REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT SUCCESSION CAUSE NO.920 OF 2009

IN THE MATTER OF THE ESTATE OF

DAVID MUGO IKOROI alias MUGO IKOROI alias MUGO IKOROI MUGENYU (DECEASED)

AGNES MUTHONI NYANJUI

MIRRIAM MUTHONI NDUNGU.....PROTESTERS

-VERSUS-

ANNAH NYAMBURA KIOI

AGNES KIRIGO

SUSAN WAMBUI

EUNICE NYAGUTHII.....APPLICANTS

J U D G M E N T

David Mugo Ikoroi (deceased) was the son of Ikoroi Mugenyo (deceased).

Ikoroi Mugenyo had 5 wives. David Mugo was the only son of Cecilia Njeri the 3rd wife of Ikoroi Mugenyo. David had four sisters;

1. Agnes Kirigo
2. Susan Wambui
3. Eunice Nyaguthii
4. Hannah Nyambura Kioi

When his father died on 19th December 1968 he David, and his step brothers filed succession cause No. 32/1987 in which the Gideon Theuri Ikoroi was the administrator of the Estate.

In that cause Gideon Theuri Ikoroi swore an affidavit in support of the summons for confirmation of the grant which he has produced as evidence in this cause, to the effect that the deceased Ikoroi Mugenyo was survived by

-himself

-Mugo Ikoroi (the deceased herein)

-Titus Munene Ikoroi

-Peris Nyambura Ikoroi

-Njagi Ikoroi

He then proceeded to distribute the estate of the deceased to these listed beneficiaries – i.e.

Parcels no. L.R **Thegenge/Gathuthi/446** and L.R. No. **156 Warazo settlement scheme**

No.	PROPERTY	BENEFICIARIES	SHARE
1	THEGENGE/GATHUTHI/446	1. GIDEON THEURI IKOROI 2. MUGO IKOROI MUGENYO 3. TITUS MUNENE IKOROI 4. PERIS NYAMBURA IKOROI & MAITAI IKOROI 5. NJAGI IKOROI AND JOSEPH MUNENE NJAGI	4.45 ACRES 4.45 ACRES 0.9 ACRES 2.0 ACRES (JOINT TITLE) EACH 0. 8 ACRES (JOINT TITLE)
2	L.R. NO. 156 WARAZO SETTLEMENT SCHEME ACRES	1. GIDEON THEURI IKOROI 2. MUGO IKOROI	19.5ACRES 16.5ACRES

According to the sisters when that matter was ongoing, their brother David died on 26th August 1997.

Agnes Muthoni Nyanjui and Miriam Muthoni Ndung'u describing themselves as the wives of deceased filed this cause on 12th November 2009. They included as a co-petitioner by the of name Raphael Mutharu Munyori being the then Chief of the Location where the deceased husband hailed from.

The four sisters upon learning of this petition, petitioned by way of cross petition and sought the dismissal of the petition on the ground that the two petitioners were not the wives of the deceased as at the time of his death as they were divorced, and that the 3rd petitioner was a stranger to the deceased's estate. In addition, that she, Ann Nyambura was the rightful person to be administrator of their brother's estate. In their affidavit in support of their petition for letters of administration for their brother's estate the three sisters in a joint affidavit sworn on 12th October 2010 deponed that their brother was one of the administrators of their father's estate which comprised of the 2 properties named herein. According to them the 2 properties were in their father's name as on 14th October 2010 when they filed their affidavit, and that her brother represented their mother's house in Succession Cause 32/1987.

In their objections to the making a grant to the 2 petitioners, the four sisters contended that by the time of his death, the 2 of them had divorced their deceased brother and it is only their mother Wanjeri Ikoroi who was living on the land alone.

On 13th April 2011 the court appointed the 2 widows and Anne Nyambura a sister to the deceased as joint administrators. Anne Nyambura passed on, and was replaced by Eunice Nyaguthii. A fresh grant was issued on 21st February 2014. Thereafter Eunice Nyaguthii filed Summons for confirmation of grant dated 7th April2014. She proposed that David Ikoroi's share of their father's estate be shared equally – i.e. into 5 equal shares – i.e. equally among the children of the house of their mother. Agnes Muthoni Nyanjui filed an affidavit of protest dated 17th December 2014. She contended that the grant in the Succession Cause No. 32/1987 had been confirmed, that the four sisters never objected to its confirmation, and David Ikoroi, their husband had not been registered to hold the land in trust for anybody – hence they were entitled to inherit the whole of his share exclusively as his wives.

They proposed a mode of distribution that gave each of them an equal share of their husband's estate.

On 2nd November 2015, it came to light that the petitioners herein (the widows) had during the pendency of these proceedings, filed another succession cause no. 607/14 on the pretext that this cause was with regard to the estate of their father in law Ikoroi Mugenyu. Apparently in order to do so they had appointed a new advocate who had filed the new cause. When this came to light their advocate in this cause one Mr. Mugo informed the court that his clients had gone behind his back to file the new cause. He sought to withdraw from acting for them.

Justice Mativo in his ruling dated 6th November 2015, that Succession Cause no.607/14 was an abuse of the court process, having been filed by the same petitioners in this cause, using the same documents, over the exact same estate (properties). He proceeded to dismiss it.

That could not have been filed in good faith. It is apparent that the two 'widows' wanted to keep the sisters of the deceased out of the picture

with the help of their step brother Gideon Ikoroi, and had obviously hoped to steal a match from the sisters.

Be that as it may, this cause and their affidavit of protest ended up before me for hearing. I heard the protestors and their witness Gideon Ikoroi. Anne Nyanjui who testified to be the deceased's 1st wife said she did not know that her husband was administrator in his late father's estate. She denied that they did not use the grant in succession cause 607/2014 to transfer the title, from their father in law's name to the deceased's name. She confirmed however that the land belonged to their father in law who had five wives. She claimed that her parents in law had left wills on how the property would be distributed. She also confirmed that she left the deceased in 1981. She was not sure when her co-wife was married but she thought it was in 1991.

P.W.2 Miriam Muthoni said she was married by the deceased in 1995 and they had 2 children, she claimed that her mother in law had left property for her son Joseph. She said when she was married in 1995, her co-wife was not at home and they never lived together in that home. She told the court that she would not know if her co wife had a house in that homestead, making her an untruthful witness. This is because P.W.1 did testify that she had put up a house in that homestead. Having lived in that home, surely P.W.2 would have known whether or not PW1 had a house there. It appeared to me she was hiding something by giving that evasive answer. She said in 1995 when she got married in that home, there was no succession cause going on, and that everything was done. She testified that all the milk accounts were her mother in law's names, who died in 1998, and she left the same to her.

She denied that she abandoned her husband when he fell sick with HIV. She said the sisters took him to hospital in Naivasha. She said she stayed there with him for one month until he died.

She conceded to having sold 3 acres of the deceased land allegedly to educate her children.

P.W.3 Gideon Ikoroi testified that the deceased was his younger brother. He confirmed that he and the brothers and a sister filed succession cause No. 32/1987 and inherited all their father's estate which they shared among themselves. He testified that the mother to the deceased left a 'letter' leaving the tea, coffee and milk cows to the 2 widows. He said that his step sisters were never left anything by their father. That their father distributed his estate when he was alive. He said he was not aware the 2 widows had sold land to one Joseph Njagi Ikoroi.

P.W.4, the Chief (now retired) Raphael Muthara Munyori told the court only wrote a letter of introduction. He denied having any interest in the deceased's estate.

They closed their case.

Counsel for the petitioners told the court that they would rely on their affidavits and written submissions.

I have carefully considered the evidence, the affidavits and submissions before me.

The petitioners' position is that the only issue for determination is how the estate should be distributed. They argue that when this cause was filed the estate that is being referred to as belonging to the deceased's, was a share from their father's estate, it had not been transferred to his name, and that's how they became beneficially entitled. That the protesters used succession cause 607/2014 to register the two properties which were shared to the deceased into his name.

Secondly that the protesters (widows) the original petitioners, should never have filed this cause in the 1st place because, even though the grant was confirmed on 12th March 1991 registration of the properties in the deceased's names happened 7 years after the death of the deceased presenting a scenario full of questions that the protesters did not explain which meant that as at the time of filing, the deceased did not have either of the two properties in his name.

The submissions on behalf of other protestors are basically that these properties belong to the deceased, that his wives are the ones who are beneficially entitled and the sisters have no claim at all, and right, as they failed to show that the property was being held on behalf of their mother's house, they have not demonstrated that they were dependents of the accused.

The petitioners pointed out that their brother the deceased had children but it was noteworthy that the 2 protestors had kept the children of the deceased out of the succession cause, naming only themselves, yet some of those children were adults who were beneficially entitled to inherit from their father, and the minor's interests had not taken been taken into account.

Before going into the issues, I need to point out that the alleged sale of three acres out of what is considered the estate of the deceased was unlawful. Whoever did it did it in conflict with the law of succession as there was no such authority.

Section 82(b) (ii) clearly states;

> "no immovable property shall be sold before confirmation of the grant;"

That amounts to intermeddling contrary to section 45 of the law of Succession Act. Whatever sale that is purported to have been made is null and void and the 'buyer' is only entitled to a refund of the purchase price from the 'seller'.

The move to start selling the property even before the grant was confirmed again points to bad faith on the part of the protesters.

Are the four sisters beneficially entitled to their brother's estate? If so what is their share?

To determine these issues it would be necessary to verify certain facts. This is provided for by the proviso to S.71 of the Laws of Succession Act which states: -

> Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.

It goes without saying that the outcome of the Succession Cause no. 32/1987 bears great weight to this cause. It is noteworthy that except for providing the confirmed grant, P.W.3 did not produce the title deeds/search certificates to challenge the evidence that the protestors used succession cause no. 607/2014 to transfer the properties long after the deceased had died. If that be the case, then that means that as at the time they filed this cause those properties were still in the name of the father of the deceased, and there was no estate in the name of the deceased and there was no estate in the name of the deceased, except an anticipation of what his share would turn out to be from his father's estate. That explains why when they filed this cause, they put in the deceased's name, and added his father's name as an 'alias' just in case.

It further explains why Gideon P.W.3 was a party in succession cause no. 607/2014 because his share to his father's estate was still tied up with the deceased's share and he needed that cause to separate his share from that of the deceased. From what is before me it would appear that the purpose for the secret filing of cause no 607 of 2014 was produce the estate of the deceased and have it inherited by the two petitioners without involving the sisters.

Gideon's participation in these proceedings raises. This is a step brother to the deceased and his sisters, but now pits the sisters with their sisters in law. He claims that the estate of his father was properly distributed, and he and his brother the deceased got the bigger chunk of their father's estate.

On the face of it that their father's estate was shared among representatives each from the 5 houses. That says something about the distribution. It appears logical to the that the fact that there were five administrators to the estate means that each house was being represented. Without any explanation to the contrary from the protesters, the only reasonable explanation in my view is that it is only because each of the five houses had to be represented.

In 1987, the deceased's mother was still alive –in fact he died before her. It is not tenable that that succession cause would lead to the disinheriting of his mother, or that the deceased would own all the family property even to the exclusion of his mother, who in those circumstances ranked higher in priority in becoming the administrator of her husband's estate . In my view, it appears to me she could only have consented to her son becoming the administrator of the family's share from her deceased husband, who died in 1968, when the deceased was 14 years old. His mother must have held forth up to the time the succession Cause 32/1987 which was filed,9 years after his death, by then P.W.1, the deceased's wife had left the home for 6 years, and P.W.2 had not even been married.

It is the protesters who filed this cause, then fled it, when they realized that sisters in law had a valid claim to the estate.

My view of the matter is that the fact that the 'widows' brought this cause while the deceased's share of the property was still in his father's name makes his sisters beneficially entitled as his children. Even if the property had been transferred to him, it is clear from Gideon's testimony that the five of them were registered as administrators of their father's estate, upon confirmation of the grant they became personal representatives of the deceased.

It is now settled that the Law of Succession Act defines children to include daughters whether married or not. This was held **RONO vs. RONO [2008] I KLR (G&F) 803** and in the case of **STEPHEN GITONGA M'MURITHI VS. FAITH MURIITHI NYERI CA NO. 3 OF 2015(UR)** where the Court of Appeal said,

> *"The appellant's complaint against the above mode of distribution is that it failed to take into account the clear principles of law enshrined in s.38 and 40 of the Law of Succession Act Cap 160 Laws of Kenya. Section 38 enshrines the principle of equal distribution of the net estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried. Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each household of a polygamous deceased. Applying the above principles to both the learned trial judges' reasoning and distribution, it is our finding that the learned trial judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of s.38 of the Law of Succession Act by discriminating against the married daughters of the deceased".*

By choosing to file this succession cause in the manner in which they did the petitioners now turned protesters realized that what they were calling the estate of her husband was the share of the house of the Celina Wanjeri their mother in law, which would include any share for the sisters and that is why they filed Succession Cause no. 607/14. From the foregoing authority, they cannot escape that position, and I do find that the 4 sisters do have a valid claim over the share that their brother now holds in his death.

Having found that; it is correct to state that whatever the deceased was given ought to have been shared by his mother's house including his mother. She being deceased, leaves him and his sisters. There is no evidence that either the mother or father of the deceased bequeathed the estate to anyone and in particular those claims were not established.

What are the parties herein beneficially entitled to? In the best interests of justice, I make and hold the following findings;

1.The deceased David Ikoroi and his four sisters are beneficially entitled in equal shares, to the share given to him out of the estate of their father, Ikoroi Mugenyo, comprised of 4.45 acres from **Thengenge/Gathuthi/446** and 16.5 acres from **L.R. 156 Warazo settlement scheme.**

2.The protesters' share is limited to David Ikoroi's share above.

3.They are to inherit the same in terms of section 40 of the Law of Succession Act which provides; 40. Where intestate was polygamous

> *(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.*

4. The protesters will have a life interest in the property to devolve in the children in equal shares.

5. Should there be any child who is still a minor then s. 58 of the Law of Succession Act will apply

It is so ordered.

Each party to bear its own costs.

Dated, delivered and signed at Nyeri this 30th day of January 2018

Teresia M. MATHEKA

JUDGE