



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 176 OF 2011

**IN THE MATTER OF THE ESTATE OF JEREMIAH MUCHOGO MACHARIA alias
NGUCHUGA MACHARIA-DECEASED**

JUDGEMENT

Jeremiah Muchogo Macharia alias **Nguchuga Macharia** (herein after referred to as the deceased) died intestate in 15th May 2010 leaving the following persons entitled to his estate, namely:-

- i. Cecilia Wamuyu Nguchuga.....Widow
- ii. Peter Macharia Muchogo.....Son
- iii. Zakayo Kahonge Muchogo.....Son
- iv. Jecinta Wairimu Macharia.....Daughter in Law
- v. Joyce Mugure Ndiritu.....Daughter----Married
- vi. Beth Mugure Njau.....Daughter----Married
- vii. Mary Wangui Muthui.....Daughter----Married
- viii. Margaret Wamuchie Masaku.....Daughter----Married
- ix. Jane Nyambura Koigu.....Daughter----Married
- x. Zipporah Wanjiru Muchogo.....Daughter----Married
- xi. Esther Watetu Muchogo.....Daughter----Married

On 23rd day of September 2011 **Peter Macharia Muchogo** a son to the deceased's (herein after referred to as the Petitioner) petitioned for letters of administration intestate to the deceased's estate. Annexed to the said petition is a letter from the local chief dated 4th February 2011 naming the above named persons as heirs to the deceased. No consent or renunciation was attached duly signed by the above named persons. The only property listed in the affidavit in support of the said petition is **Nyeri/Endarasha/462**.

The Grant was issued on 19th July 2011 and on 27th February 2013 **Cecida Wairimu Mcharia** filed a summons General seeking orders that she be substituted with the petitioners name as the administrator. A similar application was filed by **Justus Ndungu Macharia** and on 1st February 2014 the court ordered that the grant be issued in the joint names of the said **Cecida Warimu Macharia** and **Justus Ndungu Macharia** and each party to be at liberty to apply for confirmation of the grant.

On 13th May 2014 **Cecida Warimu Macharia** applied for the said grant to be confirmed. A similar application was filed by her co-administrator **Justus Ndungu Macharia** on 8th July 2014. When the two applications for confirmation came up in court on 10th July 2014, the court ordered that the application dated 7th July 2014 be treated as a protest and that the same be heard by way of oral evidence.

Justus Ndungu Macharia also filed an application seeking injunctive orders restraining the said **Cecida Wairimu Macharia** from intermeddling with the deceased's estate but on 17th June 2015 both

parties agreed to proceed with the protest on 21st September 2015.

Pursuant to the orders made on 10th July 2014, **Justus Ndungu Macharia** became the protestor in this cause. Hearing of the protest commenced before me on 29th September 2015. The protestor's evidence was that the deceased was his grandfather and that he was survived by eleven dependants as listed above. He confirmed that **Cecida Wairimu Macharia** is the wife to **John Macharia**-deceased a son to the deceased in this estate. His evidence was that he was opposed to the mode of distribution proposed by **Cecida Wairimu Macharia** who had proposed in her application dated 12th May 2014 that land parcel number **Nyeri/Endarasha/482** be shared equally between **Cecida Wairimu Macharia** and **Cecilia Wamuyu Nguchuga**.

He proposes that the land be divided in equal shares among all the dependants as per his application referred to above. He insisted that the deceased left one house, that he had one wife **Cecilia Wairimu Macharia**. He insisted that **Cecilia Wairimu Macharia's** mother is not known to him, but her husband's mother was married to the deceased in this case and that his mother passed on in 1950 and the deceased re-married to **Cecilia Wairimu Guchugo** who had two children, namely **Joyce Mugure** and **John Macharia** both of whom are deceased and he proposes both their dependants ought to inherit, these are **Charles Murage Nderitu** and **Cecilia Wairimu Macharia** and urged the court to adopt his proposal. He insisted that the deceased was never polygamous but re-married after his first wife died. He insisted that the first wife died leaving children who were adopted by the second wife.

Upon cross-examination, the witness admitted that he did not disclose in his affidavit that his grandfather was not polygamous nor did he know the date of the alleged marriages and he had nothing to prove that the deceased was not polygamous. His understanding of two houses was "*existence of two houses i.e two wives at the same time.*" The witness gave his age as 33 years and he admitted on cross-examination that his evidence was purely from information given. Further, he could not explain why his evidence varied with the contents of his affidavit in support of this application for confirmation of grant.

PW2 Cecilia Wamuyu Guchuga, confirmed she was married to the deceased, that the deceased had a previous marriage, but she did not know what happened to the first wife, that she never saw her and that she was dead by the time she was married. She came to know that the first wife was called **Mumbi** and that she had two children and she brought them up, these are **Mugure** and **Macharia**. She insisted that by the time **John Macharia** died, he was living in a different parcel of land, not the one the subject of this case. She insisted that distribution be done as per the number of the children as opposed to the number of houses.

Cecida Wairimu Macharia's evidence can be summarized as follows, that the deceased was her father in law and a grandfather to the protestor and that the deceased had two wives, namely **Mumbi** and **Cecilia Wamuyu**. She was married to son to **Mumbi**, the first wife. Her testimony was that during the deceased's lifetime he never divided his land. Her evidence was that the land in question measures **26** acres and was divided by a private surveyor into **4** portions and shared as follows:-(*i*) **Herself**, (*ii*), **Two other portions for deceased's two sons, namely Peter Macharia and Zakayo**, (*iv*) **Cecilia Wamuyu**. The said surveyor had been instructed by **Peter Macharia**, son to the second wife. She stated that they had not agreed on the said proposal and that she was given a steep portion while the others got flat areas and she had no access to the road. Her proposal is that the land be divided into two as per the number of the wives. Her evidence was that the deceased preferred that the land be divided as per the number of wives.

At the close of the trial, both counsel agreed to file written submissions. Counsel for the protestor urged the court to adopt the proposal by the protestor and share the land as per the number of the children and cited the provisions of Section **40** of the Law of Succession Act and the case of *Wachania Munuhe vs Richunge Munuhe & Another*

In his submissions, counsel for the petitioner submitted that the first wife contributed financially in purchasing the land. Unfortunately this never came up in evidence at all.

I find that the following is the key issue for determination, namely, *whether the property is to be shared*

as per the number of houses or as per the number of children.

At the very outset it's important to state the applicable law. Section 2 (1) of the Law of Succession Act provides as follows:-

"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."

The deceased died intestate on the 15th May 2010. The Law of Succession Act came into operation on 1st July 1981 hence it is the applicable law in the present case. The court of appeal in *Rono vs Rono*¹ held that African Customary Law was no longer applicable to persons dying after the commencement of the Law of Succession Act which ousted the operation of African Customary Law.

Section 34 of the Act provides that:-

"A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect."

No evidence was adduced to show that the deceased made any will or shared his property during his life time. Having found that the deceased died intestate in 2010, long after the Law of Succession Act came into force, and bearing in mind it is not disputed that the deceased married twice, the deceased estate fell for distribution in accordance with Part V of the Law of Succession Act.

The protestor insisted that the deceased was not polygamous but re-married after his first wife died. To me, whether the deceased re-married after the first wife died or had two wife's at the same time, as explained below, under Part V of the Law of Succession Act, the position does not change in that the appropriate provisions applicable in this case are Sections 35 and 40 of the Act.

It's also not disputed that the deceased was survived by his second wife and all his children as listed above. Section 35 of the Law of Succession Act caters for a situation where the deceased is survived by a spouse and children. The surviving spouse is entitled to the deceased's chattels and a life interest on the residue. The deceased in this case was survived by a spouse and children, although not all her children. Under Section 35 of the Act, upon determination of a life interest the estate should be shared equally between all children. The issue that would arise in the instant case is whether the surviving spouse can exercise life interest over property that ought to devolve to children other than her own.

Discussing the a similar position, **Musyoka J** observed that Section 35 appears to apply only to cases where the deceased had married only once, in other words, he had only one wife throughout. Section 40 on the other hand appears to address the case of a polygamist where the deceased had several wives at some stage of his life. The Act does not appear to have provisions to govern circumstances where a monogamous deceased person ends up with two households consequent upon re-marriage following the death of the first wife. It would appear that in dividing the estate of such person, the court should be guided by the provisions of both Sections 35 and 40 of the Act.

Under Section 40 of the Act, if the deceased had several wives, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the Act, the children would divide the estate equally among themselves. In my opinion, Section 40 would be more applicable in the present case.

The spirit of Part V, especially Sections **35**, **38** and **40** is equal distribution of the estate amongst the children of the deceased. The provisions are in mandatory terms, "*the property shall be equally divided amongst the surviving children..*" However, equal distribution does not always do justice, especially in polygamous situations where some of the children may be young.

It's not disputed that the deceased was married twice. What is disputed is whether or not he was polygamous since he re-married after the first wife died. In my view, under Kikuyu Customary Law, those are two houses and in my humble opinion the Law applicable is Section **40** of the Law of Succession Act I understand the submissions made by the petitioner regarding equal sharing but in this respect the law is clearly set out and there is no way the court can disregard the provisions of the law and apply customary law contrary to the express provisions of a written statute. Section **40 (1)** cited above provides that:-

"Where an interstate has married more than once under any system of law permitting polygamy,....."

The section talks of marrying more than once in a system of law permitting polygamy. It does not talk of re-marrying after the death of the first wife. I find that the above section applies to the present case.

I have carefully considered the evidence adduced by the parties and the submissions by both advocates. I have also taken into account the provisions of the Law of Succession Act. I have considering the justice of the case and taken into account that it is not always easy to achieve equality in cases of this nature as was observed in the case of *Rono vs Rono* and what may be fair in one case may not fair or applicable in another case. I have also considered that each case has to be determined on its peculiar facts and circumstances. I have considered that the last seven persons in the above list are daughters of the deceased who are all married and none of them lives on the land. But nevertheless I am alive to the fact that both daughters and sons are entitled to a share of the deceased's estate. None of the daughters attended court to help the court appreciate their preferred mode of distribution or even state whether or not they wish to be considered in the distribution. I however hasten to state that no adverse inference can be drawn from their failure to attend court.

After due consideration and after hearing some of the persons currently in occupation of the portions of the said land and who may be disrupted by a mode of distribution that may disrupt the existing status on the ground , I find that it is in the interests of justice and fairness that I order and decree as follows:-

(a) That out of title Number **Nyeri/ Endaraha/482** the following persons to allocated 5 acres each:-

- i. *Cecilia Wamuyu Nguchuga*-----5 acres
- ii. *Peter Macharia Muchogo*-----5 acres
- iii. *Zakayo Kahonge Muchogo*-----5 acres
- iv. *Cecida Wairimu Macharia*-----5 acres

(b) The remaining portion to be shared equally among the following:-

- i. *Joyce Mugure Ndiritu*
- ii. *Beth Mugure Njau.*
- iii. *Mary Wangui Muthui*
- iv. *Margaret Wamuchie Masaku*
- v. *Jane Nyambura Koigu*
- vi. *Zipporah Wanjiru Muchogo*
- vii. *Esther Watetu Muchogo*

(b) No orders as to costs.

Right of appeal 30 days

Dated at Nyeri this 18th day February of 2016

John M. Mativo

Judge