



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 1101 OF 2011

IN THE MATTER OF THE ESTATE OF DUNCAN MUREITHI KIMONDO (DECEASED)

BETWEEN

LEAH NGIMA MURIITHI.....1ST PROTESTOR

FAITH WANJIRU KIMONDO.....2ND PROTESTOR

AND

SUSAN WANJIRU MURIITHI..... APPLICANT

RULING

1. The estate relates to the late **Duncan Muriithi Kimondo** (deceased) who died on the 20th February, 1989 at the Provincial General Hospital. The identifiable properties comprising the estate of the deceased were;

- i. **Thegenge/Karia/1274**
- ii. **Thegenge/Karia/1275**
- iii. **Thegenge/Karia/1276**
- iv. **Mumbi Estate Plot P/TOL 401**
- v. **Citizen Building Society- A/c No. 02-488-588**
- vi. **Barclays Bank -A/c No.4892/2**
- vii. **Post Office Savings Bank- A/c No.30372**
- viii. **Continental Credit Finance Co. Ltd-A/c No.300-058**
- ix. **Kenyawide Building Society- A/c No.110-255**
- x. **Kenya National Farmers Union- A/c No.14-0080-0255-10**
- xi. **Cathedral parish Co-operative Savings & Credit Society Ltd**

2. The Deceased had two wives; the first wife being one Esther Nyakinyua (deceased) and this first house is comprised of ten (10) children, five of them are deceased with one being presumed to have died; the remaining five (5) are the surviving children of the deceased; the names of the children from the first wife are namely;

- i. Susan Wanjiru – the applicant herein
- ii. Francis Wachira
- iii. Duncan Wangombe
- iv. John Fatista
- v. Sammy Njione

- vi. Thomas Waithaka- Deceased
- vii. Remon Mwangi- “
- viii. Michael Kingori- “
- ix. Anita Muriithi - “
- x. David Kimondo- “

3. Leah Ngima Muriithi (who shall hereinafter be referred to as “**Leah**”) is the 1st Protestor herein and was the second wife of the deceased and her six (6) children who survived the deceased are namely;

- 1. Jane Wanjiru
- 2. Michael Kimondo
- 3. Lucy Kagure
- 4. Wilson Waithaka
- 5. Zakayo Gachuhi
- 6. Patrick Nderitu Muriithi

4. The 2nd Protestor who shall be hereinafter referred to as “**Faith**” is the widow of David Kimondo Mureithi who was a son from the first house.

5. Leah filed a Citation against the members of the 1st house and thereafter petitioned for Letters Of Administration to the deceaseds’ estate; Susan Wanjiru Kimondo (who shall hereinafter be referred ‘**the Applicant**’) is the eldest daughter from the first house filed an Objection to the making of a Grant and also filed a Cross-Petition; a consent was thereafter entered into by the parties herein that a Grant of Letters of Administration be issued to the Applicant together with the Leah and Faith; a Grant was subsequently issued to them as joint administrators on the 29th January, 2014.

6. On the 29th January, 2014 the Applicant as one of the administrators applied for the Confirmation of the Grant and proposed a mode of distribution; subsequent thereto Leah and Faith filed their separate Affidavits of Protest against the Summons for Confirmation of Grant and gave their reasons for protesting and included their proposed modes of distribution of the deceased’s estate.

7. Directions were taken on the 7th June, 2015 that the matter proceed for hearing and that **viva voce** evidence be tendered; the matter proceeded for full hearing on the 4/11/2015; all the parties gave evidence and were subjected to cross-examination; at the close of the hearing short written submissions were filed and exchanged.

1ST PROTESTORS’ CASE

8. Leah Ngima Muriithi, acknowledged that the deceased had a first wife and that she knew the children of the first house; her objection was to the applicants proposed mode of distribution of the properties of the estate of the deceased as she considers it to be oppressive and unfair.

9. That the property known as Plot No. 972 belonging to the deceased was sub-divided into three parcels that is Thegenge/Karia/1274, 1275 and 1276; the deceased transferred Thegenge/Karia/1274 to her as a gift inter vivos as a gift for taking care of him; that she had caused it to be sub-divided into two portions and that she had to sell a portion so as to educate her young child; that she resided on the other portion and therefore this property was rightfully hers.

10. She proposed that Thegenge/Karia/1275 goes to the first house as they paid off the loan that the deceased had with Kenyawide Builders in the sum of Kshs.32,000/- which loan she did not assist them in paying off; and also the first wife is buried there.

11. As for the parcel Thegenge/Karia/ 1276 she had paid off in full the AFC loan that the deceased had over this parcel; she had no supporting documents or receipts as these had been taken away by the first wife; that the deceased was buried there but she had objected to the first wife being buried thereon; she

proposed that this parcel be divided into two portions; a smaller portion measuring 0.03 Hectares that should include the area with the four graves be given to the first house; that the second portion measuring 0.087 Hectares be given to her; that this bigger portion would equalize the two houses acreage.

12. That the house in Mumbi TOL 401 be divided equally between the two houses and the rents collected be shared equally; all the shares be divided into two for each house; and the monies in the deceased bank accounts be divided equally between the two houses thereafter the houses to apportion the monies equally amongst themselves.

13. That the household goods had been taken by the applicant; and the kiosk was non-existent.

2ND PROTESTORS CASE

14. Her evidence was that the first house had ten (10) children and that three were deceased leaving seven; that the late David Kimondo Mureithi was her husband and that he was a son to the deceased and the first wife; that her husband went missing over a long period and the she was compelled to file an application for him to be presumed dead and she obtained a Death Certificate.

15. She opposed the applicants' mode of distribution and proposed that Thegenge/Karia/1276 be divided equally between the two houses; thereafter the first houses' share be divided and that each of the seven beneficiaries be given an equal share of 1/7.

16. That the property known as Thegenge/Karia/1274 did not form part of the deceaseds' estate.

17. She proposed that Thegenge/Karia/1275 goes to the 1st house and that each beneficiary in the 1st house to be given a 1/7th share; that the property known as Mumbi Estate TOL 401, the shares and the bank accounts be shared equally as between the two houses; and the 1st houses portion arising therefrom be divided equally between the seven beneficiaries.

18. That the applicant did not want her to get any property from the estate of the deceased because the applicants' contention was that the deceased had assisted her late husband to acquire other parcels of land.

19. Faith maintained that the properties Tetu/Mutairi/1952 and Rumuruti/Block/4595 were bought by her late husband with his monies; she produced Green Cards to support the fact that the property in Rumuruti was registered in the names of her late husband from the Government of Kenya in 1991; whereas her father-in-law died in 1989; as for the Tetu property the was no indication that her father-in-law had anything to do with it.

20. That she was a dependant as provided under Section 29 of the Law of Succession Act and was entitled to benefit from the 1st house.

APPLICANTS CASE

21. The applicant is the eldest daughter of the deceased from the first house; she filed her proposed mode of distribution as set out hereunder;

- i. Thegenge/Karia/1275 and 1276)
- ii. Ndathi Mugunda Shares –)
- iii. Mumbi Estate Plot Tol/401) –all to the applicant
- iv. Rekemu Bahati Forest Shares)
- v. Wachakehiri Farmers Shares)

22. She proposed that the properties listed hereunder be distributed to Leah;

6. Thegenge/Karia/1274

7. Gitugu Farmers Company Shares No.275
8. Plot in Usaid Mumbi Estate
9. Sewing Machine
10. Knitting machine
11. Household goods

23. The applicant relied on Section 42 of the Law of Succession Act so as to lock out both Leah and Faith; that Leah had been given a gift in the lifetime of the deceased that is Thegege/Karia/1274; that this property formed part of the deceased's estate; that the property Thegege/Karia/1275 had been used by the deceased as security to develop Thegege/Karia/1274; that upon the demise of their father the property Thegege/Karia/1275 still had an outstanding loan which the 1st house solely redeemed the mortgage; for those reasons Leah should not get any share of Thegege/Karia/1276; this property was also utilized by the 1st house its graveyard; her brothers were buried there but Leah had objected to the 1st wife being buried there; and that the wazee had also said that this property belonged to the 1st house.

24. That Faith was not entitled to any immovable property in the deceased estate as the deceased had helped her late husband to acquire two properties during his lifetime.

25. The applicant was agreeable to the monies lying in the accounts namely Citizen Building Society, Barclays Bank, Post Office Savings Bank, Kenya National Farmers Union, Continental Credit Finance and Cathedral Parish Cooperative Savings & Credit Union being shared equally amongst the administrators.

26. She prayed that the distribution be as per her proposal.

ISSUES FOR DETERMINATION

27. After hearing the presentations of the respective counsel and reading the written submissions this court has framed the following issues;

- i. Whether the 2nd Protestor is a beneficiary and entitled to inherit;
- ii. Whether any property was gifted to her deceased husband;
- iii. Distribution of the estate of the deceased.

ANALYSIS

Whether the 2nd Protestor is a beneficiary:

28. In her evidence the applicant does not dispute that her deceased David Kimondo Muriithi was her brother and that he was a son of the deceased from the first house; she does not also dispute that Faith is his wife and widow.

29. Faith stated in evidence that her husband went missing for a long period of time; the letter from the area chief annexed to the applicant's Form P&A 5 also corroborates the fact that David Kimondo Muriithi was indeed a son of the deceased and confirms that he was a missing person.

30. She thereafter moved the court at Karatina to have him presumed dead by filing an application thereat; that the application was allowed and she thereafter obtained and proceeded to also obtain a Grant of Letters of Administration to his estate.

31. Section 29 (a) of the Law of Succession Act gives a description of a dependant and it reads as follows;

“29(a)children of the deceased whether maintained by the deceased immediately prior to his death.”

32. This court has examined and considered the evidence put before it and is satisfied that the applicant recognized David Kimondo Muriithi as her brother and a son of the deceased from the first house; and that she knew Faith as his wife and surviving widow; and is further satisfied that Faith as a daughter in law qualifies to be a dependant and a beneficiary of the deceased's estate.

Whether any property was gifted to Faiths' deceased husband:

33. Section 38 of the Law of Succession provides where there is no surviving spouse the children should divide the estate equally amongst themselves; which then leads to the applicants' main bone of contention and her opposition to Faith gaining more than the others as the deceased had already provided for.

34. The Applicant maintains that her late brothers' family ought not to benefit from the estate as he had been helped by the deceased to purchase other properties in Rumuruti and Tetu; therefore it follows that her late brothers family should not unjustly enrich themselves by benefiting again from the estate.

35. The applicant relied on the provisions of Section 42 of the Law which provides;

“Where

- a. **An intestate has, during his life time or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or**
- b.

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

36. The section provides that a gift given during the lifetime of the deceased must be taken into consideration when distribution is carried out so as to promote the equal distribution principle.

37. It is a principle of law that he who alleges a fact must prove it; Section 107(2) of the Evidence Act provides;

“ When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”

38. The applicant testified to the fact that the deceased helped her brother to acquire properties but produced no evidence either documentary or otherwise to support or corroborate this fact; whereas Leah produced Certificates of Official Search from the Lands Registry to rebut the applicants' claims.

39. This court is satisfied that no evidence has been tendered to connect the deceased to the properties or to demonstrate that the deceased played a part in the acquisition of the properties belonging to Faiths late husband.

Distribution of the estate of the deceased

40. From the evidence adduced there is no dispute as to the properties that comprise the estate of the deceased; what is not agreed upon is its mode of distribution; and this court is therefore tasked with this duty.

41. From an overall review of the evidence adduced by the parties it is clear that the Thengenge property was the property of the deceased and its original number was Plot No.972; the deceased caused it to be sub-divided into three portions namely Thegenge/Karia/1274, Thegenge/Karia/1275 and Thegenge/Karia/1276.

42. On the basis of the forgoing this court is satisfied that Thegenge/Karia/1274 forms an integral part of the property of the deceased and this property shall be taken into consideration when determining

distribution.

43. This court has taken note of the fact that applicant has no issue with the land known as Thegenge/Karia/1274 being distributed to the second house headed by Leah; and Leah is not opposed to Thegenge/Karia/ 1275 being distributed to the first house provided that Faiths' share be included therein; Faith states that Thegenge/Karia/1274 does not form part of the deceased estate and proposes that Thegenge/Karia/1275 be given to the 1st house.

44. There seems to be a consensus on the distribution of these two properties and this court is disinclined to increase the acrimony already in existence and will therefore not disturb the mode proposed by the parties.

45. The most contentious immovable property is Thegenge/Karia/1276; the applicant proposed it be given to to the first house alone and gave her reasons in support; Leah proposed that it be divided into two portions; the smaller portion measuring 0.03 Hectares which portion should include the area with the four graves; that this portion be given to the first house; that the second portion measuring 0.087 Hectares be given to her; that this bigger portion would equalize the distributed acreage as the 1st house already had Thegenge/Karia/1275; Faith proposed that this property be divided equally between the two houses.

46. The facts that are not in dispute are that the deceased was a polygamist and had two wives and that there were two households.

47. Therefore this court finds that Section 40 of the Law of Succession to be the applicable law and distribution shall be subjected to the said provisions; the Section reads 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.”

48. This court is also guided by the Court of Appeal decision of **Rono vs Rono and Anor (2005) 1 EA 363**; where it was held that the estate of a polygamous deceased should be distributed according to the number of children and not the number of houses.

49. The first house is found to comprise of six family members which translates to six units; the second house comprises of six members and Leah being the extra unit bringing the total to seven units; the ratio of distribution is therefore determined to be 6/13 for the first house and 7/13 for the second house; this court will therefore apply these ratios in distributing Thegenge/Karia/1276, Mumbi TOL/ 401, the shares and the money in the bank accounts.

50. The provisions of Section 40 (2) of the Law of Succession further provide that the spouse is entitled to the chattels and household goods; the applicant had also proposed the same in her mode of distribution; therefore the sewing, the knitting machine and the household effects will be distributed to Leah.

FINDINGS and DETERMINATION

51. For the afore-going reasons this court finds that Faith is a beneficiary and is entitled to benefit from the deceased's estate first house.

52. The applicants proposed mode of distribution is found to be unfair; the estate of the deceased shall be distributed as follows;

A. Thegenge/Karia/1275 to the first house to be apportioned equally amongst the surviving beneficiaries and Faith.

B. Thegenge/Karia/1274 to Leah and the second house.

C. Thegenge/Karia/1276 – the portion comprising of the graveyard be first excised and be utilized as a family graveyard for the first house; the resultant acreage shall be divided on a ratio of 6/13 for the first house; and 7/13 for the second house; Leah shall hold a life interest of her share; the life interest to terminate upon her death and shall then be shared equally between all the deceased's surviving children.

D. Mumbi Plot TOL/401 – this property was not valued – the property to be divided according to the determined ratios; Leah shall hold a life interest of her portion and upon her demise it shall be shared equally amongst all the deceased's surviving children.

E. The following shares are in land buying companies if the parcels of land are identifiable then distribution shall be on the determined ratios; if not then the shares be held in the names of the applicant and Leah.

(i) Rukekimu Bahati Forest

ii. Waichakehiri Farmers

iii. Gitugu Farmers Company

iv. Nyakinyua Farmers

v. Ndathi Mugunda

F. The monies in the bank accounts listed hereunder to be shared on the determined ratios;

i. Citizen Building Society A/c No:02-488-588

ii. Barclays Bank A/c No:4892/2

iii. Post Office Savings Bank A/C No:30372

iv. Kenya Wide Building Society A/c No:110-255

v. Kenya National Farmers Union A/c No:14-0080-0255-10

vi. Continental Credit Finance Ltd A/c No:300-058

vii. Cathedral Parish Co-operative Savings & Credit Society Ltd

G. The sewing machine, knitting machine and household effects go to Leah.

53. The Grant is hereby confirmed on the terms as ordered.

54. Each party shall bear their own costs.

It is so ordered.

Dated, Signed and Delivered at Nyeri this 24th day of May, 2016.

HON. A. MSHILA

JUDGE.