



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 986 OF 2010

IN THE MATTER OF THE ESTATE OF JOHN GICHERU WAMBUGU-DECEASED

JUDGEMENT

John Gicheru Wambugu (herein after referred to as the deceased) died intestate in 29th April 2010 and on 2nd November 2010, **Lydia Wambui Gicheru** took out citations^[1] for service upon **David Githii Gicheru, Elizabeth Nyawira, Lucy Wanjiku, Ruth Wangechi & Dorcas Nyamura** who filed an entry to appearance to the said citations on 9th November 2010.

On 10th March 2011, **Lydia Wambui Gicheru** 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. *David Githii Gicheru*
- b. *Joseph Kihono*
- c. *Elizabeth Nyawira*
- d. *Lucy Wanjiku*
- e. *Ruth Wangechi*
- f. *Dorcas Nyambura*

2nd House

- a. *Lydia Wambui Gicheru*
- b. *Joel Kamau Gicheru*
- c. *Stephen Gichuki Gicheru*

The consent pursuant to Rule 26 (2) is signed by **John Kamau Gicheru & Stephen Gichuki Gicheru**. The only properties listed in the affidavit in support of the said petition are **Othaya/Ihuriro/418** and **Othaya/Ihuriro/587**.

On 9th May 2011, this court (Sergon J) restrained *David Githii Gicheru, Elizabeth Nyawira, Lucy Wanjiku, Ruth Wangechi and Dorcas Nyambura* from harrassing the petitioner herein by way of closing access road to the above parcels of land or stopping her from picking tea from the said parcels of land pending the hearing and determination of this succession cause.

On 6 October 2011, the petitioner moved this court seeking orders that *Elizabeth Nyawira, Lucy Wanjiku, Ruth Wangechi and Dorcas Nyambura* be punished for contempt of court for flouting the above order. On 16 February 2012 the court noted that the contempt had been purged and directed parties to have the determination of the dispute expedited.

The Grant was issued on 7th May 2012 to the petitioner and on 6th May 2013 **Dorcas Nyambura Gicheru** filed summons for revocation of the said grant on grounds the petitioner had failed to proceed diligently with the administration of the estate and also sought an order that the grant be issued to her. In reply to the said application, the petitioner proposed equal distribution of the estate among the two houses of the deceased. However, when the said application came up for hearing on 4th October 2013, the court directed that the petitioner files an application for confirmation of the grant within 14 days from the said date. Pursuant to the said order, the petitioner filed an application for confirmation of the grant on 17th October 2013 and proposed equal distribution of the estate among the two houses.

Dorcas Nyambura Gicheru filed an affidavit of protest on 25th November 2013 and proposed distribution as follows:-

A. Othaya/Ihuririo/418

- a. David Githii Gicheru.....0.7 acres
- b. Peter Wanjohi Gicheru.....0.7 acres
- c. Elizabeth Nyawira Gicheru.....0.7 acres
- d. Ruth Wangechi Gicheru.....0.7 acres
- e. Joel Kamau Gicheru.....0.7 acres
- f. Lydia Wambui Gicheru.....0.7 acres
- g. Stephen Gichuki Gicheru.....0.7 acres

B. Othaya/Ihuririo/587

- a. Dorcas Nyambura Gicheru.....0.7 acres
- b. Joseph Kahono Gicheru.....0.7 acres
- c. Lucy Wanjiku Gicheru.....0.7 acres

C. All the funds that were in the account as at the date of the deceased's death and that have been paid as tea proceeds in account number, Equity Bank, Othaya Branch be shared equally among all the beneficiaries.

On 18 December 2013, the court directed that this suit be determined by way of oral evidence and issued a further order directed to Equity Bank, Othaya and Nyeri Branch to avail statements of the deceased's account and charge registered on 24.5.2012.

Two witnesses statements were filed by counsel for the petitioner signed by a one **Charles Kingori Wanguku** and a one **Joseph Maina Kingori** both of whom proposed equal distribution of the estate among the two houses.

Both parties filed written submissions. Counsel for the protestor maintained that the deceased was polygamous and proposed equal distribution among the beneficiaries each getting approximately 0.7 acres or thereabouts. Counsel cited the provisions of Section 40 (1) of the Law of Succession Act^[2] 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"

Counsel further cited the following cases in support of his position, namely *Saweria Wamuruana Muchanji vs Jinaro Ngari*^[3], *Rono vs Rono & Another*^[4] and *Francis Mwangi Thiongo & 4 Others vs Joseph Mwangi Thiong'o*^[5]

Counsel for the petitioner filed lengthy submissions enumerating the history of these proceedings and

submitted that section 35 of the act is the applicable provision in this case. Counsel proposed all alternative of dividing the estate equally among the two houses. Counsel also stated that the division of the estate is premature since the de ceased is still alive and has a life interest.

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[6] 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 29th April 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*[7] held that African Customary Law was no longer applicable to persons dying after the commencement of the Law of Succession Act[8] 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.[9] 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.[10]

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.[11] 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.[12] 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.[13]

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.[14]

It's not disputed that the deceased was married twice. In my humble opinion the Law applicable is Section 40 of the Law of Succession Act.[15]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 WHICH provided distribution as per the number of houses 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. I find that the above section applies to the present case.

I have carefully considered the affidavit 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*[16] 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. After due consideration, I find that it is in the interests of justice and fairness that I order and decree as follows:-

1. That distribution be and is hereby ordered as follows:-

A. Othaya/Ithurio/418

- i. David Githii Gicheru.....0.7 acres
- ii. Peter Wanjohi Gicheru.....0.7 acres
- iii.Elizabeth Nyawira Gicheru.....0.7 acres
- iv. Ruth Wangechi Gicheru.....0.7 acres
- v. Joel Kamau Gicheru.....0.7 acres
- vi. Lydia Wambui Gicheru.....0.7 acres
- vii.Stephen Gichuki Gicheru.....0.7 acres

B. Othaya/Ithurio/587

- i. Dorcas Nyambura Gicheru.....0.7 acres
- ii. Joseph Kahono Gicheru.....0.7 acres
- iii.Lucy Wanjiku Gicheru.....0.7 acres

2. No orders as to costs.

Right of appeal 30 days

Dated at Nyeri this 22nd day March of 2016

John M. Mativo

Judge
