REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NUMBER 672 OF 2013

(IN THE MATTER OF THE ESTATE OF THE LATE BENJAMIN KIBUKA MUCHUKI (DECEASED)

TERESA WAMBUI GITHINJI.....APPLICANT

-VERSUS-

GEORGE GITAHI KIBUKA.....PROTESTER

JUDGMENT

Benjamin Kibuka Muchuki died on 22 March 2010 aged 90. He was domiciled in the Republic of Kenya and his last known place of residence was Mweiga location in Nyeri County.

On 10 February 2014, the applicant petitioned for Grant of letters of administration intestate of the deceased's estate. In the petition, she described herself as the wife of the deceased. She named eleven other people, including the protester as the deceased's children who survived him. **Title No. Nyeri/Mweiga/1049** measuring approximately 1.3 hectares was listed in the affidavit in support of the petition as the only asset comprising the deceased's estate.

The record shows that prior to the filing of the petition and, more particularly on 3 October 2013, the applicant served seven of the deceased's children with a citation to accept or refuse letters of administration intestate of the deceased's estate. The protester who was one of the children cited entered appearance to the citation on 7 October 2013; however, it appears that he did not take any further step and therefore the Grant was subsequently made to the applicant on 15 April 2014.

On 22 October 2014, the applicant filed a summons for confirmation of Grant dated 16 October 2014; in the affidavit in support of the summons, she proposed that the deceased's entire estate devolve upon her absolutely.

The protester filed an affidavit of protest which he swore on 13 March 2015. In it he deposed that the applicant separated from the deceased in 1971 and therefore she was not the deceased's wife at the time of his demise. In any event, so he swore, the deceased died testate and in his will, the deceased did not leave any legacy to the applicant.

At the hearing of the protest, Peter Wachira Kibuka, one of the deceased's children testified and produced the will showing that the deceased made it on 5 August 2009. It is alleged to have been drawn by one Benjamin Kibuka Muchuki and was attested by two other people named as Moses Ndegwa Ndirangu and William Wanjohi Ngandu.

He acknowledged the applicant to have been one of his father's two wives but reiterated that she deserted him in 1971. He testified further that he and his brother had been cultivating the land comprising the deceased's estate and that the applicant had never occupied it at any one time. When the court inquired whether he was aware whether the applicant had any children with the deceased, he not only admitted that that was the case but he went further and named four of those children. It was his evidence that his own mother was the deceased's first wife and had seven with the deceased. She was apparently deceased as well.

The witness testified further that the deceased's land was initially 16 acres. Although he testified that the applicant had never lived on the estate, he admitted during cross-examination that each of the deceased's two wives used to cultivate two acres of this land.

William Wanjohi Ngandu who, as earlier noted, was named as one of the people who attested the will, disowned the will in his testimony. He denied ever seeing the will or signing it. As a matter of fact, he was not aware whether the deceased reduced his wishes regarding the distribution of his estate in writing. He acknowledged that the deceased had two wives but he could not recall whether the applicant was one of them.

On her part, the applicant testified that she married the deceased in 1961 and together with the deceased they had seven children five of whom were alive as at the time she testified.

It was her evidence that the deceased's original parcel of land was registered as Title No. Nyeri/Mweiga/172 and it measured 22 acres. She cultivated two acres of this land while her co-wife cultivated 2 acres and that each of them had their separate houses on their respective parcels of land.

The applicant testified further that she left the deceased in 1973 after they disagreed and went to work in Nairobi. Despite their differences, she would still visit the deceased.

However, the deceased distributed almost the entire parcel of land to his children in the first house; each of his sons in the first house was given 6 acres of land. It is then that she sued him to get a share of the land. She succeeded in her endeavours and was awarded by the court two acres of land out of the land parcel **Title No. Nyeri/Mweiga/1049** which is the parcel that the deceased retained after distributing the rest to his sons in the first house. Following the court decree, the land was divided and the requisite consent from the land control board was obtained for transfer of her parcel into her name. However, the deceased died before the transfer was effected. In support of her case, the applicant produced an order issued by the Chief Magistrate, in Nyeri Chief Magistrates Court Award No. 5A of 2009 awarding her the two acres of the land. She also produced a copy of the application to the Land Control Board of Kieni West for subdivision of Title No. Nyeri/Mweiga/1049; the payment receipt for fees payable to the board; a letter of consent from the board consenting to the subdivision and the mutation form delineating the boundaries between what was to be the applicant's and the deceased's parcels of land.

Supporting the applicant's case was Samuel Wanjohi who testified that he knew the deceased as early as September 1962. He was aware that the deceased had two wives one of whom was the applicant. He was also aware that the deceased's first wife died. The two of them had children with the deceased; they lived on the deceased's land and had their own houses. He denied the deceased had any land in Nyahururu which the applicant may have been given; however, he was aware that the applicant had purchased her own land.

And with that the applicant closed her case.

The protester's protest is founded on two main grounds; first, that the deceased died testate and, secondly, that the applicant was not the deceased's wife in any event.

The first ground ought to be dismissed at the very onset for the simple reason that no evidence was presented to prove that the deceased ever made a will. The person who is purported to have drawn the alleged will never testified and the one presented as having been one of the two witnesses who attested the will denied knowledge of such a will and disowned what was purported to be his signature on the will. He went even further to testify that, as far as he was aware, the deceased did not make a written will.

There is every reason to conclude that what was presented as the deceased's will was conjured up long after the deceased' s death to counter the applicant's proposed scheme of distribution of the deceased's estate. As earlier noted, the protester was aware of the applicant's intention to petition for Grant of letters of administration intestate as early as October 2013. Although he entered appearance in response to the citation served upon him, he never followed it through with a petition of his own for Grant of probate or Grant of letters of administration with the will annexed. It is logical to conclude that if any will existed there is nothing that stopped him from petitioning for either of the two grants at the earliest opportunity possible and, at any rate, when he was served with the citation.

And even after he was aware that the applicant had petitioned for Grant of letters of administration intestate, he never lodged any objection objecting to such Grant on the ground that the deceased died testate.

As far as the second ground is concerned, there is no substance in it because Peter Wachira Kibuka admitted that the applicant was their step mother though she left way back in 1971. He also admitted that the applicant had several children with the deceased. This evidence was consistent with the applicant's evidence that she was the deceased's wife and had children with him except that she had to leave after some marital differences between them. In short, the evidence that the applicant was at one time the deceased's wife was not controverted.

According to section 3(1) of the Law of Succession Act, the term 'wife' is understood to include '*a wife who is separated from her husband'*. It does not therefore matter that the applicant and the deceased lived separately; the law recognizes her as the deceased's wife eligible for a share of his estate.

It is also worth noting that besides the frailties in the protester's case, the protester himself did not testify; his purported protest was thus not supported by his own evidence. Accordingly, it was bound to fail from the word go.

Thus the available evidence is conclusive that the deceased not only died intestate but also that he was married more than once. With this background in mind, the law applicable to the distribution of his estate would be section 40 of the Law of Succession Act, cap. 160; it reads as follows:

> **40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses 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.**
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> **(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.**

Going by the applicant's evidence that she holds an order or decree according to which she is entitled to two acres of Title No. Nyeri/Mweiga/1049, the net intestate estate available for distribution between the two houses is a factor for consideration; that estate is 1.3 ha less two acres to which the applicant is already entitled. Equally important to bear in mind is that the deceased's children are more or less equally distributed between his two houses. It is also not in dispute that of the deceased's two wives, one is deceased but her children would not, *ipso facto*, be disadvantaged by her death because going by the provisions of sections 35 to 38 of the Act, it is assumed that the children in that house will share what their mother would have been entitled to.

But as much as the number of children and the wives in the polygamous houses matter, the underlying notion in distribution of a deceased's estate in section 40 is equity, fairness and, ultimately the discretion of the court. The exercise of the discretion of the court in any particular way will, as a matter of course, take into account those factors that have been expressly specified in section 40(1) as necessary and, no doubt, the peculiar circumstances of each particular case. It follows that even if the number of children in each house was not even, neither of them would have been entitled to a larger share of the estate only because it has more children than the other. (see **Eldoret Civil Appeal No. 66 of 2002, Mary Rono versus Jane Rono & William Rono (2005) eKLR).**

Taking all these factors into consideration, I do not find any reason why the net intestate estate should not be shared equally between the two houses. Accordingly, the applicant shall have her two acres out of Title No. Nyeri/Mweiga/1049 to which she was entitled prior to the deceased's death and a half of what would have remained of this parcel and which, in effect constitutes the deceased's net intestate estate. The other half shall be registered in the names of the children of the first house as owners in common in equal shares.

All I mean is this; Title No. Nyeri/Mweiga/1049 being approximately 1.3 ha or 3.211 in acreage, only 1.211 acres is available as the deceased's net intestate estate available for distribution between the two houses. The first house shall have 0.6055 acres while the applicant will have 0.6055 acres. Considering that the applicant is already entitled to her 2 acres, her total share out of Title No. Nyeri/Mweiga/1049 shall be 2.6055 acres. Thus, Title No. Nyeri/Mweiga/1049 shall be shared as follows:

1. 0.6055 acres to be registered in the names the following persons, representing the first house, as owners in common in equal shares:

    i. George Gitahi Kibuka

    ii. Peter Wachira Kibuka

    iii. Grace Wamucii Karoki

    iv. Michael Kinyua Kibuka

    v. Jane Muthoni Munyori

    vi. Margaret Wangari Ngatia

    vii. Kenneth Kingori Ngatia

2. 2.6055 acres to be registered in the name of Teresa Wambui Githinji as the proprietor subject to life interest.

For avoidance of doubt, the respondent's protest is dismissed and the grant made to the applicant on 15 April 2014 is confirmed in the foregoing terms. Parties will bear their respective costs. It is so ordered.

Signed, dated and delivered this 24 July 2020

Ngaah Jairus

JUDGE