



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.123 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE JOHN WAMBATI OYWELI – DECEASED

AND

IN THE MATTER OF PRICILA AWOKO OMONJE.....PETITIONER

VERSUS

JOSEPH WAMBATI OYWERI.....1ST PROTESTOR

KANUTI OYWERI WAMBATI.....2ND PROTESTOR

RULING

1. This succession cause relates to the estate of the late John Wambati Oyweri who died on the 28th November, 2011. The deceased owned land Parcel No. North-Wanga-Indangalasia/114. He had two wives, Nashitanzia Ngeka Wambati (the 1st wife) and Pricila Awoko Omonje, (the 2nd wife) who is the petitioner in these proceedings. The 1st wife subsequently died after the death of her husband. She had five children, namely:

1. Joseph Wambati Oyweri - son
2. Kanuti Oyweri Wambati - son
3. Kilikonda Wambati - daughter
4. Anna Auma Wambati - daughter
5. Marita Adhiambo Wambati - daughter

2. The 2nd wife had one child, namely:

6. Carolyne Wambati - daughter

3. Grant of letters of administration were issued to the petitioner on the 23rd February 2016. On 17th August 2016, the petitioner filed summons for confirmation of grant. She proposed that the whole of the property be inherited by herself. On learning of the same the sons of the 1st wife, Joseph Wambati Oyweri and Kanuti Oyweri Wambati, filed a protest, protesting against the proposed mode of distribution of the estate. They contended that the petitioner re-married after the death of her husband and therefore that she is not entitled to benefit from the estate of the deceased. They further contended that the petitioner left out other beneficiaries to the estate and that she did not contact the family to find out what had been agreed upon by the clan on the mode of distribution of the estate. The protestors proposed the following mode of distribution:

1. Kilonda Wambati - Nil
2. Anna Auma Wambati - Nil
3. Carolyne Wambati - 2 acres

4. Joseph Wambati Oyweri - 6 acres
5. Kanuti Oyweri Wambati - 6 acres
6. Pricilla Omonje (petitioner) - Nil

4. The protestors have proposed that the daughter of the deceased with the petitioner, Carlyne Wambati, do inherit 2 acres out of the estate instead of her mother. They contend that the petitioner is now married to one Joseph Meso Wakache. They contend that the petitioner is not interested in the estate of the deceased since she has already sold part of the estate to one George Oyoda. That the sale took place before confirmation of grant and is hence in contravention of **section 82(b)(ii)** of the Law of Succession Act which prohibits sale of immovable property of an estate before confirmation of grant.

The protestors' affidavit of protest was supported by the affidavit of the 1st protestor, Joseph Wambati Oyweri deponed on 7th December 2016 which basically reiterates the contents of their protest. The petitioner did not file an affidavit in reply to the affidavit by the 1st protestor.

Submissions:

5. In their submissions, the advocates for the protestors M/s Marisio Luchivya & Co. Advocates, submitted that since the deceased was polygamous, his estate ought to be governed by section 40 of the Law of Succession Act. That since the petitioner re-married after the death of her husband, her life interest in respect to the estate of the deceased determined on re-marriage. The advocates relied on the provisions of **section 35(1)** of the law of Succession Act and the judgment of Justice Mabeya in ***In the matter of the estate of the late Murianki M'marete (deceased) and Jane Ithima vs Karia Murianki, Chuka High Court Succession Cause No. 28 of 2015*** which judgment held that a surviving spouse is entitled to a life interest of the estate but that the ultimate destination of the net intestate was the children of a deceased person.

The petitioner did not make any submissions.

Determination:

6. The questions for determination are:

- (1) Whether the petitioner re-married after the death of her husband.
- (2) How the estate ought to be distributed.

7. The 1st protestor, Joseph Wambati Oyweri says in his supporting affidavit that the petitioner currently cohabits with one Joseph Meso Wakache which relationship has subsisted since the year 2006. That the petitioner left her marital home with the deceased for the home of the said Joseph Meso Wakache. That it was illegal for the petitioner to seek for orders for the administration of the estate of the deceased herein when she has left for another marital home.

8. Safe for the said protestor alleging that the petitioner re-married after the death of her husband, the protestors have not placed any evidence before the court to prove that the petitioner indeed re-married after the death of her husband. That the protestor has been cohabiting with one Joseph Meso does not by itself prove marriage by the two parties. There is more to marriage than mere cohabitation. The allegation that the petitioner is currently married to Joseph Meso Wakache is mere speculation. The allegation is accordingly dismissed.

9. The deceased herein was polygamous. The distribution of his estate is thereby governed by part V of the Law of Succession Act Cap.160 Laws of Kenya. Section 40 of the Act states that:-

“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.”

Section 35(1) states that:-

“Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to –

(a) the personal and household effects of the deceased absolutely;

and.

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”

10. In this case there are 5 children in the 1st household and one child in the 2nd household. For the sake of distribution of the estate, the petitioner is to be included in the second house hold. The net intestate estate herein is **Land Parcel No.North Wanga/Indangalasia/114.**

11. The spirit of part v of the law of Succession Act and especially sections 35, 38 and 40 is equal distribution of the estate amongst the children of the deceased. **Section 38** is couched in mandatory terms that the estate “shall be equally divided among the surviving children.”

12. The protestors are against the daughters of the deceased benefiting from the estate. However equal distribution of the estate envisaged by part V of the Act is regardless of gender, age, financial and/or marital status of the children. The daughters of the deceased herein have not filed any affidavit indicating that they have no interest in the estate. They should therefore be included in the distribution.

13. The protestors alleged that the petitioner has sold part of the state but they not placed any evidence before the court to prove so. If on the other hand the petitioner sold the land, this is of no effect as sale of immovable property before confirmation of grant is prohibited by **section 82(b)(ii)** of the Law of Succession Act.

14. According to **section 35(1)(b)** of the Act, the petitioner is entitled to a life interest on the whole residue of the intestate estate. However, it is apparent that there is bad blood between the protestors and the petitioner. The protestors may not allow the petitioner to exercise her right of life interest on the entire estate which might render her destitute. The prudent thing is for the estate to be shared equally between all the beneficiaries including the petitioner.

15. The upshot of the above is that the deceased’s estate shall be distributed equally to the deceased’s six children and the petitioner, that is to say:-

1. Joseph Wambati Oyweri
2. Kanuti Oyweri Wambati
3. Kilonda Wambati
4. Anna Auma Wambati
5. Marita Adhiambo Wambati
6. Carolyne Wambati
7. Pricila Awoko Omonje

Each party to bear its own costs.

Delivered, dated and signed at Kakamega this 15th day of October, 2017.

J. NJAGI

JUDGE

In the presence of:

None..... for protestors

George court assistant

Petitioner absent

Protestors absent