REPUBLIC OF REPUBLIC

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 489 OF 2005

(IN THE MATTER OF THE ESTATE OF NJUGI MUTHOGA(DECEASED))

JOSEPH NDUNGU NDUHIU...............................PETITIONER

VERSUS

GEORGE MUTHOGA NJUGI......................1ST PROTESTOR

LUCY MUTHONI KARIUKI........................2ND PROTESTOR

JUDGMENT

Njugi Nduhiu, the deceased, died intestate in 1961. The grant of letters of administration of his estate was made to the petitioner on 2nd May, 2016 in his capacity the deceased's son. By a summons dated 30th November, 2016 he sought to have the grant confirmed.

According to the affidavit in support of the summons, he sought to share out the estate between himself and **George Muthoga Njugi, Loise Wangechi Kirethi** and **Samuel Mathenge Mwaniki** all of whom he described as the deceased's other children. The only asset comprising the deceased's net estate is a parcel of land known as **Title No. Tetu/Ichagachiru/364** measuring approximately 5.2 acres. The petitioner proposed to have the land shared out equally amongst the deceased's children.

By an affidavit sworn on 21st April, 2017, George Muthoga Nduhiu protested against this scheme of distribution; he instead proposed that the petitioner should get 1.8 acres of the estate for himself and in trust for the deceased's first house while he the protestor, should get 2 acres, which in his view, is the share due to the deceased's second house. He proposed Nyawira Muthoga to have 1.8 acres.

The second protestor, swore that she is the grand daughter to the deceased in the sense that her father, who happens to be deceased as well, was one of the deceased's children; all she claimed was 0.9 acres of the deceased's estate which she claims she has been cultivating since time immemorial.

Loise Wangichi Kirethe also swore an affidavit in support of the confirmation to say that the beneficiaries of the deceased's estate should inherit what they have all along occupied and cultivated since 1961 when the deceased died. She shed more light on the extent of the deceased's family. According to her, the deceased had three wives whom she named in the order of seniority as:

1. Wanjiru Njugi Muthoga

2. Wanjugu Njugi Muthoga

3. Wambui Njugi Muthoga

Her husband, who she named as Duncan Kirethi, who is also deceased, was born in the third house. According to her she is entitled to the share due to this particular house for her benefit and in trust for the surviving members of that particular house.

Loise also swore that the land comprising the deceased's estate was divided in three equal shares in 1973; each of the three houses was then given share where they have settled, cultivated and developed since 1973. The first protestor was given the share due to the second house and like the rest of the beneficiaries to the deceased's estate from the two other houses, he settled on his share which he occupies to date. Similarly, the second protestor, being the deceased's grandchild from the first house, has been in occupation of the share due to that particular house. On her part she settled on the share due to the third house and it is here she has lived for more than 40 years. It is her opinion that the estate should be distributed in such a way that each of the three houses retain whatever they have possessed all along.

At the hearing of the protest, the protestors reiterated their depositions in their affidavits. They were all in agreement that the deceased had

three wives and that each of these wives had children all of whom are deceased except the 1st protestor who is the only surviving child. The 2nd protestor testified that apart from herself, she had eight other siblings but only three of them are alive; the rest are deceased. One of them left behind five children all of whom are alive except one.

According to her, the deceased's estate should be distributed between the three houses equally. She claimed part of the share due to the first house; she testified that she has lived on this particular portion since 1969. The other portion of the same share is occupied by one Mathenge who is a son to the deceased's other son from the first house called Mwaniki Njugi.

Save for her omission from the list of beneficiaries, the 2nd protestor has no problem with the estate being shared out equally amongst the deceased's three houses in accordance with the deceased's wishes. This protestor also testified that as much as the petitioner had left her out, the petitioner himself had been given a separate parcel of land by the deceased during his lifetime and it is on this land that he is settled.

The 1st protestor testified that he was born in 1941 and that of all the deceased's children, he was the only surviving one. He also confirmed that the deceased had three wives although he could not recall what happened to their children. It was his evidence that he lives on the estate together with the 2nd protestor.

Loise Wangechi testified that she was married Duncan Kirethe, a son to the deceased's third wife in 1960. However, her husband died in 1998 and left her with eight children all of whom are alive. She has been living on the estate together with her family since 1960.

Besides herself and her family, the 1st protestor and Charity Wambui also lived on the deceased's estate but that the petitioner lives in Mweiga.

Charity Wambui Mathenge testified that she too was the deceased's granddaughter and that her father was Mwaniki who, as noted, was one of the deceased's sons in the first house. She, together with Lucy are in possession and are cultivating the portion of land that was allocated to the first house.

The petitioner himself testified that he lives in Oljororok. He has been living there since the year 2000; before he lived at Mweiga where he moved in 1963. Apparently, it is here that his father was buried. He testified that this land belonged to his father. He was of the view that the deceased's estate should be shared equally between the three houses.

My assessment of the evidence is that the petitioner and the protestors in agreement of what I think are the salient facts; that the deceased died in 1961; that he was polygamous; that except for the 1st protestor, the rest of the deceased's children are deceased; the deceased's deceased children are themselves survived by their own children (the grandchildren of the deceased), and that they are settled on the deceased's estate. It is also important to note that the only asset in the estate which they have all referred to is the land parcel **Title No. Tetu/Ichagachiru/364**.

There was a suggestion that the petitioner's father may have benefited from an inter vivos transfer; however, the petitioner denied that his father may have benefited from the deceased in his lifetime and testified that the land where his father settled was his all along. In the absence of any evidence to the contrary, I am not prepared to take this particular parcel of land into account in the distribution of the deceased's estate; in any event neither the identity of the land nor its size was given.

Apart from the 1st protestor who is keen on getting a larger share of the estate, the rest of the beneficiaries agree that the estate should be shared equally between the three houses.

Ordinarily, the intestacy provisions of the Law of Succession Act, cap 160, would be employed to address the present circumstances; however, the deceased whose estate is the subject of this cause died long before Act came into force and therefore the application of its intestacy provisions to the deceased's estate is restrictive. Section 2 (2) of the Act is clear that this is the cause one should take on administration of estates whose owners died before the Act came into force; for better understanding, it is necessary to reproduce subsection (1) as well; they state as follows:

> ***2. Application of Act***
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> ***(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.***
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> ***(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.***

One of the important considerations that has to be borne in mind is that the beneficiaries laying claim on the deceased's estate have, together with their families, known no other home apart from those portions of the estate which they occupy. I am also persuaded by the beneficiaries' evidence, in particular the evidence of Loise Kirethi, the second protestor and the petitioner that as early as 1973 the estate had been divided amongst the three houses and some of the beneficiaries from each of these houses have settled on their respective portions due to their houses since that time to date; as a matter of fact, they have assumed ownership of these particular parcels to the extent that they have developed them in one way or the other.

From what I gathered the parcels given to each house are generally equal in size; except for the 1st protestor who seeks to have more share

than the other two houses, the rest of the beneficiaries are satisfied with each each house getting an equal share of the estate which in my view, and from my evaluation of the evidence, is consistent the reality on the ground.

The 1st protester did not give any particular reason why he would want to have a larger share for the 2nd house than the rest of the houses.

Taking all these factors into consideration, I am persuaded that although the deceased's widows are deceased and many of his children are also deceased, the fact that he had three houses through which the beneficiaries, in their various capacities depending on how they relate to the deceased, is pivotal in the distribution of the estate cannot be ignored. I am therefore inclined to hold that the most acceptable scheme in the distribution of the deceased's estate is for each of the three houses to get an equal share of the estate. That is the closest I can get to in applying the Law of Succession Act, as far as it is applicable in these circumstances.

Section 38 of that Act provides that where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

There is only one surviving child the rest of the children having died; however, as noted, the deceased children were survived their own children or other beneficiaries who ordinarily would have been entitled to their estates and who, for that reason, cannot be ignored in the distribution of the deceased's estate.

The deceased's houses are now represented by one child, the 1st protestor representing the second house; the deceased's grand children representing the first house; and, the deceased's daughter-in-law representing the third house. Each of these beneficiaries should get share of the estate that should have been given to their respective houses. I would therefore order that the deceased estate be distributed as follows:

1. The first share of 1.73 acres of the estate shall be registered in the names of:

    (i) Joseph Ndungu Nduhiu and,

    (ii) Lucy Muthoni Kariuki

    (For themselves and in trust for their sisters and the children of Mwaniki Njugi).

2. The second share of 1.73 acres shall be registered in the name of George Muthoga Njugi absolutely.

3. The third share of 1.73 acres shall be registered in the name of Loise Wangichi Kirethi for herself and in trust of the deceased's grand children from the 3rd house.

In the subdivision of the land and allocation of shares as directed above, the land surveyor shall ensure that, as much as is practicable and consistent with this judgment, the beneficiaries shall retain those portions of land where they have all along settled or developed. The grant is confirmed in those terms. Parties will bear their own costs. It is so ordered.

Signed, dated and delivered in open court this 28th day of September, 2018

Ngaah Jairus

JUDGE