



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 121 OF 1993

IN THE MATTTER OF THE ESTATE OF CRISPIN WAHOME NDEGWA (DCD)

FRANCIS JAMES NDEGWA.....PETITIONER/PROTESTOR

VERSUS

1. ELIZABETH NJERI WAHOME

2. MARY WANJIRU WAHOME

3. MARY WAMBUI WAHOME

4. ANGELICA WANGUI WAHOME

5. LUCY WANJIKU WAHOME

6. CATHERINE WANJA WAHOME.....RESPONDENTS

JUDGMENT

The deceased whose estate is the subject of this cause, the late Crispin Wahome Ndegwa, died on 24th March, 1988; he was then domiciled in Kenya and his last place of residence was Chorongi-Karia village, in Nyeri County.

On 1st October, 1993 his son, the petitioner/protestor herein petitioned this court for letters of administration intestate of his deceased father's estate. According to the affidavit sworn in support of that petition, the deceased was survived by the petitioner and four daughters named in the affidavit as Elizabeth Njeri, Mary Wanjiru, Angelica Wangui and Lucy Wanjiku.

The petitioner listed three properties in his affidavit as comprising the deceased's estate; these are:-

1. Title No. Thegenge/Karia/ 288
2. Parcel No. Naromoru/ Block 2/ Muriru/1920
3. Plot No. Sweetwater /1/41

The deceased did not have any liabilities.

Objections were raised to the petition for grant of letters of administration but later, and more particularly on 19th May, 2014, this Honourable Court appointed the petitioner and his two sisters, Mary Wanjiru Wahome and Angelica Wangui Wahome as joint administrators of the estate.

By a summons for confirmation of grant filed in this court on 5th August, 2014 two of the administratrixes, Mary Wanjiru Wahome and Angelica Wangui Wahome sought to have the grant confirmed. Mary Wanjiru Wahome swore the affidavit in support of the summons. Contrary to the information given by the petitioner in the affidavit in support of the petition that the deceased was survived by five children, Mary Wanjiru deposed that, in fact, the deceased left behind seven children whom she has named as follows:-

1. Francis James Ndegwa
2. Mary Wanjiru Wahome
3. Elizabeth Njeri Wahome
4. Margaret Wambui Wahome
5. Lucy Wanjiku Wahome
6. Catherine Wanja Wahome
7. Angelica Wangui Wahome

She proposed that the deceased's estate be distributed amongst all these children as follows:-

1. Title No. Thegenge/Karia/288 measuring 1.28 ha or 3.1616 acres

- a) Francis James Ndegwa to get 0.256 ha (or 0.63232 acres)
- b) Elizabeth Njeri Wahome to get 0.256 ha (or 0.63232 acres)
- c) Mary Wanjiru Wahome to get 0.256 ha (or 0.63232 acres)
- d) Lucy Wanjiku Wahome to get 0.256 ha (or 0.63232 acres)
- e) Angelica Wangui Wahome to get 0.256 ha (or 0.63232 acres)

2. Parcel No. Naromoru/Block 2(Muriru)/920 measuring 20 acres

- a) Elizabeth Njeri Wahome to get 4 acres
- b) Mary Wanjiru Wahome to get 4 acres
- c) Lucy Wanjiku Wahome to get 4 acres
- d) Catherine Wanja Wahome to get 4 acres
- e) Angelica Wangui Wahome to get 4 acres

3. Sweetwater Plot No. 1/41

This particular parcel should be registered in common in equal shares amongst the following persons:-

- a) Francis James Ndegwa
- b) Elizabeth Njeri Wahome
- c) Mary Wanjiru Wahome
- d) Margaret Wambui Wahome
- e) Lucy Wanjiku Wahome
- f) Catherine Wanja Wahome
- g) Angelica Wangui Wahome

The petitioner filed his own summons for confirmation of grant dated 13th October, 2014; he acknowledged in the affidavit in support of the summons that the deceased was survived by seven children and not just the five he had listed in his affidavit in support of the petition. The petitioner also agreed with the applicant's proposal on the distribution of **Parcel No. Naromoru/Block 2(Muriru)/920**; however, he proposed that **Title No. Thegenge/Karia/288** should be transferred and registered in his name absolutely and the land referred to as **Sweetwater Plot No. 1/41** should be registered jointly in the names of:-

- a) Elizabeth Njeri Wahome
- b) Mary Wanjiru Wahome
- c) Angelica Wangui Wahome
- d) Lucy Wanjiku Wahome
- e) Catherine Wanja Wahome

Apart from the three properties, the petitioner also introduced some other "assets" whose description or particulars are not clear; for instance, he made reference to 'NSSF benefits', 'Tetu Coffee Co-operative Society Ltd' and 'Kenya Commercial Bank Ltd'. Whatever these assets were, he proposed that they should be distributed to all his sisters except Margaret Wambui Wahome.

Since the petitioner's summons was filed later in time, this court directed that the summons and the affidavit in support thereof be deemed as a protest to the summons filed by the joint administratrixes. The Court also directed that the protest be determined by way of oral evidence.

At the hearing, the petitioner reiterated the depositions made in his affidavit and in particular acknowledged that the deceased left behind seven children; however, contrary to what he swore in his affidavit, he said that the deceased's estate was only made up of three properties which are two parcels of land and an undeveloped commercial plot. He testified that these properties should be shared according to the proposal in his affidavit; in fact, he insisted that the properties have already been distributed and all he was proposing was merely a confirmation of the reality on the ground.

It was the petitioner's case that the parcel of land referred to as **Parcel No. Naromoru/Block 2(Muriru)/920** was purchased by the deceased in 1987 and that after his death in 1988 it was transferred to his sisters on 26th May, 1988. In proof of the fact that the deceased purchased the land, the protestor produced a receipt in acknowledgment of payment of the survey fees which his late father paid apparently for the survey of the land. He denied that his sisters ever purchased the land.

As far as the land known as **Title No. Thegenge/Karia/288** is concerned, the petitioner testified that the deceased allocated him two acres of land out this parcel in 1972; he testified that he has developed that

portion of land which he was allocated and the developments on it include a residential house worth 4.8 Million, macadamia plants and indigenous trees.

In cross-examination, he admitted that three of his sisters are living on this land; these are Elizabeth Njeri, Mary Wanjiru and Lucy Wanjiku. The petitioner did not call any witness and so his case closed with his testimony.

The applicant, Mary Wanjiru Wahome, on the other hand, testified that the land parcel **Title No. Thegenge/Karia/288** should be distributed as proposed in her affidavit. She testified that she has lived on this land all her life but that the petitioner is bent on chasing her and her sisters away. The applicant testified that one Duncan Ndegwa whom she identified as a brother to the deceased, or her uncle, paid part of the loan towards the purchase of this particular parcel of land; it is for this reason that the said Duncan Ndegwa was said to be holding the title deed to this particular land. She produced, in evidence, a copy of the official search for this property to demonstrate its ownership status; in the same breath she also produced a copy of the green card in respect of **Parcel No. Naromoru/Block 2(Muriru)/920** and an allotment letter with regard to **Sweetwater Plot No. 1/41**.

The applicant testified that together with her sisters they bought the parcel, **LR No. Naromoru/Block 2(Muriru)/920** and that out of total purchase price of Kshs 20,000/= she contributed Kshs 1,200/=. As sisters, they divided the land amongst themselves and even obtained the consent of the land control board to transfer the respective parcels but that these transfers could not be effected because the green card in respect of this parcel could not be traced.

Considering the evidence of both the protestor and the applicant, there is no dispute that that the deceased died intestate and therefore the administration and the distribution of his estate is subject to the intestacy provisions of the **Law of Succession Act, Cap 160, Laws of Kenya. Section 51 (1)** of that Act requires that the petition for letters of administration intestate must be made in a prescribed manner and form. **Section 51(2)** of the Act prescribes the information that ought to be included in such a petition; as far as they are relevant to this petition the pertinent parts of that section state as follows:-

51. (1) An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) An application shall include information as to -

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed.

This provision is mirrored in **rule 40** of the **Probate and Administration Rules** of which subrule 4

thereof emphasises that where the deceased has died wholly or partially intestate the applicant must satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.

Of all the information needed under **section 51** of the **Act**, it is only the requirement of full inventory of all the assets and liabilities of the deceased that appear to be an issue in this cause. As for the names and the number of surviving children, the parties were in agreement that the deceased was survived by seven children, although the petitioner listed only five in the affidavit in support of his petition. Nothing much, however, turned on the omission of the other two because, as noted, the number and identity of the deceased's children were not issues in dispute.

Ascertainment of the extent of the deceased's estate and the identity and shares of the beneficiaries is always a condition precedent to the confirmation of any grant in cases of intestacy such as is the case in the cause at hand. **Section 71(2)** of the Act is clear that in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled and when confirmed the grant must specify all such persons and their respective shares.

The parties' evidence has to be considered against the background of the foregoing provisions. To begin with, the petitioner listed in his petition three assets as comprising the deceased's estate; these are land parcel **Title No. Thegenge/Karia/288; Parcel No. Naromoru/Block 2(Muriru)/920;** and what has been described as a commercial undeveloped plot known as **Sweetwater Plot No. 1/41.**

In the affidavit in support of his own summons for confirmation of grant which, as noted, is deemed to a protest for purposes of these proceedings, the petitioner listed some other 'properties' but for which no evidence was produced to prove their existence. I also noted that the petitioner never made any reference to the so called assets in his testimony. Considering that they were not listed in the petition as assets comprising the deceased's estate and that no proof was ever produced of their existence I am bound to conclude that those 'assets' do not exist and are not part of the deceased's estate available for distribution. This then leaves this court with three properties which the contesting parties are in agreement that they comprise the deceased's estate.

A certificate of official search dated 13th April, 2015 in respect of **Title No Thegenge/Karia /288** and which was admitted in evidence, is clear that this particular parcel of land is registered in the name of the deceased and its approximate area is **1.28 ha.** It is therefore part of the estate of the deceased.

As for the property referred to as **Sweetwater Plot No. 1/41** all there is to prove ownership is what is indicated to be a "letter of allotment" dated 23rd July, 1984 from a company referred to as Weruini (Holding) Limited offering the deceased "**plot No. SWT/41 at Sweetwater Farm on LR 2828 and 10179.**" Again here there does not appear to be any controversy over ownership of this particular landed property and in the absence of any evidence to the contrary, I am bound to agree with all the parties that this property belonged to the deceased and thus forms part of his estate.

The remaining asset is **Parcel No. Naromoru/Block 2(Muriru)/920.** Although both the applicant and the petitioner were in agreement in their respective affidavits that this particular parcel of land belonged to the deceased, the applicant's evidence at the hearing of the protest was inconsistent with her depositions in the affidavit she swore in support of her summons for confirmation of grant. The applicant testified that she bought this particular parcel of land together with her sisters and infact she contributed the sum of Kshs 1,200/= towards the purchase price. The applicant produced a copy of the green card from the land registry to prove that the land was not owned by the deceased but by his daughters.

The petitioner, on the other hand, refuted the applicant's allegations and testified this land belonged to the deceased at all times material to this cause; he produced, in support of his testimony, a receipt from a company called Weruini Lands Limited showing that the deceased had paid some survey fees.

The most authoritative evidence on this issue, in my view, is the extract of the register from the lands

registry in respect of ownership of **Parcel No. Naromoru/Block 2(Muriru)/920** a copy of which was produced and admitted in evidence; that register shows that the first registered proprietor of this parcel of land was the Government of the Republic of Kenya; the government was so registered until the 26th May, 1988 when the proprietorship of this land was transferred to Elizabeth Njeri Wahome, Mary Wanjiku Wahome, Angelica Wangu Wahome, Lucy Wanjiku Wahome and Catherine Wanja Wahome. There is no entry in the records that suggests that this parcel of land ever belonged to the deceased. A receipt for survey fees from a company that has nothing at all to do with the Government and which makes no reference whatsoever to the land in question cannot not be taken to be evidence of ownership by the deceased of this property.

My conclusion on the issue of ownership of this land is that it is not part of the deceased's estate; considering the material placed before me, this particular property is not available for distribution amongst the deceased's children as if it was part of the deceased's estate simply because it is not. My finding may not make any difference though; I say so because the persons proposed by both the applicant and the petitioner to benefit from this land, in their mistaken belief that this land forms part of the deceased's estate, are the same people who are registered as its proprietors. It follows that either way, they were going to have the land.

The only properties left for distribution amongst the deceased's children are **Title No Thegenge/Karia /288** and **Sweetwater Plot No. 1/41**. The deceased having died intestate and without a spouse but having left behind seven children, the distribution of his estate in these circumstances is subject to **section 38** of the **Law of Succession Act**. This law states:-

38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

I need not belabour the point here because this provision of the law is as clear as it can possibly be that each of the deceased's children is entitled to an equal share of his estate. **Sections 41** and **42** which **section 38** makes reference to are of little relevance here; **section 41** deals with the interests of children who are minors in which case where the property is to devolve upon them that property is held in trust on their behalf. In this case the beneficiaries are relatively aged and therefore the issue of trust would not arise. **Section 42**, on the other hand, relates to lifetime advances or gift inter vivos such that where it is proved that the deceased paid, gave or settled any property for the benefit of a child, that property must be taken into account in the distribution of the net intestate estate. This again does not apply here because it was not proved that the deceased gave any of his property to his children during his lifetime.

In view of **section 38** of the **Act** each of the deceased's seven children is entitled to an equal share of his estate. Accordingly I will distribute the deceased's estate as follows:-

1. Title No Thegenge/Karia /288

This parcel of land which measures approximately 1.28 ha or 3.162 acres shall be shared and distributed equally amongst all the seven children of the deceased in equal shares. For avoidance of doubt each of the deceased's children share shall be as follows:-

1. Francis James Ndegwa 0.45 acres
2. Mary Wanjiru Wahome0.45 acres
3. Elizabeth Njeri Wahome 0.45 acres
4. Margaret Wambui Wahome 0.45 acres
5. Lucy Wanjiku Wahome 0.45 acres

6. Catherine Wanja Wahome 0.45 acres

7. Angelica Wangui Wahome 0.45 acres

The respective parcels shall be registered in the beneficiaries' names as absolute proprietors.

2. Sweetwater Plot No. 1/41

This property shall be registered in the following names as proprietors in common in equal shares:-

1. Francis James Ndegwa
2. Mary Wanjiru Wahome
3. Elizabeth Njeri Wahome
4. Margaret Wambui Wahome
5. Lucy Wanjiku Wahome
6. Catherine Wanja Wahome
7. Angelica Wangui Wahome

This being a dispute amongst family members parties will bear their own costs. Orders accordingly.

Signed, dated and delivered this 18th March, 2016

Ngaah Jairus

JUDGE