



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1914 OF 2008

IN THE MATTER OF THE ESTATE OF SYLVESTER CHARLES MURUMBA WAFULA (DECEASED)

JUDGMENT

1. The deceased herein died on 4th July 2008.

2. This cause was initiated by way of petition for special limited grant dated 11th August 2008 filed herein on 12th August 2008 by Rose Kajaira Wafula, hereinafter referred to as Rose, seeking preservation of certain assets and release of certain funds to her. The matter was placed before Waweru J on 12th August 2008 and it was directed that the same be served on Mary Murwayi Wafula, hereinafter referred to as Mary, described as the other widow of the deceased, who, upon being served with the petition for limited grant, now going by the name Mary Odenyo Wafula, filed an answer to the said petition dated 22nd August 2008, wherein she raised several issues. The matter was heard by Nambuye J, who delivered a ruling on 8th July 2008, where it was ordered that the estate be persevered pending grant of representation and that the two widows petition for full grant of representation.

3. Two petitions were lodged in the cause by Mary and Rose for grant of letters of administration intestate to the estate of the deceased. The first in time was lodged by Mary on 23rd February 2011. She listed eleven (11) individuals as the survivors of the deceased, being a widow, a former wife, three (3) daughters, four (4) sons, mother of the deceased and a granddaughter. Their names were stated to be Mary Odenyo, Rose Kajaira, Evaline Nakhumicha, Pamela Nakhungu, James Wanjala, Anne Nasambu, Michael Simiyu, Cyprian Waswa, Matthias Wesamba, Kateline Ngutu and Clementina Namarome. She has attached a schedule of the assets that the deceased allegedly died possessed of. The petition by Rose was filed on 28th January 2011. In it she listed twelve (12) individuals as the survivors of the deceased, being two (2) widows, four (4) daughters, four (4) sons, his mother, a granddaughter and a nephew. Their names were listed as Rose Kajaira, Mary Murwayi, Evaline Nakhumicha, Pamela Nakhungu, James Wanjala, Anne Nasambu, Michael Simiyu, Cyprian Waswa, Matthias Wesamba, Kateline Ngutu, Clementina Namarome Murumba and Edelquin Murumba. He was said to have died possessed of several assets, both real and personal.

4. The parties were no able to agree on the issue of representation, and they recorded a consent on 21st June 2011, before Lenaola J, in the following terms –

‘There being no settlement the court to determine who should be appointed Administrator and what assets form part of the estate and the modality of accounts to be taken in respect of the estate.’

5. The trial was conducted before Njagi J and I, on diverse dates. The oral hearing began on 30th May 2012 before Njagi J. The first on the witness stand was Rose. She allegedly married the deceased under Luhya customary law in 1975. The begat four children – Evaline Nakhumicha, Pamela Nakhungu, James Wanjala and Anne Nasambu. Pamela Nakhungu was said to have had a child called Catherine Ngutu, whom the witness and the deceased raised as Pamela was said to have suffered depression from which she had not recovered. She testified that she separated from the deceased in 1981 after Mary came into the picture, but added that she was never formally divorced. She mentioned that during coverture with the deceased they acquired some assets; she named two (2) Renault cars (the deceased allegedly sold one of them), twenty-two (22) acres of land, house No. 773 Plainsview, a commercial plot at Kanduyi and LR No. 12219/2. She stated that she took out loans to facilitate purchase of some of the landed assets, specifically the 22 acres and house No. 773 Plainsview. She proposed that she and Mary be appointed joint administrators. She stated that she recognized all the children of Mary as being children of the deceased. During cross-examination, she conceded that her name was not on the lease document for house no. 773 Plainsview. She said that the assets that she listed in her petition were given to her by her daughter and her brother-in-law. She stated that it was Mary who had custody of the title documents to the estate’s assets. She said she was unaware of any divorce proceedings, and if there were any she never was served with the divorce papers. She stated that the divorce papers were only brought to her attention after the deceased passed on. She said that after separation, the deceased continued to support her by giving her money for rent.

6. Francis Clement Simiyu took the stand next. He introduced himself as the elder brother of the deceased. He said that the deceased had married two wives under customary law. They both begat children. He stated that Rose left the matrimonial home after the second wife was married, but was not divorced as dowry was never reclaimed as per custom. He testified that under Bukusu customs the estate of a polygamist would be shared amongst his widows and children. He stated that he was unaware of the divorce proceedings. He testified that some thirty (30) acres of land at Matulo were sold by Mary without consulting the children, leaving twelve (12) acres. He mentioned that the

deceased owned a forty-eight (48) acre farm at Siritani and five (5) acres at Kanduyi. He said that he did not know much about many of the assets listed in the schedule. He said that the deceased had showed him his assets but he did not have the documents.

7. Evelyn Nakhumicha Kinyangi was next. She introduced herself as the first child of the deceased with Rose. She mentioned that her parents separated at some point, but she could not recall the year, and it was after that that a stepmother, Mary, moved in. She stated that her mother continued to interact with the deceased over their welfare. She said that she was unaware of any divorce proceedings between the deceased and her mother. She stated that the deceased used to take care of his seven (7) children and other relatives, who included his mother, his granddaughter and a son of his late brother. She asserted that all the assets listed in her mother's petition belonged to the deceased but conceded that she did not have any documents to prove that assertion. She said that her stepmother did not want to share the estate.

8. After Rose closed her case, Mary took the witness stand on 27th May 2015. She stated that she had married the deceased 1981 under customary law, which marriage was later solemnized under statute sometime in 1997, and a marriage certificate duly issued. She mentioned that she raised the four children of Rose. She testified that Rose was divorced in judicial proceedings, and she produced a decree of divorce to support her case. She identified the assets in the deceased's name as E Bukusu/S Kanduyi/1029, 1199, 3093 and 3237, motor vehicles KZY 478, KAJ 073X and KAX 317E, and shares in Eveready, Housing Finance Company of Kenya and Mumias Sugar. She mentioned that some assets were in their joint names such as shares and funds at Housing Finance and the National Bank of Kenya. She also mentioned an insurance policy with CFC Life, which she stated was taken out in 2007, and which named her as beneficiary. She also mentioned that one of the assets had a commercial building standing on it, and that she was collecting rent from the tenants. She proposed to be made joint administrator with any child of the deceased, and that the estate be shared out equally between the beneficiaries. She also sought to have the proceeds of the insurance policy released to her. She said she was unaware that the deceased owned Nairobi Block 93/773, Plot No. 8 Makutano-Kanduyi, Bungoma Municipality/507, account number 7007358 and other accounts in Barclays, National and Kenya Commercial banks. She stated that she had not sold any of the assets nor leased any land to a school. She mentioned that Nairobi Block 93/773 was bringing income which she was collecting. She stated that the property was jointly registered in her name and in the name of the deceased, and the same had reverted to her upon his demise. She mentioned that she had sold the said property. She denied having a property at Bandari Villas. She also mentioned that as the deceased had died in a road traffic accident, she had filed for damages arising therefrom. She stated that that case was still pending. She mentioned that the deceased was operating a professional surveyor's firm at Westlands, which wound up after he died, and she took the computers and the furniture home. She said she did not handle any of the proceeds of the work that the deceased was doing in Tanzania. She said that Pamela's child was not a dependant of the deceased as she lived with Rose and the deceased was not supporting her. In any event, she added the child's mother was an adult. She concluded by producing copies of the title documents of the assets of the estate that she was aware of.

9. She called one witness, Jackson Mbuthia Kiboi, a legal officer with Liberty Life Assurance (K) Limited, who told the court that the deceased had taken out three policies of insurance, two of them life and one personal accident. In all three Mary was named as beneficiary. He stated that under section 111 of the Insurance Act a policyholder had the option of nominating the person to benefit in the event of his death. He said that according to their records and the law the person entitled to the proceeds of the three policies was Mary, and added that the only reason they had not paid her was because of the orders made in this matter.

10. At the conclusion of the oral hearing, I directed the parties to file written submissions. There has been compliance as both sides have filed their respective written submissions complete with authorities. I have perused through the submissions and the authorities, and noted the arguments made therein. The issues for determination are those captured by Lenaola J in the order referred to in paragraph 4 here above. They are three, summarized as follows-

- (a) Who should be appointed administrator or administrators of the estate;
- (b) Which assets make up the estate; and
- (c) Who should render accounts and in what form.

11. The deceased died intestate. Section 66 of the Law of Succession Act, Cap 160, Laws of Kenya, sets out the persons who qualify for appointment as administrators of the estate of an intestate. The provision is in the following terms-

'Where a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference -

- (a) surviving spouse or spouses, with or without association of other beneficiaries;*
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*
- (c) the Public Trustee; and*
- (d) creditors ... '*

12. By dint of the above provision, the persons entitled to administer an intestate estate, in their order of priority, are the surviving spouse or spouses, the children of the deceased, the parents of the deceased, the siblings of the deceased, other relatives up to and including the sixth degree, the Public Trustee and creditors. However, the court retains discretion in making these appointments, and may disregard the order of preference stated in section 66. The contest in this matter over who should administer the intestate estate of the deceased is between two women, Rose and Mary. Rose claims that both of them are widows of the deceased, while Mary asserts that she is the only surviving widow of the deceased. By dint of section 66, surviving widows have priority over everybody else with respect to right to administration. So if these

two are the surviving widows of the deceased then they would rank prior to everybody else. Usefully they are the only persons who aspire to that office. The only issue for me to determine is who between them should be appointed.

13. The status of Mary as surviving widow of the deceased is not disputed; it is the status of Rose that is up for determination. It is common ground that Rose was married to the deceased at customary law, but separated from him at some point in their lives. She asserts that she was never divorced, but Mary counter asserts that she was divorced in a judicial process, and has produced a document to support her case. Confronted with that document, a decree of divorce, Rose says that she was not party to the said proceedings as she was never served with any court process relating to them. Among the documents that Mary placed on record is an order made in Nairobi CMCDC No. 139 of 1995 on 30th April 1997, which was extracted on 3rd September 1997. The order dissolved the marriage between the deceased herein and Rose. There was a customary law marriage, so the issue of a decree *nisi* being made absolute did not arise. It would mean that the order of 30th April 1997 was final. Mary also produced a certificate of marriage, serial number 978133, indicating that she and the deceased contracted a statutory marriage under the African Christian Marriage and Divorce Act, Cap 151, Laws of Kenya, now repealed, at Kibabii Catholic Church, Bungoma, on 6th September 1997. From this material it is clear to my mind that Rose ceased to be a wife of the deceased on 30th April 1997. Whether she was unaware of the proceedings that led up to her divorce is neither here nor there; it is matter that I cannot revisit, she should have moved the court appropriately in Nairobi CMCDC No. 139 of 1995 or by way of appeal of that decision at the High Court.

14. The persons who are entitled to a share in an intestate estate are set out in Part V of the Law of Succession Act. They include surviving spouses, children, parents, siblings and other relatives of the deceased up to and including the sixth degree. According to section 66 of the Act, it is these same persons who are entitled to administration of the estate. These are the persons who survive the deceased. A former spouse, meaning a spouse whose marriage with the deceased had been dissolved by the date of the latter's death, cannot possibly be said to be a person who has survived the deceased. She has no right in intestacy to his estate, and, by virtue of section 66, she has no prior right to administration of his estate. She cannot access the estate directly, and, the only way to lay claim to the estate is by the means provided in Part III of the Act, specifically through section 26. As Rose was no longer a spouse of the deceased as at 4th July 2008, she does not qualify to be his surviving spouse. She is not entitled in intestacy to a share in his estate, and, by dint of section 66 of the Act, she does not have priority to appointment as administrator of his estate.

15. On the assets that make up the estate of the deceased, there is quite some controversy. Mary produced several title documents that were in her possession relating to assets registered in the name of the deceased. These relate to E Bukusu/S Kanduyi/1029, 1199, 3093 and 3227, and motor vehicles registration marks and numbers KZY 478, KAJ 073L and KAX 317E. She also mentioned shares in Eveready, Housing Finance and Mumias Sugar as other assets, although she did not produce any documents to support her oral testimony on them. She conceded that there were assorted movables such as bicycles, cutters and livestock lying in some of the landed assets. Rose produced documents to prove that some of the assets in her schedule existed and belonged to the deceased, that is to say Bungoma/Municipality/507, E Bukusu/S Kanduyi/1029, 1199, 3093 and 3227, LR No. 12219/2 and Nairobi/Block 93/773, KZY 478 (Peugeot), KAJ 073L (Mercedes Benz), KAX 317E (Daihatsu Storia) and KAX 319E (Honda station wagon). For the rest of the assets she did not provide any documents of title. The contest on the assets is over Nairobi/Block 93/773, LR No. 12219/2 and the three policies of insurance. Rose claims that she had participated in the acquisition of Nairobi/Block 93/773 and LR No. 12219/2 as she had taken out loans to raise money therefor. She has not provided evidence to support these assertions. The material on record reveals that Nairobi/Block 93/773 was transferred to the joint names of the deceased and Mary by a transfer of lease dated 3rd August 1983, lodged at the lands registry on even date. A certificate of lease accordingly issued, dated 9th August 1983, reflecting the two as joint owners thereof. Upon the death of the deceased the property was transferred to the name of Mary and a certificate of lease was issued in her name, dated 31st October 2013. A certificate of official search dated 27th July 2015 shows that the said property was transferred to the names of Dick James Safari and Winnie Paul Awuor on 17th June 2015. Regarding LR No. 12219/2, there is on record a certificate of lease dated 26th March 1988, which reflects that the said property was transferred to the names of the deceased and Mary on 15th July 1998. The record states that the two were to hold the same as joint tenants. There is also a land certificate in respect of Bungoma/Municipality/507, where the registered proprietors are stated to be the deceased and Mary.

16. The concept of joint tenancy was comprehensively addressed in *Isabel Chelangat vs. Samuel Tiro Rotich & 5 others* (2012) eKLR, in the following terms –

‘ ... I must distinguish between joint ownership of land and land held in common. These are two different types of tenancies by which two or more people are entitled to simultaneous enjoyment of land. To expound on this point I have borrowed heavily from two texts, Megary & Wade, The Law of Real Property and Cheshire & Burns, Modern Law of Real property. According to Burns, “ ... a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares ...” Further, that there is a thorough and intimate union between joint tenants. Together they form one person.’

A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities.” The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under a will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are

(i) The unity of possession

(ii) The unity of interest

(iii) The unity of title

(iv) The unity of time.’

(see also *Benson Mutuma Muriungi vs. CEO Kenya Police Sacco & another* (2016) eKLR)

17. The law on joint tenancies is stated in section 91 of the Land Registration Act, No. 3 of 2012. Section 91(4) thereof provides –

‘If land is occupied jointly, no tenant is entitled to any separate share in the land and consequently –

(a) dispositions may be made only by all the joint tenants;

(b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; or

(c) Each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person and any attempt to so transfer an interest to any other person shall be void.’

Then there is section 93 which states as follows –

‘If a spouse obtains land for the co-ownership or use of both spouses ...

(a) there shall be a presumption that the spouses hold the same as joint tenants ...

(b) the Registrar shall register the spouses as joint tenants.’

18. From the above, it is plain that Mary and the deceased held joint tenancies in Bungoma/Municipality/507, LR No. 12219/2 and Nairobi/Block 93/773. Upon the demise of the deceased, his interest in the three assets united with that of or passed to the surviving tenant, that is to say Mary, accordingly constituting her the sole owner or proprietor thereof. The said three (3) properties do not therefore form part of the estate of the deceased.

19. On the insurance policies, it is plain, from the record, that Mary is named as the sole nominee, that is the person entitled to the proceeds of the said policies. This introduces the concept of nomination. The concept was addressed in *In re Estate of Carolyne Achieng Wagah (Deceased)* (2015) eKLR, where it was stated that –

‘It is the law that... funds the subject of a nomination do not form part of the nominator’s estate, and therefore such funds cannot pass under the will of the deceased or vest in his personal representative. Such funds are not subject to the succession process, and should be dealt with in accordance with the law governing the nomination. Nominations are statutory, in the sense of them being specifically provided for by a particular statute.’

(see also *Benson Mutuma Muriungi vs. CEO Kenya Police Sacco & another* (supra))

20. In this case the funds in question are insurance policies. The relevant law to govern them should be the Insurance Act, Cap 487, Laws of Kenya. The provision therein on nominations is section 111(1), which states that –

‘The holder of a policy of life assurance on his own life may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of death.’

21. The deceased in this case nominated Mary as the person to benefit from the insurance policies upon their maturity. There is nothing to suggest that the said nominations were invalid or ineffective. Consequently, the proceeds of the said policies ought to be paid directly to the nominee, Mary, without going through this cause since the funds the subject of those policies do not form part of the estate of the deceased and are therefore not available for distribution in this succession cause.

22. From the material that the parties presented before the court it is my finding that the estate of the deceased comprises of the following undisputed assets - E Bukusu/S Kanduyi/1029, 1199, 3093 and 3227, motor vehicles KZY 478 (Peugeot), KAJ 073L (Mercedes Benz), KAX 317E (Daihatsu Storia) and KAX 319E (Honda station wagon) and the shares in the listed companies. Any other assets that are subsequently found to form part of the estate can be brought up at the confirmation of the grant to be made at the conclusion of this judgment.

23. On the issue of accounts, I have carefully gone through the record of the affidavits filed herein, as well as the oral testimony of the parties, and I am not satisfied that a case has been made out for either party to render accounts with respect to their handling of estate property.

24. The directions given for the disposal of the matter were in respect of the three questions that I have addressed above. I shall here below proceed to give final orders in terms of the said directions, that is –

(a) That I hereby appoint Mary Odenyo Wafula and Evelyn Nakhumicha Kinyangi administrators of the intestate estate of the deceased;

(b) That a grant of letters of administration intestate shall issue to them accordingly;

(c) That the said administrators shall file for confirmation of their grant after expiry of ninety (90) days from the date of this

order;

(d) That the orders made herein on 22nd August 2008 are hereby discharged to pave way for the smooth administration of the estate by the administrators appointed here above;

(e) That the matter shall be mentioned after ninety (90) days for compliance;

(f) That there shall be no order as to costs; and

(g) That there is leave of 28 days for any party aggrieved by this judgment to appeal against it at the Court of Appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH DAY OF MAY, 2018.

W. MUSYOKA

JUDGE