



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

(FAMILY DIVISION)

SUCCESSION CAUSE NO 2708 OF 2012

IN THE MATTER OF THE ESTATE OF EZEKIEL WAWERU MUIRURI (DECEASED)

MARGARET MUGURE WAWERU.....APPLICANT

AND

ANNA WANGARI WAWERU.....PROTESTOR

JUDGMENT

1. The deceased in this matter **Ezekiel Waweru Muiruri** died intestate on the 15th of April 2008.
2. During his life time, it is acknowledged, that he married Anna Wangari Waweru (1st wife) on 6th January 1963 under Christian rites. In 1988 he married Margaret Mugure Waweru (2nd wife) under Kikuyu Customary law.
3. The deceased had several children with both wives as set herein below:

1st House:

- i) John Muiruri Waweru – son**
- ii) Patrick Munyambu Waweru – son**
- iii) Catherine Wanjiru Waweru – daughter**
- iv) George Wainaina – son**
- v) Pauline Wambui – daughter**
- vi) Michael Mburu - son**
- vii) Nancy Njeri – daughter**
- viii) Teresia Wanjiku – daughter**
- ix) Samuel Kamau – son**
- x) Mary Wambui – daughter**
- xi) Stephen Ng'ang'a – son**

2nd House:

- i) Venanzio Mwangi - son**

ii) James Muiruri Waweru – son

iii) Caroline Wanjiru Waweru – daughter

iv) Benson Wainaina

v) John Irungu Waweru – son

4. In a petition filed by Anna Wangari Waweru seeking to be appointed as administrator she listed herself and Margaret Mugure Waweru as her co-wife. She also listed all 16 children of the deceased as survivors of the estate.

5. Margaret Mugure filed an objection and a cross petition on 11th of August, 2015 and on 26th of January 2016 by consent of the parties both wives were appointed as administrators of the estate of the deceased.

6. The two administrators appear to have been working at cross purpose as on 24th of February 2017 Margaret Mugure Waweru applied for confirmation of the grant without the input of Anna Wangari nor her consent or those of Anna's children. The only consent filed was those of Margaret Mugure's household.

7. On her part Anna Wangari filed an affidavit of protest against the mode of distribution proposed by Margaret Mugure,

On grounds that the only legitimate heirs were those of her household as Margaret was not a wife under the law and therefore her children were not legitimate children of the deceased, further she deposed that all properties acquired prior to 1988 should go to her and her children exclusively.

8. Anna Wangari proposed further that Margaret Mugure's children, her children and herself should then equally share properties acquired after 1988.

9. This matter proceeded by way of *viva voce* evidence. Each of the parties gave evidence no witnesses were called.

Anna Wangari Waweru produced her marriage certificate and asserted that she was the only known wife of the deceased. However, in cross examination she admitted that Margaret Mugure is her co-wife having been married in 1988 and that her co-wife joined her at the matrimonial home where they lived together for 20 years.

10. Though acknowledging the co-wife Anna contended further that when Margaret was married, she found her with all the properties as nothing was acquired after Margaret got married.

11. It was her contention also that of the 5 children of Margaret, only 4 were her husband's. She claimed that the 1st son of Margaret Venanzio was not her husband's child.

12. Despite the protestor's evidence above, she did not want her co-wife chased from the matrimonial home but claimed to have built on Plot No.386/68, and Plot VI Makongeni in the 70's. She further claimed that Plot No.8 Ithang'arari, property known as Ngobit/Supuko, in Mangu, and Thika Mwalimu shares were all acquired in the 70's. She denied that there were any properties acquired after 1988.

13. It was her contention therefore that she cannot share the estate with Margaret equally. She was only willing to share matrimonial home, the bore hole and coffee machine therein.

14. Margaret Mugure on the other hand stated that she was married in 1984 and that between 1984 and 1988 she lived with him in Makongeni Phave IV after which she was taken to Mugumoini 253 where she joined Anna and her children and where they both occupied a room each of the same house. She stated further that later a storeyed building was erected where they reside to date. She argued that they should both continue to reside in their respective portions of the matrimonial home and divide the facilities therein.

15. It is her case that she gave birth to her 1st son in 1986 during pendency of her union with the deceased. She contended that though properties may have been acquired prior to 1984, she assisted develop them and pay loans. She contended further that several assets were acquired after her marriage.

16. In submissions filed on behalf of the Protestor Anna Wangari. It was argued that she is the only legal wife having been married under a system that does not allow polygamy. It was argued further that since the deceased had children with Margaret the properties acquired after 1988 may be with them. Reliance was made on Section 40(1) of the Law of Succession Act. ("The Act")

17. On behalf of the Applicant Margaret Mugure Counsel relied on Section 3(5) of the Act and contended that the circumstances pertaining herein were acceptable, under the Act. In that the deceased though in a monogamous union married again under customary law that permits polygamy and further that Section 29 of the Act permits both Margaret and her children to inherit the deceased.

18. Having considered the pleadings, evidence and submissions herein the issues for determination are:

i. Whether Margaret Mugure is a widow recognisable under the law of Succession Act.

ii. Who are the beneficiaries herein? and

iii. How are the assets left behind by the deceased to be shared?

19. Is Mugure a widow under the Act.

It is not in dispute that though the deceased married the Protestor Anna Wangari in a Christian marriage on 6th January 1963, monogamous union, a marriage expected to be exclusively of one man and one woman, he took another wife Margaret Mugure in 1984/1988 (not clear) and from 1988 to the time of his death strangely lived with both his wives under one roof each occupying a room and thereafter a wing of the matrimonial home dubbed by Margaret as Eastern and Western wing.

20. Statute law (Repeals and Miscellaneous Amendment) Act No. 10 of 1981 as if to give credence to the reality of many families in Kenya added **Section 3(5)** to the **Law of Succession Act** which stipulates that:

“(5) notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another union, nevertheless a wife for the purposes of this Act, and in particular Section 29 and Section 40 thereof, and her children are accordingly children within the meaning of the Act. “(emphasize added).

The Court of Appeal well explains the import Section (3)5 of the Act in **M.N.M Vs D. N. M. K. & 13 others (2017) eKLR** where it held as follows:

“The Section was introduced in 1981 by the Statute Law (Repealed and Miscellaneous amendments) Act, No. 10 of 1981. The purpose of the amendment was to mitigate the rigours of decisions such as the Ruenji’s Estate (supra) and Re Ogola’s Estate (supra), which did not recognise as beneficiaries widows and children born from a union of a man already married under statute and another woman during subsistence of the statutory marriage to the extent that a marriage arising from a presumption of marriage is a marriage that is potentially polygamous, the prior monogamous marriage of deceased to M would not preclude E from being recognised as a beneficiary of the deceased. (see Irene Njeri Macharia v M. Wairimu Njomo & others, CA No. 139 of 1994, Miriam Njoki Muturi vs Bilha Wahito Muturi, CA N. 168 of 2009 and Mungai vs Mungai and Another (1995-1998) EA 206.”

21. Therefore, in tandem the law, I find that Margaret Mugure and her children are beneficiaries of the estate of the deceased in accordance with section 40 of the law Act.

22. Anna Wangari put to question Margaret Mugure’s first son’s paternity, however, the matter was not seriously canvassed. Margaret Mugure stated that she was married in 1984, and that her son was born in 1986 this fact was not challenged. The presumption therefore unless same is rebutted is that the first son of Margaret Mugure is a son of his two known parents.

23. Who are beneficiaries of this estate?

On the findings above the heirs of the estate herein are:

i) Ann Wangari Waweru – 1st widow

ii) John Muiruri Waweru

iii) Patrick Munyambu Waweru

iv) Catherine Wanjiru Waweru

v) George Wainaina

vi) Pauline Wambui

vii) Michael Mburu

viii) Nancy Njeri

ix) Teresia Wanjiku

xi) Samuel Kamau

xi) Mary Wambui

xii) Stephen Ng’ang’a

xiii) Margaret Mugure – 2nd widow

xiv) Venanzio Mwangi

xv) James Muiruri Waweru

xvi) Caroline Wanjiru Waweru

xvii) Benson Wainaina

xviii) John Irungu Waweru

24. How is the estate to be distributed?

Section 40 of the Act requires that the estate be distributed to the beneficiaries taking into account the number of wives and children surviving the deceased subject to Section 35 of the Act.

25. The 1st widow has 11 children yet the 2nd widow has 5 children. The distribution therefore amongst the two houses cannot be equal as the state has to evenly distributed taking into account the number of persons in each house.

26. It is notable that some properties were acquired before the 2nd wife came into picture such as;

Plot No.8 Ithang'arari

Plot No.47 Section SSS/4 Thika

Stall No. 375 Garrisa market- Thika

27. In my view the three named properties rightly belong to the 1st widow and her family. The 2nd widow ought not to reap where she did not sow.

28. As for the rest of the properties for the court to equitably distribute the same. It is ordered that parties do jointly agree on a valuation of all assets save the three above. Proceeds from the rent being collected by the 1st widow do cater for the cost of valuation. Valuation to be done within 45 days of the date hereof

Dated and Delivered in Nairobi on this 31ST day of OCTOBER, 2019.

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ALI-ARONI

JUDGE