



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 815 OF 2013

IN THE MATTER OF THE ESTATE OF NDONGU KABUGUA.. DCD

AND

LUCY WANJIRU NDONGU.....PETITIONER

V E R S U S

PHOEBE WANJIRU NDONGU.....1ST PETITIONER

FAITH WAMBUI KUTHUA.....2ND PETITIONER

SILAS WACHIRA..... 3RD PETITIONER

STEPHEN KINYUA..... 4TH PETITIONER

PETER MURIUKI.....5TH PETITIONER

JUDGMENT

1. This matter relates to the estate of Ndongu Kabugua, deceased who died intestate in March 2011.
2. The petitioner Lucy Wanjiku Ndongu who is the wife of the deceased applied for Letters of Administration intestate of the estate of Ndongu Kabugua (deceased) which she was granted on 07/02/2014. She proceeded to file an application for confirmation of grant on 09/10/2014 in which she stated that the deceased was survived by herself as the widow and 7 children. The estate of the deceased was comprised in land parcel No. Mutira/Kirunda/185 measuring 1.53 Ha.
3. She proposed that the deceased's estate **L.R No.Mutira/Kirunda/185** be distributed as follows:
 - Phoebe Wanjiru Ndongu - 0.247 acres
 - Judy Wanguthi iNdongu)
 - Josephine Njeri Ndongu) - 0.247 acres jointly
 - Jeremiah Kabugua Ndongu - 0.72 acres
 - Ezekial Kangethe Ndongu - 0.64 acres
 - Matthew Mugo Ndongu - 0.64 acres
 - Michale Kimani Ndongu - 0.64 acres
 - Lucy Wanjiku Ndongu - 0.72 acres
4. However protests were filed by Phoebe Wanjiru Ndongu, Faith Wambui Kathua, Silas Wachira, Stephene Kinyua & Peter Muriuki.

1stProtector's case

The protestor Phoebe Wanjiru Ndongu proceeded to file an affidavit of protest on 27/11/2014. She stated that she is not a party to the consent filed in court and protested the mode of distribution. That the deceased was survived by the following;

- Lucy Karuana Ndungu (deceased) - 1st wife

Judy Wangithii Ndongu(deceased)

Peris Wanjiru Ndongu (deceased)

Phoebe Wanjiru Ndongu

- Lucy Wanjiku Ndongu - 2nd wife

Judy Wangithii Ndongu

Josephine Njeri Ndongu

Jeremiah Kabugua Ndongu

Ezekial Kangethe Ndongu

Matthew Mugo Ndongu

Michael Kimani Ndongu

5. In her further affidavit she deposes that Mary Gachui who was wife of deceased re-married and had five children who are:-

- Peter Muriuki
- Stephen Kinyua
- Julia Nyaguthii
- Josphat Karimi
- Silas Wachira

Children of Faith Wambui Kinuthia are:-

- Cecily Wanjiku Wambui (deceased)

- Julius Munene Muriithi

- Flora Karuana

- Simon Muthii Wambui

6. She proposed that the deceased estate be shared among the following in equal shares

Phoebe Wanjiru Ndongu

Judy Wangithii Ndongu

Josephine Njeri Ndongu

Jeremiah Kabugua Ndongu

Ezekial Kangethe Ndongu

Matthew Mugo Ndongu

Michael Kimani Ndongu

Lucy Wanjiku Ndongu

7. She however changed tune in the further affidavit sworn on 10/11/15 and proposed that the land be shared equally amongst the four houses.

8. 2ndProtector's case

The protestor Faith Wambui Kuthua proceeded to file an affidavit of protest on 02/07/2015. She stated that the deceased was her husband who had four wives and had children as hereunder:-

o Lucy Karuana Ndungu (deceased) - 1st wife

Judy Wangithii Ndongu(deceased)

Peris Wanjiru Ndongu (deceased)

Phoebe Wanjiru Ndongu

o Mary Gachui - 2nd wife

Peter Muriuki

Stephen Kinyua

Julia Nyaguthii Karimi

Silas Wachira

o Faith Wambui Kuthua – 3rd wife

Cecilia Wanjiku Karuana(deceased)

Julius Munene Muriithi

Flora Karuana

Simon Muthii Muriuki

o Lucy Wangithi Ndongu – 4th wife

Judy Wangithii Ndongu

Josephine Njeri Ndongu

Jeremiah Kabugua Ndongu

Ezekial Kangethe Ndongu

Matthew Mugo Ndongu

Michael Kimani Ndongu

9. She proposed the deceased's estate be shared equally among the widows.

10. 3rd, 4th and 5thProtectors' case

The protestors Silas Wachira, Stephen Kinyua and Peter Muriuki proceeded to file an affidavit of protest on 10/07/2015. They confirmed that the deceased had four wives as indicated by the 2nd protector and proposed that the estate be divided equally.

11. Petitioner's case

In response, she stated that she followed the duly set out procedures in seeking for grant. That the letter from the chief did not have the names of the 2nd – 5th protestors. She recognized the 1st protector as the daughter of the deceased and listed her as a beneficiary to the estate.

12. The protestor Phoebe Wanjiru Ndongu filed a further affidavit on 10/11/2015 and deposed that the deceased had four wives and the land

should be shared equally among the 4 houses.

13. The court gave directions that the protest be heard by way of ‘**viva voce**’ evidence. Evidence was tendered by the parties and their witnesses.

14. The parties filed written submissions. For the 1st protestor submissions were filed by M/s Ngigi Gichoya & Co. Advocates. It is submitted that the petitioner recognized the 1st protestor as a beneficiary. However in a further affidavit she deposes that the deceased had four wives and his estate should be shared equally between the four houses. That the petitioner’s allegation that the deceased had distributed his estate is not supported by annexure 3a, b & c. That deceased had applied for sub-division of the estate into four equal portions proposed by the petitioner. He relies on **Section 42 of the Law of Succession Act** which provides :-

“Previous benefits to be brought into account Where (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

He also relies on the case of **Joseph Wairuga Migui –v-Mikielina Ngina Munga (2016)eKLR** where Judge Mativo stated that:-

“In my view this Section of the law seeks to protect, respect and preserve the wishes and acts executed and undertaken by the deceased persons during their lifetime such acts or settlements effected are not subject to disruption, change of frustration”

15. It is further submitted that the section is not applicable as the deceased had intended to sub-divide his estate into four equal portions which contradicts the proposal by the petitioner who sought to distribute the estate to her herself, her children and 1st protestor which is discriminatory, illegal and unfair. He submits that the land be distributed between the four houses or as provided under **Section 40(1) of the Law of Succession Act** which provides:-

“(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.”

16. For the 2nd, 3rd, 4 & 5th protestors it is submitted that the law applicable in the distribution of the estate of the deceased is the **Law of Succession Act as provided under Section 2(1)** which states:-

“(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

17. The submissions were on a wrong assumption that the deceased died on 11/9/1970. He submits that the Law applicable is **Section 40 of the Law of Succession Act**. Counsel cited various decisions in support of his contention that **Section 40** is applicable. For the petition it is submitted that she is the only surviving wife of the deceased. She submits that the issue for determination is whether the share allocated to the 1st protestor in the application for confirmation of grant is fair. Whether the second protestor, Faith Wambui Kuthua was a wife of the deceased and whether her children Julius Munene Muriithi, Flora Karuana and Simon Muthii Muriithi were children of the deceased. Whether the 2nd protestor and her children are entitled to a share of the estate. Whether the 3rd, 4th & 5th protestors are children of the deceased and whether they are entitled to a share of the estate of the deceased.

18. I have considered the evidence adduced orally in court and in the affidavits. I have also considered the submissions. The parties have raised various issues in their respective submissions. I will collapse the issues for determination into two as follows:-

1. Whether the 1st – 5th protestors are children and/or dependants of the deceased.

2. Distribution of the estate.

19. Whether the 1st – 5th Protestors are children and/or dependants of the deceased.

With regard to the 1st protestor, there is not much to ponder about as the petitioner has acknowledged her as a child of the deceased and therefore a beneficiary entitled to a share of the estate. There is therefore no dispute that she is a dependant who should be included in the distribution of the estate.

20. The second protestor Faith Wambui Kuthua in her affidavit sworn on 25/6/15 she deposes that the deceased was her husband. She claims that she was the 3rd wife of the deceased. She deposes that the application for confirmation of grant was done without her knowledge. When she testified in court, other than casually stating that the deceased was her husband, she did not adduce any evidence on how she was a wife of the deceased. There was no evidence tendered to show under which system of marriage she got married to the deceased, whether Christian, statutory or customary. In short, she had absolutely no evidence to prove that she was the deceased’s wife. When she was cross examined, she stated that she had nothing to show she was a wife of the deceased. Her name does not suggest that she was ever the wife of the deceased. She could not tell when she got married to the deceased. She never attended the burial of the deceased nor did her children. She said she did not know the year the deceased died. With regard to her children, she told the court that she had nothing to prove that they

were children of the deceased.

21. The petitioner annexed the eulogy of the deceased **Exhibit 4** which shows that it is only the petitioner who was mentioned as the wife of the deceased and the 1st protestor as one of the children. The petitioner called DW-2- Juliana Ngrigacha a sister to the deceased and DW-3- David Munene Muriithi a brother of the deceased. The two testified that the deceased had married Lucy Karuana and he thereafter married the petitioner. DW-3- testified that Faith Wambui was born in the neighbourhood and he knows her very well. He testified that she was not the wife of the deceased. This was also corroborated by the testimony of DW-2-. I considered the testimony of DW-2- & DW-3- and I found that they were credible and I had no reason to doubt them. I find that their testimony proves that Faith Wambui Kathua was not a wife of the deceased nor were her children the children of the deceased.

22. It is trite that the who alleges must prove. This is called the burden of proof. **Section 107 of the Evidence Act** provides:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

23. Faith Wambui Kuthua has not discharged the burden of proof that she was the wife of the deceased or that her children were the children of the deceased. In deed even in the submissions it is stated that deceased died on 11/9/1970 which is really outrageous by somebody claiming the deceased is her husband. It is accepted practice that where one wishes to prove that the deceased is the father of the children, birth certificates, identity cards, baptism cards or any other relevant documentation is tendered in evidence. The children may also be called as witnesses. This was not done. Where evidence which would otherwise assist a party’s case is not tendered, the court must draw an inference that if such evidence is tendered it would be detrimental to the party’s case. This is the inference that I draw that had the birth certificates and ID Cards of the children of Faith Wambui Kuthua been produced, they would have prejudiced her case by proving that they were not children of the deceased.

24. The 2nd protestor had not taken out any Letters of Administration she did not prove that she had contracted any form of marriage with the deceased. She surfaced as has been submitted after 1st protestor fell out with the petitioner. I must point out that the 1st protestor is not credible at all as she has sworn two affidavits which are completely at variance on the same subject with no explanation on such turn about. Leave to file a further affidavit did not give her leave to file falsehoods. The affidavits by 1st protestor are disapproved by DW1 & 3 who corroborate the evidence by petitioner. The 1st protestor had signed a consent on distribution and it was a mere denial that he signature was forged. The petitioner attached a letter from the Assistant Chief showing the beneficiaries. This letter was not challenged by any of the protestor. It states that those surviving the deceased are the petitioner, the 1st protestor and the children of the petitioner. It must be taken that this letter gives the true position on the fact of the wife and children of the deceased.

25. The existence is a fact which must be proved by cogent evidence. Such evidence can be inform of documents or eye witnesses especially in cases of customary marriage where those involved in customary rites can be called. Even where a party alleges a presumption of marriage there will be evidence of neighbours who can confirm they witnesses them living together or even the matter in which the children are named. Faith Wambui Kuthua did not adduce sufficient evidence to prove the existence of a marriage customary or otherwise between her and the deceased. She has failed to discharge the burden of proof that she is a wife of the deceased or that her children are children of the deceased. It was in her testimony that she has not lived with the deceased for a very long time. I find that the 2nd protestor’s protest is without merits.

26. The other issue is whether the 3rd, 4th & 5th protestors are children of the deceased. In support of their claim evidence was sworn by Peter Muriuki. He testified that their mother was Lucy Gachui who re-married. Like the 2nd protestor, the 5th protestor did not tender any evidence to show that the deceased was his father. He admitted that his Identity Card is not in the name of the deceased. The 5th protestor did not attend the burial of the deceased. They were not mentioned in the Eulogy of the deceased and most of all, they are not mentioned in the Chief’s letter. The 5th protestor testified that their mother re-married. She was not called as a witness to corroborate the contention that they are children of the deceased. I must therefore rely on the Chief’s letter and the testimonies of DW2 & 3 who were candid and credible. As I have stated he who alleges must prove. The 3-4 protestors did not adduce any evidence to prove that they are children of the deceased or his dependants. The allegation that they were children is a matter of fact which must be established with clear evidence. They can call witnesses to tender evidence. Mere statements which are uncorroborated are not sufficient in the light of evidence by the adverse party which tend to proof the contrary. My view is that the claim is unsubstantiated and unproved. The claim is not backed by any evidence. The 3-5 protestors failed to proved that they are dependants. **Section 29 of the Law of Succession Act** defines a dependant. It states:-

“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;

(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

27. A party must prove dependency in order to be entitled to a

share of the estate of the deceased. My finding is that since the testimony by 5th protestor is uncorroborated and certainly not by 1st protestor in view of what I have stated, the petitioner's contention that they were not children of the deceased must be upheld. It is a fact which I must take Judicial notice that where children and wives want to be recognized for the purpose of inheritance, such claims are brought to the fore upon the death of deceased by demanding that they be involved in the burial arrangements and be included in eulogies. This escalates in some cases to burial disputes in some cases the deceased remaining in the mortuary for a long period. This was not the case here and the petitioner testified that the death of deceased was widely published. These protestors came on board after 1st protestor filed a protest saying that deceased had four wives. The 1st protestor is unreliable and cannot be believed. My finding is that the 3rd – 5th protestors have failed to prove that they are children of the deceased. They are not entitled to a share of the estate of the deceased.

28. Distribution:

The 2nd – 5th protestors submission was that it is based on a wrong assumption that the deceased died on 11/9/1970. The deceased as evidenced by a Death Certificate filed herein died on 13/3/2011. It follows that under **Section 2(1) of the Law of Succession Act** the law applicable is the **Law of Succession Act**. The deceased died intestate after the **Act** came into force on 1/7/81.

29. **Section 40 of the Act** deals with the estates of intestates who had married more than once under any system of the law permitting polygamy. The deceased under the circumstances of this case was not polygamous. The deceased had married Lucy Karuana who died. There was no proof that he married Mary Gachui and Faith Wambui Kuthua under customary law or otherwise. The deceased married Lucy Wanjiku and the marriage was solemnized under the **African Christian Marriage and Divorce Act Cap 151 Laws of Kenya** on 19/12/1981 as shown by exhibit -1-. Polygamy is a situation where a man marries more than one wife under a system of law that permits polygamy. However where a man marries a wife and the wife dies the marriage becomes terminated and the man is free to re-marry. The deceased was not in a polygamous marriage at any stage in his life as he remarried after his first wife died. As such the estate should devolve to his dependants in equal shares. **Section 29(a)** defines dependants as follows:-

“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”

30. Though the deceased had applied to sub-divide the land into four equal portions, he could have done so for reasons only known to himself. He died intestate and distribution should therefore proceed under intestate succession.

31. The deceased is survived by his wife Lucy Wanjiku Ndongu and the children who are Phoebe Wanjiru Ndongu Jeremiah Kabugua, Ezekiel Kangethe Ndongu, Mathew Mugo Ndongu and Michael Kimani Ndongu. **Section 35(1)(a) &(b) of the Act** applies: It provides:-

“(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”

32. This is because the **Act** does not appear to have a specific

provision to govern circumstances where a monogamous man ends up with two households, not owing to being polygamous but as a result of re-marriage following the death of his first wife. It presents a situation where there is a surviving spouse and children and the applicable provision would be **Section 40(1) of the Act** which makes provision for a surviving spouse and children. The provision of section 35 gives the widow a life interest in the whole residue of the net intestate estate. Life Interest determines upon the death of the widow and the estate is supposed to be distributed equally between all the surviving children. In the case of the Estate of **Jeremiah Muchogo Macharia alias Nguchuga Macharia – deceased Succ Cause No. 176/2011** Mativo J. when considering distribution of the estate where the deceased was survived by a widow and children, stated that the issue which would arise is whether the surviving spouse can exercise life interest over property that ought to devolve to children other than her own. He stated:- ***“I have considered the justice of the case and taken into account that it is not always easy to achieve equality in cases of this nature as was observed in the case of Rono –v- Rono and what may be fair in one case may not be fair or applicable in another case. I have also considered that each case has to be determined on its peculiar facts and circumstances ……………”***

33. What the court has to consider is the fair distribution of the estate. In the case of **Rono –v- Rono Eldoret Civil Appeal No. 66/2002** where the central question was the distribution of the estate in a polygamous marriage the court embraced the concept of equity and fairness based on the circumstances of the case in the distribution of the estate. In the present case a fair distribution would be based on the number of children and the widow of the deceased. The 1st protestor has lived on the estate as well as the petitioner and her children. Having considered the evidence tendered, the law applicable and the submissions, I find that a fair distribution in view of the gap in the law would be that estate be distributed equally between the children and the widow.

34. In Conclusion.

I find that the protest by the 2nd, 3, 4, & 5 protestors is without merits and is dismissed with costs.

35. The estate of the deceased comprised in land parcel No. Mutira/Kirunda/185 shall be distributed equally amongst all the dependants that is to say:-

o Phoebe Wanjiru Ndongu

o Lucy Wanjiku Ndongu

o Judy Wangithi Ndongu

o Josephine Njeri Ndongu

o Jeremiah Kabugua Ndongu

o Ezekiel Kangethe Ndongu

o Mathew Mugo Ndongu

o Michael Kimani Ndongu

The grant shall be confirmed in these terms.

Dated at Kerugoya this 18th Day of March 2019

L. W. GITARI

JUDGE