



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 685 OF 2008

(IN THE MATTER OF THE ESTATE OF STEPHEN WAHOME GIKONYO (DECEASED))

JANE NGIMA WAHOME.....APPLICANT

-VERSUS-

STEPHEN WAHOME GIKONYO.....PROTESTER

JUDGMENT

The applicant and the protesters are the administrators of estate of the late Stephen Wahome Gikonyo who died intestate on 1 December 2006; he was aged 100 at the time of his demise, and he was domiciled in the Republic of Kenya, his last known place of residence being Kagwathi, Karundu location in Nyeri County.

He was survived by two wives; the applicant and Revereta Wamabaire Wahome. The latter was his first wife, but she too died during the pendency of this cause, more particularly in February, 2013. Besides the two houses, the deceased was also survived by seven children all of whom were born in the first house; of these children, the protester was the first born. The applicant did not have any child at all.

By a summons for confirmation of grant dated 7 May 2012, the applicant sought for the following orders:

“1. That the grant of probate/or letters of administration intestate or with will annexed made to the said Jane Ngima Wahome in the matter on 13/4/2010 be confirmed.

2. That the cost of this application be in the cause.”

In an affidavit sworn in support of the summons, she proposed to have the deceased's estate distributed as follows:

1. Title No. Thegenge/Kianjogu/968 (Measuring app. Area 0.486 ha)

(To be registered in the name of Jane Ngima Wahome as absolute proprietor)

2. Title No. Gituamba/Muhotetu/ Block 2/991 (Measuring app. Area 4.399 ha)

(i) Jane Ngima Wahome (5 acres)

(ii) Mary Nyambura Wahome (3 acres)

(iii) Reverata Wamabire Wahome (2.86 acres)

3. Plot No. 5 Kaguathi

To be shared equally between:

(i) Jane Ngima Wahome

(ii) Revereta Wamabaire Wahome

The protestor was not satisfied with the proposed scheme of distribution of the estate and so he filed two affidavits of protest in that regard; in the latest affidavit sworn and filed on 6 September 2016, he proposed the estate to be distributed as follows:

1. Title No. Thegenge/Kianjogu/968

To be shared equally between:

- (i) Samuel Gikonyo Wahome
- (ii) Ambrose Mwangi Wahome
- (iii) Moses Maina Wahome
- (iv) Simon Mwaniki Wahome
- (v) Jane Ngima Wahome to have life interest over the entire land.

2. Title Number Gituamba/Muhotetu/ Block 2/991

To be shared as follows:

- (i) Mary Nyambura Wahome (2 acres)
- (ii) The remainder to be shared equally between the following people:
 - (a) Samuel Gikonyo Wahome
 - (b) Ambrose Mwangi Wahome
 - (c) Moses Maina Wahome
 - (d) Simon Mwaniki Wahome

4. Plot No. 5 Kaguathi

To be shared equally between:

- (i) Samuel Gikonyo Wahome
- (ii) Ambrose Mwangi Wahome
- (iii) Moses Maina Wahome
- (iv) Simon Mwaniki Wahome
- (v) Jane Ngima Wahome (to enjoy the rental income in her lifetime)

The protest was heard by way of oral evidence but before delving into this evidence, it is necessary that the summons be put in its proper perspective at the very onset.

Firstly, by a ruling delivered by this honourable court on 27 April 2012, both the applicant and the protestor were appointed as joint administrators of the deceased's estate; the grant made in that behalf has never been revoked or annulled and therefore it is the only grant that can possibly be confirmed. It follows that the applicant's prayer that "**...the grant of probate/or letters of administration intestate or with will annexed made to the said Jane Ngima Wahome in the matter on 13/4/2010 be confirmed**" has no factual or legal basis. If anything, the grant made to the applicant on 13 April 2010 was revoked by the ruling of 27 April 2012 and it is in the same breath that the applicant and protestor were appointed as joint administrators of the deceased's estate.

Secondly, it is not in dispute that Reverata Wamabaire Wahome, the applicant's co-wife died even before the confirmation proceedings took off and therefore it would not only be futile but it would also be illegal to allocate any part of the deceased's estate in her name.

At the hearing, the protestor acknowledged the applicant as his stepmother though she had no child with the deceased or at all. His own mother was Reverata Wamabaire Wahome; the latter had eight children with the deceased except that one of them died. He named his siblings as follows:

- 1. Priscilla Wangare

2. Ambrose Mwangi
3. Moses Maina
4. Agnes Wambui
5. Simon Muriuki
6. Mary Nyambura

He admitted that the applicant was entitled to life interest in **Title No. Thegenge/Kianjogu/968**; upon her death, the land would be shared amongst the deceased's surviving children. Nonetheless, it was his case that the land should be shared equally, apparently between the applicant and the deceased's sons.

As far as **Title No. Gituamba/Muhotetu/ Block 2/991** is concerned, he testified that their last-born child should get 2 acres out of this land and the remainder to be shared equally amongst the deceased's four sons. Even then, he admitted that their deceased's wives were to have a life interest in the property.

Similarly, Plot No. 5 Kaguathi, ought to be shared amongst the deceased's four sons but the applicant should have a life interest over the same property. It was evidence that the property is developed and leased out. His proposed scheme of distribution, so he testified, is in accordance with his deceased father's wishes.

During cross-examination, he admitted that prior to his death, the deceased gave each of his sons their share of land and that **Title No. Thegenge/Kianjogu/968** is what remained of the deceased's land after his sons got their share. This particular land, according to his evidence, was left for the benefit of the deceased himself and his two wives.

Lucy Wanjiru Maina (PW2) testified that she was married to one of the deceased's sons, Moses Maina Wahome, and therefore the deceased was her father-in-law; it was her evidence that on 10 July 2006, she was at Kagwathi together with the deceased and his two wives; present also was the protester. On that day, the deceased declared how he wanted his property distributed. It was his wish that his wives benefit from the rental income from Plot No. 5 Kaguathi during their lifetime and that this property would only be shared out amongst his sons after their death. Since the first wife died in February 2013, it is the applicant who has been receiving the rental income.

As far as Muhotetu land is concerned, the first-born daughter was to get two acres of the land while the remainder was to be shared in accordance with the protester's directions. She confirmed that in his lifetime, the deceased gave each of his sons one acre of land; what remained was **Title No. Thegenge/Kianjogu/968** which measures approximately 1.2 or 1.3 acres.

It was also her evidence that the deceased's wives lived in the same house but in separate rooms. Initially, the applicant lived on **Title No. Thegenge/Kianjogu/968** but at some stage in his life, the deceased left with her and went to live on the Mohothetu land where his first wife was living. The deceased returned on 2006, the same year he died at the age of 104 years old.

On her part, the applicant adopted her affidavit in support of the summons for confirmation of grant and testified further that the deceased gave her 1.7 acres of **Title No. Thegenge/Kianjogu/968**; her co-wife was given 4 acres of land which was registered in her sons' names. It was her evidence that she had been living on this land since 1957 and that she has always been in its exclusive possession.

As for **Title Number Gituamba/Muhotetu/ Block 2/991**, she was to get 5 acres while her co-wife was to get 6 acres; out of her share, the deceased's first wife was to give her daughter Mary Nyambura 3 acres. Like the protester, she testified that Plot No. 5 Kagwathi was to be shared between herself and her co-wife. She confirmed also that she collects rent from Plot No. 5 Kagwathi for her exclusive use but she agreed that this particular property would eventually be inherited by the deceased's children. The deceased's sons, on the other hand, use Muhotetu land exclusively. She did not have any problem with the deceased's sons inheriting what she owns.

Bernard Igwanja (DW2) testified that he was a village elder and that he was aware that the deceased reduced his wishes on distribution of his estate in writing. As a matter of fact, he is the one who wrote what the deceased said regarding his estate. Whatever he wrote was eventually signed at the chief's office.

Lawrence Githaiga Wambugu (DW3) testified that he was a senior assistant chief and that the deceased lived within his area of jurisdiction. On 2 May 2005, he came to his office with two other people. He had a document showing how he wanted his property distributed. The documents had been written two months earlier and the deceased had already signed it. He signed and stamped the document. He kept a copy of the document.

My appreciation of the record is that the grant made to both the applicant and the protester is on the understanding that the deceased died intestate; as matter of fact, when the applicant petitioned for grant of letters of administration she made her petition on the basis that the deceased died intestate. If there was any written will by the deceased, it should have been filed for grant of probate or for grant of letters of administration with the will annexed. It follows that it would be difficult to distribute the deceased's estate according to what has been presented by the applicant as "the deceased's wishes when there is no evidence of any will, whether oral or written, and which are the only means known in law through which a deceased's person's wishes are expressed. (See section 5(1) and 8 of the Law of Succession Act, cap. 160).

It follows that only the intestate provisions of the Act would be applicable to the distribution of the deceased's estate. The relevant provision is, no doubt, section 40 of the Act; 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.

(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.

Underlying this provision of the law is the notion that the most ideal scheme for distribution of a deceased's estate, where he was married more than once, is one informed by fairness and equity. While division of the estate equally amongst the deceased's houses or his children is a relevant factor, it is not the decisive factor in the distribution of a net intestate estate in a polygamous family set-up; it is fairness, equity and, ultimately the discretion of the court that count. The exercise of the discretion, one way or the other, is in turn informed by those factors that have been outlined in section 40(1) as necessary and, no doubt, the peculiar circumstances of each particular case.

Nowhere has this notion been explained better than in the Court of Appeal decision in **Eldoret Civil Appeal No. 66 of 2002, Mary Rono versus Jane Rono & William Rono (2005) eKLR**. While commenting on the leading judgment by Waki, J.A., Molo, J.A. stated as follows:

"I had the advantage of reading in draft form the judgment prepared by Waki, J.A., and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned Judge to be laying down any principle of law that the Law of Succession Act, cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr Gicheru. I can find no such provision in the Act."

The learned judge's view of section 40(1) was stated as follows: -

"My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has discretion to take into account the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.

Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in a case of young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality."

Turning back to the present case, the fact that one house has seven children while the other has none cannot be ignored; equally important is the fact that the deceased gifted some of his children with land the remainder of which the applicant is now settled on. Worth of note also is the fact that apart from the deceased's daughters who are settled where they are married, the deceased's sons are settled on their respective parcels of land which the deceased gifted them inter vivos.

I am also minded that the applicant is settled on the land parcel Title No. Thegenge/Kianjogu/968 where, according to her evidence, she has been living since 1957. I have no reason to doubt her evidence. Apart from this parcel of land, she also appropriates exclusively the rental income from Plot No. 5 Kagwathi. None of the children lays any claim on this income and both parties agree that the applicant is entitled to exclusive rights to this property subject only to life interest.

The deceased's sons, on the other hand, are cultivating land parcel **Title Number Gituamba/Muhotetu/ Block 2/991**. Except for Mary Nyambura whom they have proposed to give two acres of this land, none of the other two daughters of the deceased appear to be interested in his estate.

I am also conscious that the residue of the net intestate estate must ultimately be distributed according to the rules set out in sections 35 to 38.

My assessment of the deceased's family is that they have all lived peacefully in this state of affairs; the applicant, in particular, regards her co-wife's children including the protester, as her own children whom she also acknowledges are entitled to inherit whatever she owns upon her demise.

For reasons I stated earlier, neither of the schemes proposed by the applicant and the protester in their respective affidavits would be practicable; if I have to repeat, no allocation of any part of the deceased's estate can be made in the name of Reverata Wambaire Wahome in the wake of her death. As for the protesters proposal, no competing interests can be made on the same property at the same time; the court cannot share out the deceased's estate amongst his children and at the same time purport to give the applicant the same estate subject to life interest.

Taking all these factors into consideration, I would divide and share out the deceased's estate as follows:

1. Title No. Thegenge/Kianjogu/968

Shall be transferred and registered in the name of Jane Ngima Wahome subject to life interest.

2. Plot No. 5 Kiagwathi

Shall be transferred and registered in the name of Jane Ngima Wahome subject to life interest.

3. Title Number Gituamba/Muhotetu/ Block 2/991

Shall be shared out equally among the following persons:

- (i) Mary Nyambura Wahome
- (ii) Samuel Wahome Gikonyo
- (iii) Ambrose Mwangi Wahome
- (iv) Simon Mwaniki Wahome
- (v) Moses Maina Wahome

The grant of letters of administration intestate made in the joint names of the applicant and the protestor on 27 April 2012 is confirmed in the foregoing terms. Being a family dispute, parties will bear their respective costs.

Signed, dated and delivered on 5th August 2020

Ngaah Jairus

JUDGE