



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 49 OF 1999.

IN THE ESTATE OF THE LATE PETER MACHARIA MARIANJUGU (DECEASED).

MONICAH WAMUHU MACHARIA.....PETITIONER/PROTESTOR

VERSUS

LUCY ANN WANGUI MACHARIA.....OBJECTOR/APPLICANT

JUDGMENT

BACKGROUND

1. The petitioner/respondent herein filed this petition in respect to the estate of late **Peter Macharia Marianjugu** who died on 31st October 1998 at Nakuru Nursing Home. The petitioner had initially granted Grant of Letters of Administration which was confirmed 12th May 2003. The objector challenged the grant on the grounds that it was obtained fraudulently where the petitioner had concealed that the applicant together with his brother were entitled to inherit their father's estate. By ruling delivered on 9th February 2004 **Justice Daniel K. Musinga** revoked grant issued to the petitioner on 1st April 1999 and the applicant/objector was awarded cost to be paid by the estate herein.
2. Subsequently Grant of Letters of Administration intestate were issued to **Monica Wamuhu Macharia** and **Lucy Ann Wangui Macharia** on 11th July 2011.
3. The objector/2nd administrator herein filed an application for confirmation of the grant dated 17th May 2012. In her application she listed the following as the deceased's beneficiaries;

1st house:

- a) Monicah Wamuhu Macharia – 1st wife;
- b) Joseph Maina - son;
- c) Francis Gathenya Macharia – Son;
- d) Patrick Muchiri Macharia– son;
- e) Paul Kahiga Macharia – Son;
- f) Alice Wangui Macharia– daughter;
- g) Janet Wangari Macharia - daughter.

2nd House

- a) Magdalene Njoki Macharia – 2nd Wife

- b) Lucy Ann Wangui Macharia – daughter;
- c) Solomon Marianjugu - son;
- d) Micheal Maina Macharia - son.

4. She stated that the estate had a liability of Kshs. 600,000/= and listed the following as the assets left by the deceased;

i. Nakuru Municipality Block 10/238

ii. Nakuru Rare/Naishi 1349

iii. Chinga/Gikigie/578

iv. Othaya /Kihugiru/ 597

v. Othaya /Kihugiru/ 720

vi. Nakuru Municipality Block 4/317

vii. Nakuru Municipality Block 6/141

viii. Nakuru Municipality Block 1/735

ix. Nyeri municipality Block 1/735

x. Othaya /Kihugiru/ 1299

xi. Mitsubishi Lorry KYT 006

xii. Mitsubishi Lorry KZL 415

xiii. Mitsubishi Lorry KWF 064

xiv. 504 Station Wagon KAB 029

xv. 504 pickup KWL 351

xvi. Toyota Pickup KXQ 240

xvii. Toyota AE 90 Limited KAJ 364

5. She proposed that the assets of the deceased and the amount of money left in the bank should be shared equally between the two houses or as the Court may deem fit in the circumstances. And went ahead to propose as follows: -

1st house of Monica Wamuhu Macharia to get:

- i. Nakuru Municipality Block 10/238
- ii. Nakuru Municipality Block 4/317
- iii. Nakuru Municipality Block 6/141
- iv. Nakuru Municipality Block 1/735
- v. Nakuru Rare/Naishi 1349
- vi. Mitsubishi Lorry KWF 064
- vii. Toyota AE 90 Limited KAJ 364
- viii. Toyota Pickup KXQ 240
- ix. 504 Station Wagon KAB 029

2nd house of Magdalene Njoki Macharia

- i. Chinga/Gikigie/578
- ii. Othaya /Kihugiru/ 597
- iii. Othaya /Kihugiru/ 720
- iv. Nyeri municipality Block 1/735
- v. Othaya /Kihugiru/ 1299
- vi. Mitsubishi Lorry KYT 006
- vii. Mitsubishi Lorry KZL 415
- viii. 504 pickup KWL 351

6. She proposed to have the liabilities of the estate of the deceased paid by her co- administrator/the petitioner/protestor herein since she has been in control of the deceased's estate and receiving proceeds in exclusion of her family.

7. The petitioner/protestor herein objected to the mode of distribution proposed by the objector/applicant and also objected to the beneficiaries listed by the applicant. She stated that the deceased was only survived by only one wife; **Monicah Wamuhu Macharia** and **Magdalene Njoki Macharia** was not a wife to the deceased. **Michael Maina Macharia** was also not a son to the deceased.

8. The protestor indicated that in addition to assets listed by the applicant, the deceased's assets included Nakuru Municipality Block 11/722 and Nakuru Municipality Block 13/352.

9. She further averred that the movable assets being motor vehicles Mitsubishi Lorry KWF 064, 504 Pickup KWL 351, Toyota Pickup KXQ 240 and Toyota AE 90 Limited KAJ 364 are not available for distribution as the same were disposed of to **Jessi Kinga Mureithi, Auctioneers, Simon Kinyua** and **Christopher K. Chetallam** respectively by the deceased during his life time thus not available for distribution.

10. She further stated there are no liabilities in the estate of the deceased since she has already cleared all the debts and further, no funds are available in the deceased's accounts and her proposed mode of distribution was as follows;

To be inherited by Monicah Wamuhu Macharia;

- i. Nakuru Municipality Block 10/238,
- ii. Nakuru Rare/Naishi 1349, Chinga/Gikigie/578 Othaya /Kihugiru/ 597,
- iii. Ng'arua farm 4569,
- iv. Othaya Plot No. 4/22,
- v. Motor vehicles KYT 006, KZL 415 and KAB 029;
- vi. Nakuru Municipality Block II/722 – **Joseph Maina**
- vii. Nakuru Municipality Block 4/317 – **Francis Gathenya**
- viii. Othaya/Kihugiru/ 720 - **Lucy Anne Wangui**
- ix. Nakuru Municipality Block 13/352 - **Patrick Muchiri**
- x. Nakuru Municipality Block 6/141 - **Paul Kahiga**
- xi. Nakuru Municipality Block 1/735 - **Janet Wangare**
- xii. Othaya /Kihugiru/ 1299 - **Solomon Marianjugu**

11. She admitted having been in control of the deceased's estate since his demise as she was not aware of the second house. Parties filed written submissions as captured hereunder.

PROTESTOR'S/PETITIONER'S SUBMISSIONS

12. The protestor submitted that the main issue in dispute is the mode of distribution of the deceased's estate and relied on her affidavit sworn on 26th July 2012. She submitted that **Magdaline Njoki Macharia** was not a wife to the deceased and has not made any application before the honourable court to be enjoined in this cause in any capacity at all, she said she has not petitioned to be enjoined as a co-administrator or even an administrator in the estate; that her children applied to be considered as the children of the deceased and **Justice D.K. Musinga** (as he then was) allowed them in to the cause. She urged this Court to distribute the estate of the deceased as provided for under **Section 35(5) of the Law of Succession Act** and confirm the grant issued as per her proposed mode of distribution. She quoted **Section 35(5) of the Law of Succession Act** as follows: -

“Subject to the provisions of Sections 41 and 42 and subject to any appointment or award made under this Section, the whole residue of the net intestate estate shall on the death, or, in case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving spouse.”

OBJECTOR'S SUBMISSIONS

13. The objector submitted that the main issue for determination at hand as agreed by parties was the mode of distribution, whether the same should be in accordance to the number of children or houses.

14. She submits the protestor in her affidavit of protest deponed on 26th July 2012 conceded the deceased had children from a second union; **Lucy Ann Wangui** (the objector) and (her brother) **Solomon Marianjugu**. The mode of distribution suggested by the protestor was unfair and not substantiated. The protestor alleged the deceased had disposed of some of his motor vehicles before his demise but the same was not substantiated.

15. She further submitted that the deceased was survived by two wives and that the protestor is misleading the Court when she submits that **Magdalene Njoki Macharia** is not a wife to the deceased and has not made any application under **Section 26 of the Law of Succession Act** to be considered as a dependant of the estate of the deceased. She submitted that **Magdaline Njoki Macharia** filed application on 30th May 2008 seeking to be considered as a dependant in this cause and the said application remains unopposed showing the deceased that the deceased had 2 wives.

16. The objector submitted that contrary to petitioner's/protestors allegations, the said **Magdaline Njoki Macharia** was a wife to the deceased married under the Kikuyu Customary Law and they separated with the deceased in the year 1995 but he continued to maintain her and the children. She further submitted that her application dated 30th May 2008 to be considered as dependant remains unopposed indicating that the protestor is agreeable to her position.

17. She submitted that in the said application, the said **Magdaline Njoki Macharia** averred that she was married under Kikuyu Customary Law and stated that from the union, they were blessed with 2 issues namely **Lucy Ann Wangu** and **Solomon Marianjugu**.

18. She further averred in the supporting affidavit that sometimes in 1995, she separated with the deceased but the deceased continued to maintain the children; that to date she still lives in the deceased's property in Nyeri together with the objector and her siblings and the initial grant issued to the protestor was revoked on ground that she left out **Magdaline Njoki Macharia** and her children from befitting from the estate; that she had failed to disclose their existence.

19. The objector submitted that **Magdaline Njoki** disclosed that she had a son prior to her marriage with the deceased and that the deceased took care of the said son as his own child and should be considered as a dependant.

20. The objector urged the Court to consider the said **Magdaline Njoki Macharia** and her son **Michael Maina Macharia** as dependants of the deceased. The objector quoted **Section 29(a)** which define who a dependant is to include former wife and children whether maintained or not by the deceased at the time of his death and submitted that even though Magdalene had separated from the deceased in the year 1995, he continued to maintain her and to date they still live in the deceased's property without any contention from the protestor; that being former wife of the deceased, she is entitled to his estate having made an application for provision.

21. The objector submitted that deceased having married **Magdaline Njoki Macharia** as a second wife, he therefore died intestate and a polygamous man with two wives, the estate should therefore be distributed as per **Section 40 of the law of Succession Act**. **Section 40(1)** provides as follows;

“When an intestate has married more than once under any system of law permitting polygamous, 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.”

22. The objector submitted that the estate of the deceased should be distributed as per the number of houses as opposed to the number of children in each house. She urged the Court to take into account the cost awarded to the objector while distributing the estate of the estate as per the ruling delivered on 9th February 2004.

ANALYSIS AND DETERMINATION.

23. I have considered averments in the affidavits filed by the parties herein. I have also perused the documents filed, and previous

proceedings and note that the deceased left behind the following assets:

i. Nakuru Municipality Block 10/238

ii. Nakuru/Rare/Naishi 1349

iii. Nakuru Municipality Block 4/317

iv. Nakuru Municipality Block 6/141

v. Nakuru Municipality Block 1/735

vi. Nakuru Municipality Block 13/352

vii. Chinga/Gikigie/578

viii. Othaya /Kihugiru/ 597

ix. Othaya /Kihugiru/ 720

x. Othaya/Kihugiru/1299

xi. Nyeri municipality Block 1/735

xii. Plot No. P.S.S site at Othaya Town.

xiii. Mitsubishi Lorry KYT 006

xiv. Mitsubishi Lorry KZL 415

xv. 504 Station Wagon KAB 029

xvi. 404 Pickup KZD 948

xvii. 404 Pickup KWL 351

xviii. Mitsubishi Lorry KWF 064

xix. Toyota AE 90 Limited KAJ 364

xx. Toyota Pick-up KXQ 240

24. What is not in dispute is that the deceased had children from two different women; **Monicah Wahumu Macharia** and **Magdaline Njoki Macharia**. He sired 6 children with **Monicah Wahumu Macharia** namely; **Joseph Maina, Francis Gathenya Macharia, Patrick Muchiri Macharia, Paul Kahiga Macharia, Alice Wangui Macharia and Janet Wangari Macharia**; and with **Magdaline Njoki Macharia** she had two children namely; **Lucy Ann Wangui Macharia** and **Solomon Marianjugu** but she had one child namely, **Michael Maina Macharia** at time of her union with the deceased.

25. Counsels for the parties herein agreed that the only issue for determination by the Court is whether the deceased's properties should be distributed according to houses or according to the deceased's children.

26. However before considering mode of distribution I wish to consider whether **Magdaline Njoki Macharia** and **Michael Maina Macharia** are deceased's dependants. Counsel for the petitioner submitted that they acknowledge that the testator had two children with the deceased. This was confirmed by counsel for the objector. The objector being the daughter of the deceased from the second house. It is not disputed that he was not sired by the deceased and by application dated 30th May 2008 **Magdaline Njoki Macharia** applied to be included as one of the dependants of the deceased and no objection was raised; further that she has been living in the property of the deceased and upon separation he maintained her together with her son **Michael Maina Macharia**; that the two should be included as dependants of the deceased.

27. I now proceed to consider whether the assets of the deceased should be distributed according to houses or according to children.

28. My understanding of **Section 40 of the law of Succession Act** is that, in a polygamous home the deceased's asset will first be divided according to houses considering the number of children in each house; each child being considered as a unit and the wife being an additional unit. The number of units to translate as ration of distribution of assets between the two houses. That will result in equal and fair distribution of the deceased assets among the dependants.

29. In the instant case as observed above, the first house has 6 children making 6 units and wife will add the units to 7. As observed above, the second house has 3 children making 3 units and on adding the second wife, the units add to 4.

30. From the foregoing I order that the estate of the deceased be distributed equally between the children of the deceased, each child being taken as a unit and adding the wife in each house as additional unit.

FINAL ORDERS

31. Assets of the deceased be distributed according between the two houses according to units made up as follows: -

i. 1st house 7 units

ii. 2nd house 4 units

iii. Each party to bear own costs.

Judgment dated, signed and delivered via zoom at Nakuru This 18th day of December, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Karanja Mbugua counsel for Petitioner Absent.

Ms. Mwangi counsel for Objector