



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
SUCCESSION CAUSE NO. 404 OF 2012
IN THE MATTER OF THE ESTATE OF JAMES MIGWI GAKAU-DECEASED

Joseph Wairuga Migwi.....Petitioner/Applicant

versus

Mikielina Ngina Munga.....Protestor/Respondent

JUDGEMENT

James Migwi Gakau (herein after referred to as the deceased) died intestate on 9th September 1998 and on 30th April 2012, **Samuel Kamau Migwi** and **Joseph Waruga Migwi** petitioned for letters of administration intestate to the deceased's estate and named the following persons as the persons surviving the deceased, namely:-

1st House

- a. Mikielina Ngima Munga--1st Wife*
- b. Hanna Wanjiku Migwi--- Daughter*
- c. Samuel Kamau Migwi---Son*
- d. Zainabu Nyawira Migwi---Daughter*

2nd House

- a. Wangechi Migwi---2nd Wife*
- b. Samuel Kamau Migwi---Son*
- c. Joseph Wairuga Migwi---Son*
- d. Samuel Njuguna Migwi---Son*
- e. Wilson Gichia Migwi---Son*
- f. David Mwangi Migwi---Son*

g. Paul Maina Migwi---Son

h. Lucy Njeri Migwi---Son

i. Mary Wanjiku Migwi---Daughter

j. Agnes Wambui Migwi--- Daughter

k. Jane Wangari Migwi--- Daughter

The only properties listed in the petition as comprising the deceased's estate are title numbers **Nyeri/Endarasha/1284** and **Nyeri/Endarasha/1285**. The said petition was gazetted on 8th June 2012 and the grant was issued to the petitioners on 9th June 2012. On 14th February 2013, **Joseph Wairuga Migwi** applied for the said grant to be confirmed and proposed that the above properties be shared among all the beneficiaries in equal shares including the two wife's as additional units as provided for under Section 40 of the Law of Succession Act.[\[1\]](#)

Mikelina Ngina Munga filed an affidavit of protest on 17th May 2013 stating *inter alia* that:-

a. ***That*** she is the first wife of the deceased with whom she had **three children** while the second wife had **six children** when she got married and had **four others** with the deceased.

b. ***That*** originally, the deceased owned **Nyeri/Endaraha/912** measuring 5.5 acres and at the time he married the second wife, he had no house for her to reside in, hence **0.5 acres** out of the said land was sold to source funds for constructing a house for her.

c. ***That*** the remaining parcel of land was divided equally between the two houses and two separate titles issued and each house was put into exclusive use of their respective portions, and a distinct boundary to date exists between the said parcels.

d. ***That*** from the said sub-divisions, three parcels of land were created with distinct titles among them **Nyeri/Endarasha/1284** which was meant to be registered in the joint names of the protestor and the deceased and in support of this the protestor exhibited a copy of a letter of consent.

e. ***That*** the other two portions are **Nyeri/Endarasha/1285** and **Nyeri/Endarasha/1286**. The second wife's portion was issued with two titles as aforesaid because **Nyeri/Endarasha/1286** measuring **0.5 acres** was to be sold to enable the second wife raise funds to cater for medical bills for her son **David Mwangi** and she did sell the said portion to a one **Wilson Mwangi Mwaniki**, the same person who had purchased the initial **0.5 acres** referred to above.

f. ***That*** the deceased died before effecting the aforesaid transfers, but one month before his death, he reiterated his wish before his brother a one **Kamau Gakau** and other family members maintaining that each of his family had a distinct parcel of land.

g. ***That*** upon the deceased's death, the clan convened a meeting and requested the 2nd wife to hand over the original titled deed for her parcel, which she did and it was agreed that these proceedings be instituted jointly bearing in mind the deceased's wishes.

h. ***That*** the protestor proposed distribution as follows; (a) **Nyeri/Endarasha/1284** to be granted to **Mikielina Ngina Munga** to hold in trust for her children and **Nyeri/Endarasha/1285** to be granted to **Margaret Wangechi Migwi** to hold in trust for her children.

At the hearing hereof the protestors evidence was essentially a repeat of the contents of the above affidavit of protest reproduced above and she reiterated that each of the two wife's occupied their respective portions and that the deceased's wish was to leave them the way they were, that he involved

his brother **Kamau Gakau** whom he told he had two wives and that he had divided his land and that after the deceased's death no issue arose until she asked that they petition for letters of administration. She insisted that her co-wife lives on her portion and she (protestor) also occupies her portion, that the deceased shared his land when he was alive and no one questioned him and that they stayed **for ten years after the deceased divided his land as aforesaid** before his death. She insisted that she uses her portion, that, she build there when her husband was alive and that her husband build a house for her co-wife in her portion after selling a portion of the land as earlier explained.

On cross-examination she confirmed that the deceased brother handed them each their respective titles after the deceased's death.

Joseph Wairuga Migwi, son to the second wife and a co-administrator to the estate confirmed that the deceased had two titles in his name. He said he was not aware that his father ever went to the Land Control Board and that the deceased never told them how he wanted his land to be divided. He insisted that the deceased died intestate. He also said the deceased owned plot number **1286**, still in the deceased's name. He asked that the land be shared as per the number of children.

Both parties filed written submissions. Counsel for the protestor maintained that the deceased was polygamous and that he divided his land into two parcels with distinct titles prior to his death, and that his intention was that each of the two houses represented by each wife occupy one portion and in furtherance of this intention he sought and obtained consent of the Land Control Board to transfer **Nyeri/Endarasha/1284** to the protestor, that the deceased put each of the two wife's and their respective families in occupation of their respective portions, hence the distribution should be as per the deceased's wish. Counsel cited the following cases; **(a) Martha Wanjiku Waweru vs Mary Wambui Waweru**^[2] where **Onyancha J** dealing with a similar situation observed as follows:-

"The deceased divided his three pieces of land without any uncertainty. His intention was clear- that 928 should go to the Petitioner/Respondent; 929 to appellant/objector; and 930 to his two sons of opposite houses in the shares of 1.6 and 1.6 acres. There is evidence that all the members of the family accepted deceased's decision as none, including the respondent/petitioner, as admitted protested. The two sons took possession and continued cultivation for more than seven years after the deceased's death, without dispute.

In this case the deceased had in his lifetime distributed his estate as he wished. He had power to do so. His family members did not protest or change his mode of distribution which they had opportunity to do during his lifetime. He fixed clear physical boundaries which no one interfered with at any stage even after his death. In my view his wishes should have been respected....."

(b) Counsel also cited the case of **Paul Kiruhi Nyingi & Another vs Francis Wanjohi Nyingi**^[3] where the court upheld the wishes of the deceased. In his well considered judgement **Makhandia J** (as he then was) noted as follows:-

"Unless it can be demonstrated that those wishes of the deceased as captured in the black book were illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected in my view. Nothing has been brought to my attention that remotely suggests that the deceased's was biased, unfair and or discriminatory against any of the beneficiaries in the manner he wanted his estate shared out on his demise. In any event, it would appear that some of the beneficiaries were aware of the contents of the black book during the deceased's lifetime. If they were despatched with the distribution they should have taken it up with him."

(c) Counsel also cited the case of **Peter Chira & Another vs Nelson Gathogo**^[4] where the court upheld the deceased's wishes.

The Petitioner's counsel submitted that the deceased was polygamous, that The Law of Succession Act^[5] is the applicable law, that the properties in question constitute the free property of the deceased herein within the meaning of Section **3 (1)** of the Act and that the provisions of Section **40 (1)** of the Act do

apply in the present case and cited the decision of the Court of Appeal in *Francis Thiong'o vs Joseph Thiong'o*[6] where the court interpreted section 40 (1) aforesaid.

The issue for determination is **(a)** *whether the deceased distributed his properties prior to his death as alleged by the protestor.*

At the very outset it's important to state the applicable law. Section 2 (1) of the Law of Succession Act[7] 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."

While it is possible for a person to distribute his properties during his/her lifetime, there are certain elements which must be demonstrated as prove that indeed the deceased gave out a gift *inter vivos*. This brings into play the provisions of Section 42 of the Law of Succession Act[8] which provides:-

“42. *Where-*

(a) an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate.

That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house.”

In my view this section of the law seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. They are to honoured and effected.[9] There is evidence that originally the deceased owned one parcel of land being **Nyeri/Endarasha/982**. This has not been refuted. There is undisputed evidence that the deceased divided the above title and sold 0.5 acres to finance the construction of a house for his second wife. This evidence has not been refuted. There is unchallenged evidence that out of the original title, the deceased also created two equal parcels of land being **Nyeri/Endarasha/1284** which he gave to his first wife and title number **Nyeri/Endarasha/1285** which he gave to his second wife and both wife's settled in their respective portions, a position that obtains to date. This evidence has not been denied. There is evidence that the two portions **1284** and **1285** were equal but the deceased removed 0.5 acres from the second wife's portion and sold it to raise funds to treat her sick child. Curiously, this evidence too has not been rebutted.

The protestor also stated that after the deceased divided his land as aforesaid, he lived for another ten years or so and no one raised any objection at all. The protestor also stated that the deceased made his wishes clear to his entire family and involved his brother who after the demise of the deceased he gave each wife her title and there were no objections at all and the family agreed to petition for letters of administration jointly. The problem arose at the confirmation stage when the applicant **Joseph Wairuga Migwi**, a son to the second wife sought to have the property distributed as per the number of children prompting the protest the subject of this ruling.

Counsel for the applicant cited the provisions of Section 40 (1) of the Law of Succession Act[10] which provides 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"

With respect, I think Section 40 (1) cited above cannot apply where the deceased expressed his wishes

and intention in a very clear manner as in this case and took steps to ensure his preferred wishes are effected. The deceased in this case not only expressed his wishes but took crucial steps which left no doubts as to what his intentions were and long before he died he not only divided his land as stated above, but he also settled each wife in their respective portions. As observed above, such clear wishes are to be protected, respected and preserved as provided for under section 42 cited above. Such acts or settlements effected are not subject to disruption, change or frustration. They are to be honoured and effected.

I have carefully considered the affidavit and oral 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.^[11] I have considered 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*^[12] and what may be fair in one case may not be fair or applicable in another case. In the present case the second wife is said to have **ten children** while the first wife has **only three**. That may be so, but the express wishes of the deceased cannot be ignored. To me, the deceased was clear in his mind as to what he wanted and he freely bequeathed each of his two wife's a parcel of land during his life time, and lived for another 10 years after doing so and no one raised an objection.

I find useful guidance and resemblance in the above cited case of *Martha Wanjiku Waweru vs Mary Wambui Waweru*^[13] where **Onyancha J** observed *inter alia* as follows"-

"In this case the deceased had in his lifetime distributed his estate as he wished. He had power to do so. His family members did not protest or change his mode of distribution which they had opportunity to do during his lifetime. He fixed clear physical boundaries which no one interfered with at any stage even after his death. In my view his wishes should have been respected....."

I also find it necessary to reiterate with approval the above cited excerpt from the judgement of **Makhandia J** (as he then was) in the case of *Paul Kiruhi Nyingi & Another vs Francis Wanjohi Nyingi*^[14] where he upheld the wishes of the deceased in circumstances similar to the present case.

I reiterate that there is unchallenged evidence that the deceased first sold **0.5 acres** out of his land to build a house for his second wife. Then, he divided the remaining land into **two equal portions** one for each wife, thus maintaining equality. Then, out of the portion for the second wife, he excised **0.5 acres** being title number **Nyeri/Endarasha/1286** and sold it to the same person who bought the first portion. This portion was sold to raise money to cater for medical bills for the second wife's then ailing child. This crucial evidence was not contested. The only reason why the second wife's portion appears smaller is because after the deceased divided the land, he excised the said **0.5 acres** which he sold to cater for the treatment of the second wife's child.

As **Makhandia J** observed above *it has not been demonstrated that the deceased's wishes were illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected in my view. Nor has it been shown that the deceased's was biased, unfair and or discriminatory against any of the beneficiaries. In any event, it would appear that some of the beneficiaries were aware of the distribution in question during the deceased's lifetime. If they were despatched with the distribution they should have taken it up with him.*

I find that the facts of this case are so clear that Section 40 (1) of the Act on distribution as per the number of houses cannot apply without offending the express wishes of the deceased as provided for under Section 42 cited above. I have also considered that each case has to be determined on its peculiar facts and circumstances. I find that my answer to issue framed above is in the affirmative. After due consideration, I find that the protestors protest has merits and I allow it and order as follows:-

1. That distribution of the estate of the deceased **James Migwi Gakau** be and is hereby ordered as follows:-

a. Title number **Nyeri/Endaraha/1284** be registered in the name of **Mikielina Ngina Munga** to hold in trust for herself and all her children **Hanna Wanjiku Migwi, Samuel Kamau Migwi** and

Zainabu Nyawira Migwi in equal shares.

b. Title number **Nyeri/Endaraha/1285** be registered in the name of **Margaret Wangechi Migwi** to hold in trust for herself and her all children **Samuel Kamau Migwi, Joseph Wairuga Migwi, Samuel Njuguna Migwi, Wilson Gichia Migwi, David Mwangi Migwi, Paul Maina Migwi, Lucy Njeri Migwi, Mary Wanjiku Migwi, Agnes Wambui Migwi and Jane Wangari Migwi** in equal shares.

2. No orders as to costs.

Right of appeal 30 days

Signed, dated and delivered at **Nyeri** this **31st** day **March** of 2016

John M. Mativo

Judge

[1] Cap 160, Laws of Kenya

[2] {20007}eKLR

[3] {2009}eKLR

[4] {2002}eKLR

[5] Cap 160, Laws of Kenya

[6] Court of Appeal Case No. 8 of 2015-Nyeri

[7] Cap 160, Laws of Kenya

[8] Cap 160, Laws of Kenya

[9] See the Judgment of A. Mabeya J. in **Succession Cause No.43 of 2002, In the matter of the Estate of Noah Wanjala Kimawachi-Deceased**

[10] Cap 160, Laws of Kenya

[11] Supra

[12] Supra

[13] {20007}eKLR

[14] {2009}eKLR