



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 142 OF 1992

(IN THE MATTER OF THE ESTATE OF WAMBUGU NGERA (DECEASED))

WAKAHORA NGORORO.....APPLICANT

-VERSUS-

1. CECILIA MUMBI

2. TARCISIO KARIUKI WAMBUGU

3. THOMAS GATUTHA WAHOME

4. CECILIA THONGORI WANJERU.....PROTESTORS

AND

1. CHARLES KARIUKI CHEGE

2. HARRISON KAMAU WAWERU

3. ROSEMARY WARUGURU NDERITU

4. CHRISTOPHER KAMAU MACHARIA

5. FRANCIS MUKOMA KAIYA

6. MARY MWENDE MWANGI.....INTERESTED PARTIES

JUDGMENT

Wambugu Ngera died intestate in 1967 at 110 years old. He hailed from Othaya and was domiciled in the Republic of Kenya.

The petition for grant of letters of administration of his estate was filed in 1992 by one of his sons Tracisio Kariuki Wambugu. In the affidavit in support of the petition, the petitioner named the following as other children and grandchildren of the deceased:

1. Sisto Wahome Wambugu (son)
2. Ngugi Wambugu (son)
3. Kiama Wambugu (son)
4. Mathew Ndirangu Wambugu (son)
5. Joseph Wachira Kariuki (grandson)

6. Philip Wambugu(grandson)

In the same affidavit, the deceased is said to have owned a parcel of land known as Title No. Othaya/Kihuguru/398 measuring approximately 8.2 acres. The record shows that on 26 May 2003, Tracisio Kariuki Wambugu, Cecilia Ngari, Wakahora Ngororo and Samuel Chege were appointed as joint administrators of his estate.

By a summons for confirmation of grant dated 17 November 2006 Wakahora Ngororo sought to have the grant confirmed. Apart from the children listed in the affidavit in support of the petition as having survived the deceased, he added Cecilia Thogori Wanjeru as the deceased's daughter.

He also named the following as the deceased other dependants

1. Thomas Gatutha Wahome (grandson)
2. David Kamau Wahome(grandson)
3. Wambugu Kiama(grandson)
4. Wanjohi Kiama(grandson)
5. Wachira Kiama(grandson)
6. Ngeera Kiama(grandson)
7. Wakahora Ngororo(purchaser)
8. Samuel Kariuki Chege(purchaser).

The applicant proposed to share out the deceased's estate as follows:

1. Cecilia Thogori Wanjeru-2.05 acres
2. Taracisio Kariuki Wambugu-1.025 acres
3. Wambugu Kiama, Wanjohi Kiama, Wachira Kiama and Ngeera Kiama-1.025 acres in their joint names.
4. Mathew Ndirangu Wambugu-0.925 acres
5. Ngugi Wambugu-0.675 acres
6. Wakahora Ngororo-0.45 acres
7. Thomas Gathuta Wahome-0.775 acres
8. David Kamau Wahome-0.775 acres
9. Samuel Kariuki Chege-0.5 acres.

This application provoked a string of protests mostly from persons who have described themselves as 'purchasers' or 'interested parties'. Thomas Gatutha Wahome, the deceased's grandson swore his affidavit of protest on 22 January 2017 and filed it on the even date. In it he claimed that he is entitled to 2.733 acres of the estate and not 0.775 acres which the applicant has allocated him.

Cecilia Mumbi also the deceased's grandchild swore and filed hers on the same date that Thomas Gatutha Wahome filed his. She claimed that David Kamau Wahome who has been allocated 0.775 acres is her son; his correct name, according to her evidence, is David Kamau Mumbi and that she should get the share allocated to him.

Taracisio Kariuki Wambugu filed his protest on 16 January 2007; he deposed that since the applicant was only a purchaser and not a beneficiary of the deceased's estate, he should get his share from the person who sold him his land. He proposed to have 2.5 acres of the estate for himself. He also proposed that Ngugi Wambugu and Mathew Ndirangu should share their mother's share after which they can transfer them to persons to whom they sold their shares. Thomas Gatutha Wahome should get his father's (Wahome Wambugu's) share and similarly, Daniel Kinyua Kiama should get his father's (Kiama Wambugu's) share to hold in trust for himself and his brothers. As for Joseph Wachira Kariuki and Philip Wambugu Wanjeru, they should get the share due to the house of Magdalene Kahiuko who is described as one of the wives of the deceased Wambugu Ngera.

Unfortunately, Taracisio died before he could prosecute his protest.

Samuel Kariuki Chege swore an affidavit in which he stated that he purchased 0.25 acres of land from Sisto Wahome Wambugu on 27 December 1990. However, the said Sisto Wahome Wambugu died in July 1993 before he could clear the balance of the purchase price. He paid the balance to Sisto's sons in January 1994. These sons later added him another parcel of land making the total he claims from the estate to be 0.5 acres.

David Kariuki Wahome swore an affidavit in support of the Samuel Kariuki Chege's depositions.

Cecilia Thongori Mumbi swore her affidavit on 17 June 2008 and lamented that though she is the deceased's daughter she had been disinherited. She also swore that the deceased had five wives one of whom died without any child. The deceased, according to her evidence, divided his land into four equal portions amongst his four houses and each of these houses has settled on their respective portions. Since she is unmarried, she has been utilizing the portion given to her mother's house. She supported the summons for confirmation of grant.

Harrison Kamau Waweru filed his affidavit of protest on 29 January 2015 and swore that in 1999, the applicant sold him 0.1 acres of the estate for which he paid Kshs. 130,000/=. The applicant is said to have bought the land from one of the sons of the deceased.

Rosemary Waruguru Nderitu also swore an affidavit on 29 January 2015 claiming that she bought 0.2 acres from Cecilia Thongori in 2001. Christopher Kamau Macharia swore and filed an affidavit claiming that he purchased 0.25 acres from Cecilia Thogori Wanjeru.

On his part Francis Mukoma Kanja swore an affidavit also on 29 January 2015 to the effect that he purchased 0.2 acres from Mathew Ndirangu. Similarly, Mary Mwendu Mwangi also swore an affidavit of protest claiming that she bought 0.1 acres from Mathew Ndirangu.

Of those who filed affidavits of protest, Cecilia Mumbi, Harrison Waweru and Christopher Kamau testified in court when their protests came up for hearing; others who testified were Francis Mukoma, Joseph Kibira Kaharau, Rosemary Wanjugu Nderitu.

In their testimony, the protestors or interested parties largely adopted their depositions in their affidavits.

Cecilia Mumbi testified that her father, Sisto Wahome Wambugu was the deceased's son and therefore the deceased was her paternal grandfather. It was her evidence that she and her son David Kamau Wahome agreed to sell 0.1 acres of their share of the estate to Samuel Kariuki Chege. Samuel Kariuki Chege did not, however, pay the purchase price.

She testified further that the deceased had four wives and she, together with her brother Thomas Gatutha Wahome, were from the first house.

She also testified that Cecilia Thongori Wanjeru is the only surviving daughter of the deceased.

The purchasers' common narrative was to the effect that they bought various parcels of land comprising the deceased's estate from either the deceased's sons or his grandchildren. Harrison Waweru Kamau, one of the alleged purchasers purchased 0.1 acres from Wakahora Ngororo. On his part, Christopher Kamau Macharia purchased 0.25 acres from Cecilia Thongori. Francis Mukoma Kanja and Mary Mwendu Mwangi, on the other hand, bought their parcels from Mathew Ndirangu Wambugu in 1994 and 1995 respectively. Ndirangu himself had died and so they were claiming Ndirangu's share of the estate. Joseph Kibira was not a direct purchaser but his father, one Kaharu Wachira purchased his share from Ndirangu. The same Ndirangu sold 0.2 acres of the estate to Rosemary Wanjugu.

In his testimony, the petitioner testified that he was not related to the deceased but that he was aware the deceased had four wives and that each of the deceased's houses had been given 2.05 acres of his land. As far as he was also aware, Cecilia Thongori Wanjeru is the only surviving child of the deceased.

He testified that Thomas Gatutha Wahome and Cecilia Mumbi were from the first house; there was nobody from the second house while Cecilia Thongori was from the third house. Wachira and Kiama are from the fourth house. He testified that he bought his parcel of land from the deceased's sons.

Cecilia Thongori Wanjeru testified that the deceased was her father and that he had four wives whom she named as follows:

1. Nyakwea Wambugu
2. Mugure Wambugu
3. Magdalene Kariuki Wambugu
4. Margaret Kabui Wambugu

She was from the third house and that of all the deceased's children, she was the only survivor.

Thomas Gatutha and Cecilia Wahome are the grandchildren in the first house and they are the only survivors in that house. Their father was Sisto Wahome.

The second house is also survived by grandchildren only whom she identified by single names as:

1. Kariuki

2. Wanjohi
3. Waguthi
4. Wachira
5. Kiama
6. Ndirangu
7. Ngurukie

It was also Cecilia's evidence that all the children in the fourth house also died but there are grandchildren whom she named as follows:

1. Nderitu
2. Wambugu
3. Wothaya
4. Wambui
5. Muthui
6. Thongori

She was in agreement with the summons for confirmation of grant.

Cecilia Gathoni Kariuki testified that she was the wife of Samuel Kariuki Chege who purchased land from the estate.

David Wambugu Murage testified that the deceased was his mother's father (or his grandfather).

That far the evidence went.

The deceased died long before the enactment and commencement of the Law of Succession Act, cap. 160 and therefore the application of this law to his estate would be subject to section 2 of the Act which states as follows:

2. (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.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

(3) ...

(4) ...

When I consider these provisions together, I am bound to come to the conclusion that succession to the deceased's estate ought to be influenced by the 'written laws and customs' applying at the date of his death. However, in the absence of any evidence of such written laws or customs that applied at the time the only law applicable and which lends itself to the present circumstances is the Law of Succession Act, in particular, the intestacy provisions thereof, the deceased having died intestate.

In any event, even if any of the parties was to present evidence of written laws or customs that would otherwise apply at the time of the deceased's demise, the administration of his estate would, as much as possible be still subject to the intestacy provisions of the Law of Succession Act if subsection (2) of section 2 is anything to go by.

With this in mind, and also considering that the deceased was polygamous and died intestate, the provision in the Act that immediately comes to mind as far as administration of the deceased's estate is concerned is section 40; it states 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.

There is evidence that the deceased had four houses except that none of his wives in these houses is alive. Again, except for the surviving child in the third house, all his children had also died. This particular child, Cecilia Thongori Wanjeru, testified that it is only the deceased's grandchildren in these houses. According to her testimony, two of them were in the first house; the second house has seven while the fourth house had six.

Being the closest member of the deceased's family, I couldn't find any reason to doubt her testimony in this regard. In any case, apart from the applicant who testified that the second house did not have any children, none of the protestors ever contested Cecilia's evidence. Unlike Cecilia who, above everything else, was the deceased's only surviving child, the applicant was not related to the deceased in any way. It is reasonable to assume that Cecilia would, for this reason, be more familiar with the deceased's family than the applicant.

The principle underlying the distribution of a deceased's estate where the deceased was polygamous is fairness and equity and not necessarily equality amongst the houses; nonetheless equality as the basis of distribution of the estate may well be adopted as the appropriate scheme if it results in fairness and equity. (See **Eldoret Civil Appeal No. 66 of 2002, Mary Rono versus Jane Rono & William Rono (2005) eKLR**).

It is upon this understanding that I see no reason why each of the deceased's four houses should not have an equal share of his estate; as a matter of fact, this is the scheme that has been generally endorsed by the deceased's family members who, as noted, are related to him in varying degrees of consanguinity. His only surviving daughter alluded to this scheme and though not related to the deceased in any way, the petitioner also testified that the deceased had allocated his land to his houses for houses in equal shares.

My only concern with this scheme is that it has been proposed that part of the estate should devolve upon people who have been identified as 'purchasers' some of whom have, as noted, protested against the proposed scheme.

As much as the so-called purchasers or interested parties have voiced their concern and laid a claim on the deceased's estate, I find those claims to have no foundation in law; at their very best, they are based on illegalities. I have come to this conclusion because they have all confirmed in their evidence that they transacted on the deceased's estate and purported to dispose of it long after his demise and obviously before the grant had been confirmed. In so doing, they have infringed the provisions of 45(1) of the Law of Succession Act which protects a deceased's person's estate against intermeddling; that section states as follows:

45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

Perhaps to underscore the protection attached to such an estate against alienation without the authority of the court, subsection (2) spells out the sanctions that accrue if the deceased's estate is intermeddled with; that provision of the law states as follows:

(2) Any person who contravenes the provisions of this section shall –

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

In the face of this provision of the law, if I was to sustain the 'purchasers' claims, I would be doing nothing more than perpetuating what is otherwise an illegality.

For the reasons I have given, it would be meet and just if the deceased's estate is distributed equally amongst his four houses. It is apparent from the evidence that there are only two grandchildren in the first house; these are Thomas Gathuta and Cecilia Wahome. They will get the share due to the first house registered in their names as owners in common in equal shares.

Cecilia Thongori Wanjeru, the only surviving child of the deceased is from the third house; she is entitled to the share due to that house absolutely.

Cecilia also listed single names of deceased's descendants in the second and fourth houses; the difficult with her testimony to this end is allocating the estate to persons whose identities are not certain particularly when some of the single names given are shared amongst several of the deceased's children. None of these intended beneficiaries testified and, at least, provide the basic details of their identities sufficient enough for this court to list them against their respective shares of the deceased's estate.

Nevertheless, despite this apparent lack of detail, the court cannot proceed as if the deceased has no grandchildren who are entitled to a share of his estate by virtue of being the deceased's children's children; it has been acknowledged that they exist and the court cannot close its eyes to this fact.

The only alternative of going around this difficulty is to entrust these children's share of the estate to the only surviving child of the deceased to hold it in trust for them.

In the ultimate and for avoidance of doubt, the deceased's estate comprising of Title No. Othaya/Kihuguru/398 is hereby distributed as

follows:

1. (a) Thomas Gathuta

(b) Cecilia Wahome

Shall be registered as owners in common in equal shares of 2.05 acres of the estate.

2. Cecilia Thongori Wanjeru shall be registered as absolute owner of 2.05 acres of the estate.

3. 4.10 acres made up of two parcels 2.05 acres each for the second and third houses respectively shall be registered in the name Cecilia Thongori Wanjeru strictly to hold in trust for the grandchildren of the deceased in those two houses.

For the reason that the petitioner is not related to the deceased in any way and also because he effectively intermeddled in the deceased's estate by purporting to alienate it before the confirmation of grant, he ought not to have been appointed the administrator of the deceased's estate in the first place; I would therefore revoke the grant made to him together with Tracisio Kariuki Wambugu, Cecilia Ngari and Samuel Chege and instead appoint Cecilia Thongori Wanjeru who, as noted, is the deceased's only surviving child as the sole administratrix of the deceased's estate. The grant made to her is confirmed in the foregoing terms. Parties shall bear their respective costs. It is so ordered.

Dated, signed and delivered in open court this 29th day of November 2019

Ngaah Jairus

JUDGE