



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 736 OF 2011

IN THE MATTER OF THE ESTATE OF FRANCIS MWANGI GITHINJI (DECEASED)

CHARLES KARUME MWANGI

JOSEPH MAINA MWANGI

JOHN KANYEKI MWANGI

DANIEL WARUTERE MWANGI

BEATRICE NJOKI MWANGI

EUNICE MUMBI MWANGI..... PROTESTORS

VERSUS

JOHNSON MAINA MWANGI.....RESPONDENT

RULING

1. The estate relates to the late Francis Mwangi Githinji (deceased) who died on the 9th November, 2008 at the Nanyuki District Hospital; the identifiable properties comprising the estate of the deceased are land parcel numbers **Ruguru/Sagana/34, Nanyuki/Marura Blk 1/105 (Ichunga) and Laikipia/Euaso Nyiro/Suguroi/Block IX/344(Wiyumiririe).**

2. The Deceased at the time of his demise left three widows and twelve children surviving him namely;

(i) Wanjiru Murigi- (now deceased)- widow of the deceased from the 1st house;

(ii) Mary Wambui Mwangi - widow from the 2nd house and is one of the petitioner/respondents herein;

(iii) Magdaline Nyawira Mwangi - a widow from the 3rd house;

(iv) Johnson Maina Mwangi - a son of the deceased from the 1st house who is also a petitioner and the respondent herein; and will hereinafter be referred to as '**Johnson**';

(v) Beatrice Njoki Mwangi - daughter- 1st house

- (vi) John Kanyeki Mwangi - son – 2nd house
- (vii) Charles Karume Mwangi - son- 2nd house
- (viii) Eunice Mumbi Mwangi – (now deceased)- daughter – 2nd house
- (ix) Daniel Warutere Mwangi - son- 2nd house
- (x) Tabitha Wanjiru Mwangi - daughter- 3rd house
- (xi) Margaret Gathigia Mwangi - daughter – 3rd house
- (xii) Gerald Njogu Mwangi – son – 3rd house
- (xiii) Lilian Wangui Mwangi - daughter – 3rd house
- (xiv) Ann Njoki Mwangi - daughter – 3rd house
- (xv) Mary Wangari Mwangi – daughter – 3rd house

3. The Petitioners are the widow and son of the deceased and they had jointly petitioned for Letters of Administration on the 29/08/2011; the Grant was issued on the 11/01/2012; on the 12/07/2012 one of the petitioners namely Johnson proceeded to file Summons for Confirmation of the Grant and claimed to be the executor of the deceased's Will and proposed that the two properties be distributed as per his late father's wishes as contained in the said will which was as follows;

- (i) **Ruguru/Sagana /34** –to Johnson Maina Mwangi that it be registered in his name in trust for the 1st house;
- (ii) **Laikipia/Euaso Nyiro/Suguroi/Block IX/344 (Wiyumiririe)**- to be registered in the name of Joseph Maina Mwangi as a Trustee for the 2nd house;

4. On the 9/02/2016 the Protestors filed their Affidavit of Protest and therein proposed that the mode of distribution of the properties be in accordance with their late fathers' wishes as per his Oral Will; and the wishes were that;

- (i) Parcel Number **Ruguru/Sagana/34** measuring approximately 6.9 acres be shared equally amongst the five sons of the deceased with each getting 1.38 acres;
- (ii) Parcel Number **Laikipia/Uasonyiro/Suguroi Block IX/344 (Wiyumiririe)** measuring approximately 1.5 acres be shared equally between the two (2) daughters of the deceased, namely Beatrice Njoki Mwangi and Eunice Mumbi Mwangi; with each getting 0.75 acres;

5. Directions were taken on the 14/03/2016 that the matter proceed for hearing and that '**viva voce**' evidence be tendered; that witness statements be filed and exchanged; the matter proceeded for full hearing and all the concerned parties gave evidence and were subjected to cross-examination; hereunder is a summary of the evidence tendered by the respective parties.

THE PROTESTORS' CASE

6. The evidence of Charles Karume Mwangi (**PW1**) was that he represented the 2nd and 3rd houses; that his deceased father had three (3) wives; the 1st widow (now deceased) had two issues from the marriage, Johnson the petitioner being one of them; the 2nd widow who was still alive was his mother and that she

had six issues of whom two were deceased leaving four who are still alive; that the third widow had six issues from the union with the deceased;

7. He stated that his late father had called them to his uncles place and had briefed them on his mode of distribution; that there was no written will made by his late father but only an oral will existed;

8. The protestor had a problem with the distribution by Johnson in that the Respondents' proposed mode of distribution was not in accordance with their late father's Oral Will; further that he had not consulted any of the protestors on this new mode of distribution nor had their consents been obtained;

9. He prayed that he be enjoined as one of the administrators of the estate of their deceased father; and that the distribution be as per his father's oral will which is as set down hereunder;

(i) Parcel Number **Ruguru/Sagana/34** be shared equally amongst the five sons;

(ii) Parcel Number **Nanyuki/Marura Blk 1/105 (Ichunga)** be distributed to the 3rd House;

(iii) Parcel Number **Laikipia/Uasonyiro/Suguroi Block IX/344 (Wiyumiririe)** be given to two (2) sisters equally.

THE RESPONDENTS CASE

10. Johnson the respondent when testifying relied on his affidavit dated the 5th May, 2016 and stated that the mode of distribution he proposed was as per the wishes of his late father; he referred to the affidavit made by his father at the Nanyuki Law Courts in 2004 which affidavit outlines the wishes of his late father; a copy of the affidavit was annexed to the respondents affidavit and was tendered into evidence as '**PExh.1**';

11. That he was not present when the affidavit was made by his late father but it was among the documents his late father gave him for safe keeping;

12. He urged this court to adopt his proposed mode of distribution.

ISSUES FOR DETERMINATION

13. After hearing the rival presentations of the respective parties this court has framed the following issues for determination;

(i) Whether the written will or the oral will were valid WILLS;

(ii) Distribution of the estate of the deceased.

ANALYSIS

14. The parties had recorded a consent in court on the 5/05/2016 and agreed that the remains of one of the protestors namely Eunice Mumbi Mwangi (now deceased) be interred on the Sagana property pending hearing and determination of the matter; that in the event the parcel was found to belong to the 1st house then her remains would be exhumed and buried on the portion distributed to the 2nd house.

Whether the written will and or the oral will were valid WILLS;

15. The Protestor bases his mode on his late fathers' oral will; he contends that there was no written will and that his late father had made his wishes orally known on how the properties ought to be distributed; **PW2** who was the brother of the deceased and an uncle of the litigants corroborated the evidence of the protestor in that there was no written will and that the deceased had made an oral will; he recalled how his

late brother had called him when he was ailing and requested him to watch over his family; and that before his demise he had told him how to distribute his properties; **PW3** also corroborated the existence of the oral will;

16. This court states that the validity of such a will is predicated upon the date of the making of the will and the date of the testators demise; Section 9(1)(b) of the Law of Succession provides that for such a will to be valid the testator must have died within three (3) months from the date of making the will;

17. The evidence proffered by **PW2** was that the deceased made known his wishes in October, 2006 when he (**PW2**) had gone to visit him; in his evidence he confirmed the date the deceased died as being November, 2008 which makes the period from when the oral will was made to the testators demise to be approximately two (2) years which then takes it outside the ambit of three(3) months;

18. In the above circumstances based on the evidence on the date on which the testator made the oral will this court is left with no option but to find the oral will as being invalid;

19. Johnson on the other hand contends that there was a written will which forms the basis of his proposed mode of distribution; in his evidence stated that the written will in existence was in the format of an affidavit made by the testator (his late father) at the Nanyuki Law Courts and it is dated the 13th May, 2004; before addressing the issue of its validity this court states that it is at a loss in trying to understand why the petitioners petitioned for Letters of Administration 'intestate' (emphasis mine) instead of pursuing a Grant of Probate of the Will.

20. In addressing the issue of the validity of this written Will this court has had occasion to peruse the same and has noted that there was only one witness who attested the document namely one Wambugu Ngumba an agemate of the deceased and holder of ID Number [particulars withheld];

21. The applicable law on attestation is found at Section 11(c) of the Law of Succession which provides that no written will shall be valid unless it is attested by two or more competent witnesses each of whom must have seen the testator sign or affix his mark to the will;

22. The written will is therefore found to be invalid on the grounds that it does not bear a second signatory and attester in that it does not comply with the mandatory provisions of Section 11(c);

Distribution of the estate of the deceased.

23. This court having found both the oral will and the written will to be of no testamentary value it is then tasked with the duty of distributing the properties that constitute the estate of the deceased;

24. From the evidence adduced it is not disputed that the deceased was polygamous and had three wives and a total of twelve children;

25. Further it is also not disputed that the third household is well catered for by the gifting of **Parcel Number Nanyuki/Marura Blk 1/105 (Ichunga)** to them by the deceased; the members of this house it is noted did not show any interest in the protest and did not enjoy themselves either as parties or witnesses; it is also evident from the circumstances of the case that there seems to be a consensus on the mode of distribution of this particular property and this court is disinclined to interfere with it and will therefore not disturb the mode proposed by the parties.

26. This court reiterates the fact that the wrangles are as between the members of the 1st and 2nd households and that the dispute is over two of the properties namely, land parcel numbers **Ruguru/Sagana/34 and Laikipia/Euaso Nyiro/Suguroi/Block IX/344(Wiyumiririe).**

27. The deceased having been found to be polygamous Section 40 of the Law of Succession is found to be the applicable law on distribution; therefore distribution of the properties shall be subjected to the said provisions;

28. Section 40 reads as follows;

“Where an interstate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate 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.”

29. This court is also guided by the Court of Appeal decision of **Rono vs Rono and Anor (2005) 1 EA 363**; where it was held that the estate of a polygamous deceased should be distributed according to the number of children and not the number of houses.

30. The first house is found to comprise of two (2) family members which translates to two units; the second house comprises of four members and the surviving widow being the extra unit bringing the total to five (5) units; the ratio of distribution is therefore determined to be 2/7 for the first house and 5/7 for the second house; this court will therefore apply these ratios in distributing land parcel numbers **Ruguru/Sagana/34 and Laikipia/Euaso Nyiro/Suguroi/Block IX/344(Wiyumiririe)**.

FINDINGS AND DETERMINATION

31. For the afore-going reasons this court finds that both the oral and written wills are both found to be invalid;

32. The respondents proposed mode of distribution is found to be unfair; the estate of the deceased shall be distributed as follows;

A. Parcel Number Nanyuki/Marura Blk 1/105 (Ichunga) /Karia/1275 to the third household;

B. Land parcel numbers Ruguru/Sagana/34 and Laikipia/Euaso Nyiro/Suguroi/Block IX/344(Wiyumiririe) shall be divided on a ratio of 2/7 for the first house; and 5/7 for the second house; The 2nd widow shall hold a life interest of her share; the life interest to terminate upon her death and shall then be shared equally between all the deceased’s surviving children from the 1st and 2nd households.

33. Each party shall bear their own costs.

It is so ordered.

Dated, Signed and Delivered at Nyeri this 21st day of September, 2017.

HON. A. MSHILA

JUDGE.