

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 1118 OF 2009

IN THE MATTER OF THE ESTATE OF SAMUEL GICHUHI

MUGAMBI alias GICHUHI S/O MUGAMBI(DECEASED)

NAOMI WANJIKU GICHUHI.....PETITIONER/RESPONDENT

-VERSUS-

RUTH WANGECHI KAMAU

ANNE WAMBUI IRUNGU

MARGARET MUMBI KAGIRI

ESTHER WAMBUI KAGUNYA

MARY WANGUI NDERITU.....PROTESTERS

JUDGMENT

SAMUEL GICHUHI MUGAMBI (the deceased) died on the 1st May 2008 at the age of 106 years at Kigwandi according to the certificate of death issued on the 4th August 2008. He had two wives in his life the first of whom pre deceased him. He had five children with her, four daughters and one son, who also predeceased him. In the first house was survived by

1. RUTH WANGECHI KAMAU 75 daughter married
2. ANNE WAMBUI IRUNGU 73 daughter married
3. MARGARET MUMBI KAGIRI 71 daughter married
4. ANTONIA NYACHIUMA WACHIRA 57 daughter in law
5. ESTHER WAMBUI KAGUNYA 59 daughter married

In the second house he was survived by ;

1. NAOMI WANJIKU GICHUHI 75 widow
2. JASON MAINA GICHUHI 57 son
3. MARY WANGUI NDERITU 41 daughter in law
4. DAVID WACHIRA GICHUHI 50 son
5. MARY WANGECHI GICHUHI 47 daughter
6. EVANTUS MWANGI GICHUHI 44 son

His estate comprised of the following properties;

1. L.R THENGENGE/UNJIRU/ 666
2. L.R THENGENGE/UNJIRU/ 599

3. L.R LAIKIPIA/ TIGITHI/MATANYA BLOCK 6/108
4. PLOT 10A KARURUMO
5. BARCLAYS BANK SHARES-1166
6. BARCLAYS BANK ACCOUNT NO. 3709806
7. POSTBANK ACCOUNT NO. KNYE 268
8. THENGENGE UKIRA FARMERS COMPANY SHARES-1092
9. TAIFA SACCO ACCOUNT NO. [particulars withheld]
10. TETU HOUSING SHARES-148

The widow filed this succession cause and was issued with grant of letters of administration intestate on 6th October 2010. She filed the summons for confirmation of grant on the 14th July 2011.

In her affidavit in support of the Summons she described the children as surviving the deceased, and herself and the two daughters in law as the dependants of the deceased. She proposed the following mode of distribution.

PROPERTY	BENEFICIARY	SHARE
1 LR. THEGENGE/UNJIRU/599 3.84hectares	1. NAOMI WANJIKU GICHUHI 2. ANTONIA NYACHIUMA WACHIRA	6.94 ACRES 2.62 ACRES
2. LR. THEGENGE/UNJIRU/666 0.67 acres	ANTONIA NYACHIUMA WACHIRA	ABSOLUTELY
3. LR. LAIKIPIA/TIGITHI/MATANYA/BLK 5/1013 6.685 hectares	1. JASON MAINA GICHUHI 2. MARY WANGUI NDEIRTU 3. DAVID WACHIRA GICHUHI 4. EPHANTUS MWANGI GICHUHI 5. NAOMI WANJI GICHUHI 6. ANTONIA NYACHIUMA WACHIRA	4 ACRES 4 ACRES 3 ACRES 3 ACRES 3 ACRES 3 ACRES
4 PLOT NO. 10A KARURUMO MARKET	1. EPHANTUS MWANGI GICHUHI 2. MARY WANGUI NDERITU	BOTH IN EQUAL SHARES
5 ALL CASH IN A/C NOS.3709800 B.B.K LTD (NYERI BRANCH) KNYE 268 POST BANK AND ALL SHARES IN B.B.K LTD	1. NAOMI WANJIKU GICHUHI 2. RUTH WANGECHI KAMAU, 3. ANN WAMBUI IRUNGU 4. MARGARET MUMBI KAGIRI 5. ANTONIA NYACHIUMA WACHIRA 6. ESTHER WAMBUI KAGUNYA	ALL IN EQUAL SHARES

		7. JASON MAINA GICHUHI 8. MARY WANGUI NDERITU 9. DAVID WACHIRA GICHUHI 10. MARY WANGECI GITHUHI 11. EPHANTUS MWANGI GICHUHI	
6	SHARES IN TETU HOUSING CO-OPERATIVE SOCIETY LTD.	NAOMI WANJIKU GICHUHI	WHOLLY
7	SHARES IN THEGENGE UKIRA FARMERS CO. LTD.	DAVID WACHIRA GICHUHI	WHOLLY

The protesters on their part through an affidavit of protest filed by ESTHER WAMBUI KAGUNYA sworn on the 20th day of September 2011 and filed on the 22nd September 2011 have proposed that the estate be shared equally between the two houses as provided for under section 40 of the LOSA since the deceased died intestate and was polygamous.

Parties agreed to proceed by way of oral evidence.

The protester's position was given in the testimony of Esther Wambui Kagunya. She testified that her father had not distributed his estate during his life time.

The Petitioner testified and called three witnesses who also recorded, filed and served their statements to the protesters following directions given by Mativo J who handled the matter before his transfer.

According to her evidence and that of her witnesses the deceased left a will which the petitioner filed on the 4th March 2016 distributing his estate. That the married daughters in the first house were never given anything because they were not there when the will was made, a case, like the Swahili saying goes, of *asiyekuwepo na lake halipo*. That no one could now go against that will.

Parties filed written submissions.

I have carefully considered the evidence on record, the witness statements, the documents filed and the submissions by each party

The only issue for determination is the mode of distribution of the estate.

The petitioner's position is that she is following the will of the deceased. However she has not explained why if there was indeed a valid will she filed this cause on the basis that the deceased died intestate.

The document said to be a will is not dated and only bears the date of translation. The petitioner told the court that those who were present were the ones the deceased gave something, that what the deceased said was recorded by the 'headman' one Mutara. DW2 Paul Wahome Matu confirmed that the deceased had two wives and his wish was for each house to have its share. That the deceased only gave property to the unmarried daughters who were present.

According to DW3 Joseph Munene Gathigi, the deceased made his will and members of his family who were present signed and agreed that the property was properly shared.

I have perused the so called will which the petitioner insists she has followed in her mode of distribution. One can immediately see the disparities that stand out.

With regard to L.R 599 it says that the land to the east of the deceased's house shall belong to Antonia Nyachiuma, and the one to west to Naomi Wanjiku and her family. No acreage is mentioned

With regard to L.R 666 it says that it be consolidated with 599 and he and his wife will farm on the northern side of the consolidated land in their life time. The petitioner has distributed this to Antonia absolutely.

That the parcel no 544 at Kagumo is to be shared equally between Antonia Nyachiuma and Ephantus Mwangi. No such property is mentioned in the list of deceased's assets and if by any chance it is the Plot no. 10A Karurumo Market, then the distribution does not comply as it replaces Antonia with Mary Nderitu.

Another Parcel No J51 to be shared among the following,

1. ANTONIA NYACHIUMA WACHIRA 3acres
2. JASON MAINA GICHUHI 4acres

3. CHARLES NDERITU GICHUHI 4acres

4. DAVID WACHIRA GICHUHI 3acres

5. EPHANTUS MWANGI GICHUHI 3acres

6. MARY WANGECHI AND NAOMI WANJIKU 3acres

In the list of assets there is no J51 but if it be the parcel no Laikipia/Tigithi/Matanya BLK5/1013, then again, she does not comply as according to the 'will' she is to share 3 acres with Mary Wangechi yet in the distribution she gives herself three acres, and removed Mary Wangechi.

Some members of the family also get more shares than others without any explanation at all especially for the properties which the deceased allegedly did not distribute.

From the above disparities it is obvious even the person claiming there was a will has not followed it.

In any event the document appears to have been an expression of the deceased's wishes but it bears no date and cannot answer to the legal requirements of a "will" as defined by the LOSA *means the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II, and includes a codicil.*

The long and short of it is that there was no will and the deceased died intestate meaning, by dint of section 34 LOSA "A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect", what is being described as will is not capable of taking effect, and any property he had is considered free property and available for distribution.

Secondly the issue of married or unmarried daughters is settled in the Kenyan jurisprudence on succession and cannot be pleaded in an intestate matter as a reason for disinheritance. The LOSA does not know sex or gender. It knows children and they have equal rights to inherit.

It is not in dispute the deceased was polygamous having married RUDIA WAMBURA (deceased) and NAOMI WANJIKU each of whom they had five children.

The house of NAOMI has submitted that it is ANTONIA who ought to get the share for RUDIA's house and then decide how to share with them.

That cannot be. ANTONIA is a daughter in law of the deceased and is beneficially entitled just like her sisters in law, and it is not for the house of NAOMI to tell the house of RUDIA how to share their share.

Having said that it is my view that the applicable law is section 40 of the LOSA.

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.

(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.

All the deceased's children are adults and there is no need to make special provisions for any of them. It is only fair that the estate be shared equally between the two houses. It is important however to take into consideration the fact that some of the family members may have been in occupation of some parts of the estate, especially where the homestead of the deceased was. Hence while sharing the estate equally, care should be taken not to cause unnecessary hardship to any member of the family.

With regard to the 1st house the deceased was predeceased by his wife so there are children and no spouse. For them section 38 applies and the share for their house shall "devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."

Regarding the second house their share will be shared among them taking into consideration that their mother the petitioner is one unit.

I therefore make the following findings and orders;

1. That the deceased died intestate
2. That he was polygamous

3. That section 40 of the Law of Succession Act applies to his estate

However before making final orders it is necessary that I be furnished with further information. The protesters' submission that all the shares be sold and the proceeds be shared equally sound very drastic to me. What if there are members of the family who would rather their father's investment devolves to them and they continue to benefit from it? I think it is important to give parties a final go at sharing the estate between the two houses.

1. Where was the matrimonial home for the deceased and his two wives?
2. What is the value of the cash in the bank accounts?
3. What is the size of plot 10A Karurumo Market?
4. Can each side now make a proposal on what they can have without splitting some of the properties into miniscule portions?

On the foregoing reasons I defer final orders for 30 days to enable parties supply this information.

Dated, delivered and signed this 26th January 2018 at Nyeri.

Teresia M Matheka

Judge

Ms. Macharia for Lucy Mwai for protesters

Present in court:

Antonia Wachira

Naomi Wanjiku

Jason Maina

Ephantus Gichuhi

David Wachira

Mary Wangui Nderitu

Mention on 12th March 2018 for parties to provide the court with further information and for final orders.

Judge