

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 318 OF 1994

IN THE MATTER OF THE ESTATE OF MUTHEE GORO (DECEASED)

JUDGMENT

1. For determination is the summons for confirmation of grant dated 21st July 1999. It is brought at the instance of Florence Wanjiru Muthee, a widow of the deceased and one of the administrators of the estate. She has identified the survivors of the deceased and the assets available for distribution. The deceased is said to have had two households. Members of the first household are identified as Johnson Goro Muthee and James Muthaka Muthee. The second household is said to comprise Nancy Purity Njeri Muthee, Esther Karen Kanuthu Muthee, Mary Josephine Wanjiku Muthee, Diana Waitherero Muthee, Felista Irene Njoki Muthee, Damaris Nyambura Muthee, John Mark Goro Muthee and Stephen Samuel Karanja. The applicant, the widow, is in the second household.

2. The assets identified as making up the estate are said to include a building and business known as Rwathia Njoguini, another called Gloria Hotel, others referred to as Goodwill Building, Kirinyaga House, Rwambogo House, Brilliant Building, Ngara Road Self-selection Supermarket, motor vehicle KAA 636A, two undeveloped plots at Thome, Laikipia/Marmanet/139 and 145, money in various banks, motor vehicle KXN 893, Tractor KYC 071, LR No. 37/245/7, Mutitu Ngoru/Block 2/36 and 38, 200 shares in Kenya Commercial Bank, 674 shares in Barclays Bank of Kenya Limited, 614 shares in the Kenya Framers Association, two undeveloped plots in Githurai, LR No. 37/464, Rwathia Distributors Limited, Kiriti Company Building, Ruga Buildings, Laikipia/Marmanet/S. Rumuruti/Block 1, Muthengera Farm, Laikipia Kinamba/Block 1/15 and 704, and businesses without buildings being – Express Bar, Riverside Bar, Indo Fish & Chips, Mukurweini Bar and Munyu Bar.

3. She proposed distribution between the two households. Her proposal being that the first household gets Rwathia Njoguini, Gloria Hotel, Goodwill Building, Kirinyaga House, Rwambogo House, Brilliant Building, Ngara Road Self-selection Supermarket, motor vehicle KAA 636A, one undeveloped plot at Thome, Laikipia/Marmanet/139 and 145, money in various banks, however, under the first household she proposes to take motor vehicle KXN 893, Tractor KYC 071, LR No. 37/245/7, Mutitu Ngoru/Block 2/36, 200 shares in Kenya Commercial Bank, 674 shares in Barclays Bank of Kenya Limited, 614 shares in the Kenya Framers Association and the personal and household effects due to the first household. For the second household, she proposes that it gets one undeveloped plot at Thome, two undeveloped plots in Githurai, LR No. 37/464, Rwathia Distributors Limited, Kiriti Company Building, Ruga Buildings, Laikipia/Marmanet/S. Rumuruti/Block 1, Muthengera Farm, Laikipia Kinamba/Block 1/15 and 704, Mutitu Ngoru/Block 2/36 and 38, and businesses without buildings being – Express Bar, Riverside Bar, Indo Fish & Chips, Mukurweini Bar and Munyu Bar.

4. In response to the application James Muthaka Muthee, a son of the deceased, swore an affidavit of protest on 17th May 2002. He states that after the deceased's demise, the two houses agreed to have the matter settled by the extended family through arbitration by elders. He has attached to his affidavit two documents which represent the resolution on the distribution of the estate as between the two households.

5. There are directions on record that the application for confirmation of grant be disposed of orally.

6. The hearing commenced on 25th April 2007. The first on the stand was Florence Wanjiru Muthee, the applicant widow. She stated that she married the deceased in 1966, a year after his first wife had passed on. She asserted that the issue of the deceased having two households did not thereof arise. She testified that she obtained representation jointly with her stepson, James Muthaka Muthee, and with two other

family members, Githaiga Gathara and Francis Gikua. She proposed that the property be shared equally, save that all the money in the bank should be given to her, she mentioned that she had rejected the elders proposed distribution as it was unfair. She conceded that she had let James Muthaka Muthee ran the supermarket at Ngara and to use the motor vehicle KAA 636A. She felt that the Nairobi West property ought to go to two of her daughters in equal shares. She proposed that Laikipia/Marmanet/145 be retained by James Muthaka Muthee. She said that she was farming permanently at Nyahururu, as the children lived in Nairobi with the deceased. On the houses in Nairobi, she stated that the deceased used to live with the children of the first household in the first house (LR No. 37/464), but acquired the second house after he married her, and all the children moved into the second house. She would like to keep both houses, as the children in the first house had a supermarket at Ngara and the Gloria Hotel in town. The Ngara supermarket business operated from rented premises. On the Rwathia Companies and the Njoguini Companies, she stated that the deceased did not own them, and her children were not directors in any of them. She mentioned that she was director in the Ruga Group of Companies. She stated that James Muthaka Muthee farmed the Muthengera Farm – P/No. 139., while his brother Goro was on P/No. 145. She put the total acreage of the Nyahururu farms at 162.5 acres, 76 acres of which were said to be in the hands of the first house. She proposed to give the first family P/Nos. 145 and 223. She said that her family occupied the Ngoru, Rumuruti and Kinamba farms while the other side of the family occupied the Muthengera farm. She felt that the first house should not be allowed to retain the entire Muthengera farms as it was too big and ought to be shared out equally amongst all of them. On the money in the bank she proposed that the same be shared equally, and the same with the bank shares.

7. The protestor, James Muthaka Muthee, took the stand next. He mentioned that the grant made to them was interim. He mentioned that he was opposed to the distribution proposed by the applicant. He testified that the joint administrators had meetings where distribution was agreed upon. He denied ever living with the applicant and her children, insisting that he lived in Nairobi with the deceased while she lived at a farm at Nyahururu. He testified that the deceased had shares in the Njoguini Group of Companies, which owned six properties within the Nairobi city where the Njoguini, Gloria, Kirinyaga, Chemoquip, Goodwill and Rwambogo Buildings stand. He was of the view that the estate be distributed as between the two houses as opposed each individual.

8. At the close of the oral hearing, the parties were directed to file written submissions., which they did file. The submissions were highlighted on 22nd June 2015.

9. This matter was heard by Onyancha J., however, Onyancha J. retired before writing the judgment; that is how the matter ended up on my lap.

10. The deceased died intestate in 1993, that is after the Law of Succession Act had come into force. His estate therefore fell for distribution in accord with Part V thereof. The deceased was survived by a spouse and children. It transpired that the deceased had married twice, the second wife was married after the first one had died. There is contention as to whether he died a polygamist or not, and whether his estate ought to be distributed in terms of section 35 or 40 of the Act. Whether he was a polygamist or not, the end result in my view would be the same, the estate is shared equally amongst the children, with the widows getting the personal items absolutely.

11. The family has not been able to agree on distribution. What is being referred to as the first house insists on distribution according to houses, while the second house feels distribution should be done according to individuals. The first household appears to be influenced by the customary notion of equal distribution between the houses, which would advantage them given the number of members in the house.

12. I believe that the spirit of both sections 35 and 40 is that the property is shared out equally amongst the survivors. That way there is a fair distribution. The properties were valued, but the parties appear to be still not in agreement on the valuations. After taking into account the affidavits on record, the recorded evidence, inclusive of the annexures and exhibits, I believe justice would be served if all the assets are shared out equally amongst all the immediate survivors of the deceased, that is to say the two sons of the deceased in the first house, and the widow and her eight children in the second house.

13. The application for confirmation of grant hereabove shall be disposed of in the terms proposed in paragraph 12 here above. The interim grant of letters of administration intestate is hereby upgraded to a full grant. The same shall thereafter be confirmed accordingly. A certificate of confirmation of grant shall issue accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH DAY OF SEPTEMBER, 2017.

W. MUSYOKA

JUDGE