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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CAUSE NO. 806 OF 2014**

**IN THE MATTER OF THE ESTATE OF SHELMITH NJOKI alias SHELOMITH NJOKI WANJAU alias MRS SHELOMITH NJOKI alias MRS NJOKI SHELOMITH (DECEASED)**

**HULBERT GATHU GUARA.....PROTESTOR**

**AND**

**BERNARD GITHI MACHARIA**

**LUCY NJERI CHIENI.....PETITIONERS**

**RULING**

1. The estate relates to the late **SHELOMITH NJOKI alias SHELOMITH NJOKI WANJAU alias MRS SHELOMITH NJOKI alias MRS NJOKI SHELOMITH (DECEASED)** who died on the 22<sup>nd</sup> May, 2014; she died intestate and her estate is comprised of the properties listed hereunder:

- (i) Kirimukuyu/Mbogoini/379
- (ii) Mutira/Kangai/291
- (iii) Karatina Township Block 1/390
- (iv) Kenya Commercial Bank Shares – Certificate No.[xxxx]
- (v) Co-operative Bank Karatina Branch A/C No .[xxxx]
- (vi) Kenya Commercial Bank Karatina Branch A/C No. [xxxx]

2. As set out in the Chiefs letter dated the 18/09/2014 the deceased was survived by the following children;

- (i) Lucy Njeri Chieni - daughter
- (ii) Elizabeth Njogu Karani – daughter in law
- (iii) Joan Wanjiku Guara – daughter
- (iv) Benard Githii Macharia – son
- (v) Winfred Nyaguthi Macharia - daughter

3. The two Petitioners herein as a daughter and the son of the deceased petitioned for Letters of Administration and a Grant was issued to them on the 2<sup>nd</sup> December, 2014; by an application dated 7/10/2015 the Petitioners applied for the Confirmation of the Grant and therein proposed their mode of distribution; this application was withdrawn and a fresh application was filed on the 10/10/2016;

4. The Protestor who is a grandson of the deceased was directed to file an Affidavit of Protest against the summons for confirmation of 10/10/2016 and therein gave his reasons for protesting and included his proposed mode of distribution of the deceased's estate.

5. Directions were taken that the matter proceed for hearing and that '*viva voce*' evidence be adduced; the Protestor testified and called no witnesses and only one Petitioner gave evidence and likewise called no witnesses; after the hearing hereof both parties were directed to file and exchange written submissions; hereunder is a summary of the respective parties.

#### **THE PROTESTOR'S CASE**

6. The Protestor (**Hulbert**) described himself as a son of Joan Wanjiku Guara who was a daughter of the deceased; that the deceased was his maternal grandmother and the Petitioners were his uncle and aunty;

7. His mother passed on the 20<sup>th</sup> November, 2016 and had already been provided for before her demise; that when the first application for confirmation was filed on the 7/10/2015 his mother was alive and her share had been included therein; that this application was then withdrawn and another one filed on the 10/10/2016 and the Petitioners' proposed mode of distribution was unfair and unjust;

8. His contention was that even though his mother was married she was entitled to benefit from the deceased's estate; and that even though his mother was now deceased he was entitled to inherit her share; that despite her demise the Petitioners had continued depositing their mothers share of the rental income from Karatina Township Block 1/390 into their family bank account; and he produced Bank Statements (marked as "**B(2)**") to support his claim; that this property formed part of his grandmothers estate and was a residential property;

9. Under cross-examination Hulbert confirmed that he had never resided on any of the properties that comprised the estate of his grandmother and that he resided with his father in Kirinyaga and worked there as well; he confirmed that his grand-mother predeceased his mother and that she had not been given any land during his grandmother's life time;

10. He testified that he was entitled to inherit from his mother's lineage and his father's too; and that he could inherit his mother's portion despite the fact that she had not yet inherited it; he stated that he was able to identify her portion particularly in Mutira/Kangai/291 which was to be divided between the three daughters;

11. Before her demise her mother was dependant on his grandmother for medicine as she was sick and the grandmother used to also provide for her; as for himself he only got help from his grand-mother when needed;

12. His protest was anchored on these grounds.

#### **RESPONDENTS' CASE**

13. In response the Petitioner Bernard Githi Macharia confirmed that he was one of the administrators to the estate of the deceased who was his mother; that Hulbert is a son to his late sister Joan Wanjiku; that the Protestor is a nephew and not a sibling;

14. The deceased had five (5) children and before the demise of his mother nothing had been gifted to Hulbert; he confirmed that there was an earlier application for confirmation that was made when Joan was alive which application was later withdrawn; in this application he had provided for Joan because she had complained that she was having problems with her husband; and the family sympathized with her because she was hypertensive so they purposed to give her monetary support and to buy her medication for her hypertension; they also allocated her a share in their mothers property to enable her support herself; had she been alive she could have handled the distributed portions as she so pleased;

15. The support given by the family was meant for Joan and not for Hulbert; that they continued to support Hulbert's sisters for three (3) months;

16. Hulbert wanted the subject properties divided into equal shares with the deceased's children; but Hulbert belonged to another lineage, that of his father's and was not entitled to inherit property that belonged to the deceased herein;

17. He prayed that the protest be dismissed;

### **ISSUES FOR DETERMINATION**

18. After hearing the presentations of the respective counsel and reading the written submissions this court has framed the following issues;

(i) Whether Hubert is entitled to benefit from the deceased's estate;

(ii) Distribution of the estate;

### **ANALYSIS**

#### **Whether Peter is entitled to benefit from the deceased's estate:**

19. It is not disputed that the Protestor is a grandchild of the deceased; from the evidence adduced there is also no dispute as to what constitutes the estate of the deceased that is available for distribution;

20. It can be discerned from the evidence adduced that the Protestor's mother was being taken care of by her siblings; when the first application was filed that is on the 7/10/2015 the administrators had included her share as she was alive and was thus entitled to benefit from the deceased's estate by dint of Section 29(a) of the Act; unfortunately, she passed on the 20/11/2015 before the Grant was confirmed;

21. On the 10/05/2016 the matter came up for confirmation of the Grant and this court being seized of this matter and indeed brought it to the attention of the parties the fact that Joan was deceased; on this date all the beneficiaries and the Protestor were present before this court and there was no opposition to their deceased sister's share devolving to her children; the only pending issue then was that the Protestor was to obtain consent from his siblings to have his name substituted and in the place of his deceased mother and her portion devolve to her children; another date was given for confirmation;

22. What is interesting to note is that at the next date set for confirmation the matter took an about turn and positions changed drastically and hardened leading to the withdrawal of the application dated 7/10/2015 and the filing of a fresh application which also led to the filing of the protest herein;

23. The dispute herein is as between a grandchild of the deceased against his aunties and uncle; the Protestor claims that when the first application for confirmation was filed, his mother was alive and her share had been included therein; that since his mother was now deceased he was entitled to inherit her share in the estate of the deceased;

24. This court finds that the two applicable provisions of the law is Section 29 of the Law of Succession Act (**'the Act'**) which set out the persons entitled to benefit from the estate of the deceased; and Section 38 of the same Act;

25. Starting with Section 29 of the Act it reads as follows;

**"Section 29: 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;"**

26. The protestors case was that Joan was his mother and that she was also a daughter to the deceased; that the deceased used to support his mother by buying her medication; the petitioner acknowledged the fact that Joan was their sister and that she was indeed hypertensive and that the family had made a decision to support her to help her manage her condition; so she was given a share of the rentals from the Karatina property; the family continued to support the family of their deceased sister for a short period after her demise;

27. Having considered the evidence placed before this court it is satisfied that Joan was a child of the deceased and qualified as a dependant and beneficiary of the deceased as provided for under the aforementioned section;

28. The second leg relates to Section 38 of the Act which reads as follows;

**“Section 38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.” (emphasis mine)**

29. In this instance there is evidence that the deceased died intestate; there was no evidence that she had a spouse; the key word in the section is **“surviving children”**; both parties led evidence that Joan died after the deceased herein and it is not disputed that the first proposed mode of distribution had made provision for Joan;

30. Indeed one of the submissions made by the petitioners is self-defeating in that they had made provision for the family of another deceased sibling vide his widow Elizabeth Njogu Karani; yet he had excluded Joan whereas it was an established fact that she was a **‘surviving child’** of the deceased as at the time of the demise of the deceased;

31. Bernard’s case was simply that Hulbert was of a different paternal lineage and was therefore not entitled to benefit from his maternal grandmother’s estate; this contention is found to be patriarchal and unfounded particularly when he did not adduce any evidence to support his contention that the subject properties were ancestral lands;

32. In considering the evidence of both sides in totality this court is satisfied that the Joan was a surviving child at the time of the demise of the deceased and her family qualifies to benefit in the deceased’s estate; this then brings into play the provisions of Section 38 of the Act; which leads to the next issue of distribution of the deceased’s estate;

#### **Distribution of the estate of the deceased**

33. From the evidence it is discerned that there is no surviving spouse of the deceased; Bernard stated that there were five (5) children who had survived the deceased; the applicable law is found at Section 38 of the Act which provides that the estate be divided equally among the children;

34. This court reiterates that the mode of distribution proposed by the Petitioners is found to be not only unfair but discriminatory; as they have made provision for the family of another deceased sibling vide his widow Elizabeth Njogu Karani, yet they have excluded Joan’s family; again no evidence was adduced to demonstrate that the immoveable subject properties were ancestral lands;

35. This court is satisfied that the best mode of distribution is in accordance with Section 38 of the Act; this court finds that there was no surviving spouse therefore the subject properties shall be divided in equal shares; among the Petitioner and his siblings inclusive of Joan Guara;

#### **FINDINGS AND DETERMINATION**

36. The Protestor is found to be entitled to his late mother’s share in the estate of the deceased;

37. The Petitioner’s mode of distribution is found to be unfair and discriminatory; the protest is found to be meritorious and is hereby allowed;

38. The Grant is hereby confirmed on the terms as set out hereunder;

All the properties comprising the estate of the deceased shall be divided into five (5) equal shares between all the children of the deceased;

39. The late Joan’s portion to be distributed to the Protestor and his siblings; and the Protestor is directed to regularize his legal status within six (6) months from the date hereof in default any family member shall be at liberty to take out Letters of

Administration in respect of the Estate of Joan Guara;


40. Each party shall bear their own costs.

It is so ordered.

**Dated, Signed and Delivered at Nyeri this 21<sup>st</sup> day of February, 2019.**

**HON. A. MSHILA**

**JUDGE.**

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