceased. In regards to Esther Kina Douglas, she swore an affidavit dated September 15, 2016 where she stated that she is not interested in the estate thus renouncing her rights to inherit from the estate herein. [See *Rono v Rono* CA 66/2002; also *In re Estate of Evans Ngugi Wanjau (Deceased)* [2020] eKLR].
14. Whether the protestor should get the amount of Kshs. 48,000/= as alleged; the respondent during cross examination was asked whether he was aware that the protestor risked his title deed for the health of the deceased and in which he conceded but downplayed it to have been a kind gesture from the protestor; further, he submitted that even the sisters also contributed towards the clearing of the said hospital bill. In the proceedings, the protestor upon being asked the basis of the Kshs. 48,000/=, he stated that the same was as a result of the labour he offered towards the farm/estate. In my view, the prayer is thus clouded given the fact that this court is a court of evidence and the same ought to have been proved.
15. I also note that the issue of intermeddling has been raised and the person accused of the same is an administrator, the protestor herein. The estate of a dead person vests in the personal representative/s that the court appoints through a grant of representation. That is the effect of section 79 of the *Law of Succession Act* and under section 45, it is clear that an administrator has authority derived from the grant to handle the estate property. In this case, the protestor has been accused of collecting proceeds of coffee from the year 2010 to the exclusion of the other beneficiaries and that there is need to render the account on how much he has collected over the years. The protestor during the hearing, conceded that indeed he has been tilling the land and selling the coffee berries but he has been using the same towards his sustenance. I take judicial notice of the fact that for one to collect proceeds from a farm, he has to cultivate farm and take care of it which cannot be possible without financial input. None of the parties herein has testified to the effect that they have contributed or assisted the petitioner in cultivating the land and therefore they cannot be heard to claim the proceeds.



16. In the end, the court makes the following orders;The estate shall be shared equally between the protestor, the late Epapharas Njeru Njerera and his sisters except Esther Kina Douglas who has relinquished her right to share in the estate. The share of Epapharas Njeru Njerera to be held by Luka Nyaga in trust for the 2 children of the deceased until they attain the age of maturity.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF MAY, 2022.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent

