



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 12 OF 2006

(IN THE MATTER OF THE ESTATE OF GACHOKI NJURU (DECEASED))

LUCY NYARUAI GACHOKI..... ADMNISTRATRIX/PROTESTOR

VERSUS

LOISE WAMBUI GACHOKI.....ADMNISTRATRIX/APPLICANT

JUDGMENT

Gachoki Njuru (the deceased) died on 16th September 1980 at Kiandemi village in Nyeri, his last known place of residence. He died at an advanced age of 110 years and he was then domiciled in the Republic of Kenya.

On 13th March, 2006, **Loise Wambui Gachoki**, the administratrix/applicant herein, petitioned for grant of letters of administration intestate of the deceased's estate. According to the affidavit in support of the petition, she named 21 people as having survived the deceased. Herself and **Lucy Nyaruai Gachoki**, the protestor herein, are named as the deceased's wives; apart from three other persons who are described as the deceased's grandchildren, the rest of the listed survivors are his sons and daughters.

In the same affidavit, the petitioner swore that the deceased's estate comprised the following assets:

- 1. Title No. Othaya/Kiandemi/597** measuring approximately 2.4 acres
- 2. Title No. Othaya/Kiandemi/520** measuring approximately 3.03 ha
- 3. Title No. Nyandarua/Shauri Block 1(Leshau Pondo)1444** measuring approximately **1.235 ha.**

These assets are estimated to have been worth Kshs 3,000,000/= at the time the petition was filed. It is indicated in the affidavit that the deceased had no liabilities.

The grant of letters of administration intestate was subsequently made to the applicant on 23rd January, 2007 and on 8th February, 2008 she applied to have it confirmed. In the affidavit in support of the summons for confirmation of grant, she listed only two of the deceased's three properties as available for distribution. Again, of all the survivors of the deceased, only three were named as beneficiaries entitled to a share of the properties she listed; in particular, she proposed those two assets to be distributed as follows:

- 1. Title No. Othaya/Kiandemi/597**

- i. Loice Wambui Gachoki to get 0.8 acres
- ii. Lucy Nyaruai Gachoki to get 0.8 acres
- iii. Benjamin Ngure to get 0.8 acres

2. Title No. Othaya/Kiandemi/520

- i. Loice Wambui Gachoki to get 2 acres
- ii. Lucy Nyaruai Gachoki to get 4 acres
- iii. Benjamin Ngure to get 2 acres

On 22nd February, 2008, the grant was confirmed and the estate distributed as proposed by the applicant.

By a summons general dated 22nd July, 2008, the protestor applied to set aside orders confirming the grant on, among other grounds, that the grant was confirmed on the same day it was issued; that the estate was distributed amongst three persons yet there were 21 survivors who survived the deceased; that one of the assets of the deceased had been left out; and, that nobody attended the confirmation proceedings at the time the grant is alleged to have been confirmed.

When this application came up for hearing on 19th November, 2008, the court was of the view that the protestor ought to have filed an application for revocation or annulment of grant. The learned counsel for the protestor took cue and withdrew the application; he subsequently filed a summons for revocation of grant dated 27th May, 2010. The record shows that the application was allowed by consent though the summons which the court made reference to was said to be dated 7th February, 2011. Be that as it may, on 14th February, 2012, parties agreed that the grant issued on 22nd February, 2008 be revoked and afresh one in the joint names of the applicant and the protestor be issued. They were also granted leave to file a summons for confirmation of grant before the expiry of six months.

By a summons for confirmation of grant dated 14th June, 2012, the applicant applied to have the grant confirmed. This time round she listed 16 names of the deceased's survivors and proposed the estate to be distributed as follows:

1. Title No. Othaya/Kiandemi/597

- (i). Loise Wambui Gachoki to get 0.6 acres to hold in trust for herself and her children.
- (ii). Benjamin Ngure Kabue and Joseph Ndore Mwaniki to get 0.6 acres.
- (iii). Dorcas Wanja Gachoki, Dominic Njuru Gachoki and Rachael Karungari King'ori to get 0.6 acres in equal shares
- (iv). Lucy Nyaruai Gachoki to get 0.6 acres to hold on her behalf and in trust for her children.

2. Title No. Othaya/Kiandemi/520

- (i) Loise Wambui Gachoki to get 0.7575 ha to hold in trust for herself and her children.
- (ii) Benjamin Ngure Kabue and Joseph Ndore Mwaniki to get 0.7575 ha
- (iii) Dorcas Wanja Gachoki, Dominic Njuru Gachoki and Rachael Karungari King'ori to get 0.7575 ha in equal shares

(iv) Lucy Nyaruai Gachoki to get 0.7575 ha to hold on her behalf and in trust for her children.

3. Title No. Nyandarua/Shauri Block 1(Leshau Pondo) 1444

(i)Loise Wambui Gachoki to get 0.30875 ha to hold in trust for herself and her children.

(ii)Benjamin Ngure Kabue and Joseph Ndore Mwaniki to get 0.30875 ha.

(iii)Dorcas Wanja Gachoki, Dominic Njuru Gachoki and Rachael Karungari King'ori to get 0.30875 ha in equal shares.

(iv)Lucy Nyaruai Gachoki to get 0.30875 ha to hold on her behalf and in trust for her children.

4. 1/5 of Plot No. 2 Gatuyani

To be shared equally amongst the following:

(i)Loise Wambui Gachoki to hold in trust for herself and her children.

(ii)Benjamin Ngure Kabue and Joseph Ndore Mwaniki

(iii)Dorcas Wanja Gachoki, Dominic Njuru Gachoki and Karungari King'ori.

(iv)Lucy Nyaruai Gachoki to hold on her behalf and in trust for her children.

On 20th July, 2012, the protestor filed her own summons for confirmation of grant and proposed the estate to be distributed as follows:

1. Title No. Othaya/Kiandemi/597

(i) Charles Kihungi Gachoki to get 2 acres

(ii) Dorcas Wanja Gachoki to get 1 acres

(iii) Paul King'ori Gachoki to get 0.8 acres

(iv) Peter Theuri Gachoki to get 0.8 acres

(v) Isaac Muchiri Gachoki to get 0.8 acres

(vi) Francis Gitonga Gachoki to get 0.8 acres

(vii) James Mathenge Gachoki to get 0.8 acres

(viii) Benjamin Njuru Gachoki to get 0.8 acres

2. Title No. Othaya/Kiandemi/520

(i). Lucy Nyaruai Gachoki to get 1.4 acres

(ii). Loise Wambui Gachoki to get 1.4 acres

3. Title No. Nyandarua/Shauri Block 1(Leshau Pondo)

i. Paul King'ori Gachoki to get 0.3 acres

- ii. Peter Theuri Gachoki to get 0.3 acres
- iii. Isaac Muchiri Gachoki to get 0.3 acres
- iv. Francis Gitonga Gachoki to get 0.8 acres
- v. James Mathenge Gachoki to get 0.8 acres
- vi. Benjamin Njuru Gachoki to get 0.8 acres

4. 1/5 Share of Plot No. 2 Gatuyani

- i. Lucy Nyaruai Gachoki
- ii. Loise Wambui Gachoki
- iii. Dominic Njuru Gachoki
- iv. Joseph Ndore Mwaniki

To be registered in their names as proprietors in common in equal shares.

On 26th October, 2012, the court directed that this second summons for confirmation of grant be treated as a protest against the earlier summons by the applicant. It further directed on 14th December, 2012 that the protest be disposed of by way of oral evidence.

The protester testified that she is a co-wife to the joint administratrix; their deceased husband had six wives three of whom predeceased him while the other one died after his demise. The two of them live on **Title No. Othaya/Kiandemi/520** together with the deceased's children. According to her evidence nobody lives on **Title No. Othaya/Kiandemi/597**, though they both cultivate it. As for Plot No. 2 Gatuyani, it is developed but it was not clear whether it accrues any income. She named her children as:

- i. Charles Gachoki
- ii. Paul Kingori
- iii. Peter Theuri
- iv. James Mathenge
- v. Isaac Muchiri
- vi. Francis Gitonga
- vii. Benjamin Njuru Gachoki

The deceased, according to the protestor, gave land to each of his first-born children before his death. The deceased's children were spread in each of his houses as follows:

1. Muringe (1st House)

- i. Kabue Gachoki
- ii. Mwaniki Gachoki

iii. Njambi

iv. Gathoni

2. Wanjiru/Wangechi (2nd House)

i. Dominic Njuru

ii. Rachael Karungari

iii. Warangi(deceased)

iv. Dorcas wanja

3. Wanjira (3rd house); she had no children

4. Wamucii (4th house)

i. Kerigo

5. Lucy Nyaruai (5th house)

i. Matthew Mwangi

ii. Charles Kihungi

iii. Francis Gitonga

iv. James Mathenge

v. Paul Kingori

vi. Peter Theuri

vii. Isaac Muchiri

viii. Jane Njambi

ix. Mary Muthoni

x. Margaret Wambui

Two other children in this house died.

6. Loice Wambui (6th house)

i. Duncan Mwangi

ii. Benjamin

iii. Jane Njambi

I noted that some of these names do not exactly match those in the affidavit in support of the petition.

The applicant, Loice Wambui admitted her co-wife's son Matthew lives on a parcel of land that belonged

to the deceased; she could not, however, recall its registration number.

She asked the court to have the estate distributed between four houses because Feneranda Kerigo of the 4th house is not interested in the estate and there is no survivor in the third house. I noted that the said Feneranda Kirigo had not formally renounced her right to inherit and therefore there would be no legal basis not to allocate her a share of her father's estate. The applicant also testified that Benson Ngiire and Joseph Ndore are the deceased grandsons; their father was from the first wife.

From the foregoing evidence, the material facts are not in dispute; for instance, it is not disputed that the deceased was polygamous and had six houses; the extent of his estate is also not in dispute. The identity of his children from each of the houses except for the third house where there was no child at all is also not in dispute. The only point in controversy is how the estate should be shared out among the houses and by extension, amongst the children of the deceased. The appropriate law which would ordinarily apply to these set of circumstances and resolve the question at hand is section 40 of the **Law of Succession Act, cap 160**; that provision 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.

The learned counsel for the applicant submitted, however, that the application of the Law of Succession Act to the administration of the deceased's estate is restricted to the extent that he died in 1980 before this law came into force. His argument is no doubt based on **section 2 (1)** of the Act which is categorical that the Act applies to estates of those persons who died after the commencement of the Act. Perhaps for better understanding it is appropriate that I reproduce the entire section 2 of the Act here; it 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) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of this death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.

Counsel submitted that in view of the provisions of **section 2 (1)** of the **Act**, this court should distribute the deceased's estate in conformity with Kikuyu customary law according to which a deceased's person's property is distributed amongst his houses if he was, as in the present case, polygamous. Following this law, the deceased's property should have been shared amongst his six houses but since one house no longer exists and the other has only a daughter who is married, the estate should devolve amongst the rest of the four houses. In this regard counsel cited the High Court decision in **Koinange & 13 Others versus Charles Karuga Koinange (1986) eKLR** where Justice S.M. Amin cited the Restatement of African Law Vol. 2 by E. Cotran and held at page 15 of the judgment that:

The principle enunciated, inter alia, is that inheritance under Kikuyu customary law is patrilineal. The pattern of inheritance is based on distribution of a man's property amongst his wives' houses, subject to the provision that the eldest may get a slightly bigger share. In a polygamous household the reference is to the house of each wife.

While there is some force in the learned counsel's arguments, I cannot ignore the fact that none of the applicant's witnesses ever tendered any evidence regarding Kikuyu customs or Kikuyu customary law and how such law applied to the deceased's estate. An opinion as to the existence of any general custom or right of persons is admissible in evidence under **section 51** of the **Evidence Act, cap 80** only if it is given by a person or persons who would likely know of its existence. In this case no such opinion was given and therefore the court has no basis upon which to form its opinion that despite the undisputed fact that the deceased died prior to the commencement of the succession law, Kikuyu customs or customary law applied to the deceased and his estate; in the absence of such opinion or evidence, it would be a misdirection for this court to proceed on the presumption that a certain custom or customary law should influence the administration of the deceased's estate.

But even if it had been proved that the administration of the deceased's estate is subject to Kikuyu customs, **subsection (2) of section 2** suggests that it is not altogether improper to apply the Law of Succession Act to the estates of persons who died before the Act came into force. This portion of the law acknowledges that the administration of an estate of persons dying before the commencement of the Act may be subject to written laws and customs of the time but it goes further to say that the administration of those estates shall, as much as possible, be in conformity with the provisions of the Law of Succession Act. I find this provision a strong reason for the application of intestacy provisions of the Law of Succession and, more so, when the applicant has not provided any evidence of the law or customs which applied to the deceased at the time of his demise and how such law or customs should influence the distribution of his estate.

Accordingly, I find **section 40** of the Act a useful guide in the administration of the deceased's estate. The leading decision in the application of this provision is the **Eldoret Civil Appeal No. 66 of 2002, Mary Rono versus Jane Rono & William Rono (2005) eKLR** where the central question was distribution of the deceased's estate in a polygamous family unit as is the case here. The court embraced the concept of equity and fairness based on the circumstances of the case in the distribution of the estate. Justice Omolo J.A. (as he then was) ruled out the notion that a polygamous person's estate must in every case be shared out equally between or amongst his houses. He also discounted the idea that the court has no discretion to determine the ratio in which the estate should be distributed among the beneficiaries from the various houses. The learned judge, however, held that in determining the proportion due to each house, the court is enjoined to consider the number of children in each house, amongst other factors.

I also think that as much as the learned judge of appeal held that there is no laid down principle of equality which the courts must adhere to in the distribution of a deceased's estate amongst several houses in a polygamous family unit, he did not discard it altogether. I am of the humble view that if fairness and equity can be found in the equal distribution of a deceased person's estate amongst the houses, then there would be nothing wrong if the estate is distributed equally between or among them.

Some of the factors one would consider pertinent in the fair and equitable distribution of the deceased's estate in the present cause are that at least one house of the six houses does not exist. In one other house, there is only one survivor and yet in another house there are as many as ten survivors. There was also uncontroverted evidence that the two surviving widows are living on part of the estate together with their children. Several other children have settled and live on the other part of the estate. It is therefore important that the distribution of the estate should not uproot and dislocate the deceased's family members from where they have settled over the years unless they occupy or use more land than what this honourable court is bound to allocate them. In the event the latter scenario obtains then the affected party will have to cede that share of the estate that is over and above that which he or she is entitled to.

Taking all these factors into consideration and for the reasons I have given, I direct that the deceased's net intestate estate be distributed as follows:

1. Title No. Othaya/Kiandemi/597

- i. Lucy Nyaruai to get 1.1 acres (subject to life interest)
- ii. Loise Wambui 0.4 acres (subject to life interest)

iii. 1st House's Children:

- (a) Benjamin Ngure Kabui
- (b) Joseph Ndore Mwaniki
- (c) Jane Njambi

To get 0.6 acres which shall be registered in their names as absolute proprietors in common in equal shares)

iv. 2nd House's Children:

- (a) Dominic Nduru
- (b) Rachael Karungari

(To get 0.3 acres which shall be registered in their names as joint proprietors)

2. Title No. Othaya/Kiandemi/520

- i. Lucy Nyaruai to get 3.6 acres (subject to life interest)
- ii. Loise Wambui to get 1.4 acres (subject to life interest)

iii. 1st House's Children:

- (a) Benjamin Ngure Kabui
- (b) Joseph Ndore Mwaniki
- (c) Jane Njambi

To get 1.4 acres which shall be registered in their names as absolute proprietors in common in equal shares)

iv. 2nd House's Children:

- (a) Dominic Njuru
- (b) Rachael Karungari

To get 1 acre which shall be registered in their names as absolute joint proprietors.

3. Title No. Nyandarua/Shauri Block 1(Leshau Pondo)

- i. Lucy Nyaruai to get 1.4 acres (subject to life interest)
- ii. Loise Wambui to get 0.45 acres (subject to life interest)

iii. Feneranda Kirigo to get 0.15 (absolutely)

iv. 1st House's Children:

- (a) Benjamin Ngure Kabui
- (b) Joseph Ndore Mwaniki
- (c) Jane Njambi

To get 0.42 acres which shall be registered in their names as absolute proprietors in common in equal shares.

v. 2nd House's Children:

- (a) Dominic Njuru
- (b) Rachael Karungari

To get 1 acre which shall be registered in their names as absolute joint proprietors.

4. 1/5 Share of Plot No. 2 Gatuyani

To be registered as proprietors in common in equal shares in the following names

- i. Lucy Nyaruai (subject to life interest)**
- ii. Loise Wambui(subject to life interest)**
- iii. Feneranda Kirigo**
- iv. Dominic Njuru**

To hold in trust for himself and for :

- (a) Rachael Karungari**
- (b) Dorcas Wanja**

v. Benjamin Ngure Kabui

To hold in trust for himself and for:

- a. Joseph Ndore Mwaniki
- b. Jane Njambi

The grant of letters made to the protestor and the applicant on 14th February, 2012 shall be confirmed in the foregoing terms. This being a family dispute, parties will bear their respective costs.

Signed, dated and delivered in open court this 31st day of March, 2017

Ngaah Jairus

JUDGE