



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 855 OF 2015**

**IN THE MATTER OF THE ESTATE OF STEPHEN MWANGI GITHUKA**

**MONICA NJERI MWANGI ----- APPLICANT**

**VERSUS**

**SARAH WANJIRU MWANGI ----- 1<sup>ST</sup> RESPONDENT**

**GLADYS WAIRIMU MWANGI ----- 2<sup>ND</sup> RESPONDENT**

**JANE WANGARI MWANGI ----- 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Stephen Mwangi Githuka died on 24/11/1985. According to the P & A form, he was survived by:

**1<sup>st</sup> house**

1. Sarah Wanjiru Mwangi - widow
2. Lucy Mwihaki Mwangi - daughter
3. Gladys Wairimu Mwangi - daughter
4. Jane Wangari Mwangi - daughter
5. Mary Watiri - daughter
6. Zipporah Wambui - daughter

**2<sup>nd</sup> house**

1. Monica Njeri Mwangi - widow

2. The assets of the deceased are;

- a. LR No. 464/18 (original number 464/1/14 in danger Bahati Constituency measuring 7.5 acres.
- b. 12 acres in Cura Farm
- c. Plot Number 6 and 17 Dundori Center Nakuru
- d. Kshs. 141, 207.55 Barclays Bank of Kenya Limited

Liabilities are listed as;

a. Funeral expenses 6,550/=

3. The matter is before court for the distribution the parties having failed to agree on the mode of distribution. The same was canvassed by way of affidavit evidence and submissions.

4. In her affidavit sworn on 20/4/2018, Monica Njeri Mwangi proposes that since there exists 2 houses, the properties should be divided equally between the 2 houses at 50%. She accuses the 1<sup>st</sup> house of depleting cash at Barclays Bank and also of selling Cura farm (12 acres).

5. In response, Gladys Wairimu Mwangi in her affidavit sworn on 8/5/2018 avers that Monica sold 6 cows that belonged to the estate. I am urged to follow RONO vs RONO and distribute the property to wives and children as units.

6. It is proposed that the property be distributed as follows;

a. LR no. 464/18 Original 464/1/14 measuring 7.5 acres approximately to be divided as follows;

i. Hiving off 0.5 acres for the family mausoleum.

ii. Hiving off 0.5 acres of land which business premises have been built on.

iii. The remainder of 6.5 acres to be subdivided equally amongst the 9 units each getting 0.72 acres.

iv. That the rental income being collected be deposited in a joint interest earning account with monthly payments to each of the 9 units.

b. 12 acres Cura Farm to be divided as follows;

i. Adjustments to be made on account the expenses incurred through the processing of the various documentation, payments of stamp duty, rates, rent, penalties paid by the previous administrators after having sold off approximately 4 acres.

ii. Adjustments to be made to factor in the innocent purchasers for value who have bought the land from the administrators and further from individuals beneficiaries of the estate of Lucy Mwhaki (2 acres).

iii. That the remainder of the 6 acres to be subdivided and be distributed amongst the 8 units(which excludes the estate of the late Lucy Mwhaki).

c. Plot No's 6 and 17 to be either sold and the sums be distributed amongst the 9 units or in the alternative that such sums collected as rent be directed and as channeled to a joint interest earning account for monthly payments to each of the 9 units.

d. On the Kshs. 141,207/= we submit that the same was channeled to the treatment of our late mother as such we cannot communicate further.

7. It is deponed that the court sitting as a succession court cannot cancel titles and doing so would be *ultra vires*.

8. Monica Njeri Mwangi in a response to the affidavit of Gladys in an affidavit sworn on 14/5/2018 depones that she never sold any cows. She accuses the respondents of selling the land without a grant. She insists on a 50% sharing.

9. Both sides filed written submissions.

10. Of determination is; what is the mode of distribution of the estate herein.

11. Serious allegations and counter allegations about intermeddling with the estate have been made as relates to cash held in bank and some cows. At this stage, this court is not seized of a proper opportunity to answer the questions arising.

12. The parties chose to dispose of the issue of distribution through affidavit evidence and submissions. What then is on record is allegations and counter allegation. Both sides bore the burden of proof as to the allegations (See **Section 107** of the **Evidence Act**). Secondly, as per **Section 3(4)** of the **Evidence Act**, "a fact is not proved when it is neither proved nor disproved".

13. I have come across orders of this court sitting at Nairobi ordering the erstwhile administrators to give accounts. Monica does not seem to have pursued that matter to its logical conclusion. It is impractical to, at this stage, drag this very old cause backwards to enforce orders issued in 1993. The complaint is affected by latches.

14. I will thus dwell on the issue of mode of distribution as that is the matter properly before the court.

15. The deceased was survived by 2 wives and 5 children.

16. The respondent appears to suggest that within the meaning of **Section 40**, the deceased's estate should be shared out to 9 units. The

affidavit in support of the petition for grant sworn on the 7/9/1992 shows that the deceased was survived by 2 widow and 5 daughters. Therefore including widows as units within the meaning of **Section 40** of the **Law of Succession Act**, the applicable units are 7.

17. **Section 40** of the **Law of Succession Act** provides;

**“Sec. 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.”**

18. The estate herein falls perfectly within the purview of **Section 40** of the **Law of Succession Act**.

19. The respondents have proposed provision 0.5 acres for a mausoleum and 0.5 acres of land on which business premises have been built on from L.R. No. 464/18 original number 464/1/14 leaving 6.5 acres to be divided equally amongst the 9 units. It is also proposed that rental income being collected be deposited in a joint interest earning account with monthly payments to each of the 9 units.

20. This proposal is a deviation from counsels own submission that **Section 40** of the **Law of Succession Act** is applicable in the distribution of the estate.

21. In the absence of an agreement by the parties, the hiving off 0.5 acres for a mausoleum and 0.5 acres where business premises are built is not supported by law. This entire land apart from 0.5 acres where business premises are put up shall be shared out among the children equally and the surviving widows considering each widow as a unit.

22. The 0.5 acres where business premises are located to be sold and the proceeds there from be shared equally by all the children and both widows considering each as a unit.

23. Cura Farm (12 acres) is to be shared out equally among the children adding each of the widows as a unit. This court cannot factor unknown or unproven expenses incurred through payments of various, documentation, stamp duty, rates, rent and penalties as suggested by counsel for the respondents. The estate is supposed to meet all its expenses and only the net estate is available for distribution. Such expenses however must be placed before court by the administrators in a full and accurate account. This has not been done.

24. I am also urged to factor in unknown purchasers who bought land from the administrators. No evidence is adduced as to the propriety of the purported sales, if at all. An administrator has a no right to sell of capital assets before confirmation. The said purchasers (if they exist) may very well seek remedies from the alleged sellers as the purported sellers could not pass title they themselves did not have.

25. **Section 82(h) (ii)** of the **Law of Succession Act** provides as follows;

**“No immovable property shall be sold before confirmation of grant.”**

26. The grant herein having not been confirmed, no person had authority to sell any part of the movable properties. Such sales if at all were null and void and unenforceable.

27. No evidence of the mentioned purchase transactions has been presented before court by way of sale agreements or documents of transfers. The alleged purchasers can therefore not seek protection from the Court under **Section 93** of the **Law of Succession Act**.

28. The **Court of Appeal** in **JECINTA WANJA KAMAU vs ROSEMARY WANYOIKE AND ANOTHER [2013] eKLR** stated;

**“Before the appellant could seek protection as a purchaser under Section 93 of the Act she had first to prove that she is a purchase. In this case, there was no prima facie evidence that she was a purchaser. In any case, and as provided by Section 82 (b) (II) of the Act, it would have been illegal for Beatrice Njeri Magondu to sell the land before the confirmation of the grant.”**

29. A blanket reliance on **Section 93** of the **Law of Succession Act** by purchasers for protection is not tenable and such protection must depend on the facts and circumstances of each case. The Court of Appeal in **JANE GACHOKI GATHECA vs PRISCILLA NYAWIRA GITUNGU & ANOTHER [2008] eKLR** gave clarity on where the protection is unavailable. The Court stated;

**“We think, with respect, that there is a fallacy in invoking and applying the provisions of Section 93(1) of the Law of Succession Act and the superior court fell into error in reliance of it. The section would only be applicable where, firstly, there is a “transfer of any interest in immoveable or moveable property”. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void *ab initio* and the property is traceable.”**

30. A holder of a non-confirmed grant and who purports to sell immovable property of the deceased to 3<sup>rd</sup> parties is synonymous with a thief who acquires no right or interest which is transferable in stolen property. Even when the grant is confirmed, the disposal of assets must be in

accordance with the terms set by court and any transaction discordant with such terms would be void *ab initio* and the property traceable.

31. The alleged sales herein are void *ab initio* and the properties traceable.

32. The submission that this court has no power to cancel title to land is in my view a misapprehension of the law. Having found the transactions for sale of land void *ab initio* this court has inherent powers to rescind any consequent transfer of title based on those transaction. The court had discretion to invalidate a fraudulent action by a personal representative.

33. I am fortified in that finding by the holding by ***K.H. Rawal J*** (as she then was) in the estate of **CHRISTOPHER JUDE ADELA (deceased) 2009 eKLR** where the learned judge stated;

**“The correct reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of section 23 of the RTA (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a Carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal action prejudicing the interest and rights or right beneficiaries of the estate.**

**In short, I do not agree that section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative.”**

34. Plot number 16 and 17 Dundori Centre are to be sold and proceeds shared out equally among children as a unit and adding each widow as a unit.

35. With the result that the estate of Stephen Mwangi Githuka shall be distributed in accordance with **Section 40** of the **Law of Succession Act** and as more particularly spelt out at paragraphs 20, 21, 22 and 33 of this judgment.

Orders accordingly.

**Dated and Signed at Nakuru this 28<sup>th</sup> day of February, 2019.**

**A. K. NDUNG'U**

**JUDGE**