



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1638 OF 1993

IN THE MATTER OF THE ESTATE OF SIMON NDUNG'U KIHONGE(DECEASED)

JUDGMENT

1. The Summons dated 27th September 1999 is premised on section 71(1) of the Law of Succession Act, Cap 160, Laws of Kenya, and Rule 40(1) of the Probate and Administration Rules. It seeks confirmation of the grant made on 8th April 1998 to the four (4) widows of the deceased namely; Beatrice Wangari, Jane Nyambura, Tabitha Wairimu and Lucy Nyambura.
2. The application is brought at the instance of Lucy Nyambura Ndung'u, the fourth widow. Her affidavit in support of the application was sworn on 27th September 1999. She has identified the survivors of the deceased and the property he died possessed of; and she has proposed how the said property ought to be distributed.
3. According to her, the deceased died a polygamist having married four times, the wives have been listed in paragraph 1 of this ruling. It can therefore be said that his estate comprises four (4) houses. As at the time of the affidavit was sworn, all four widows were alive. Three had children, while one was childless. The first house is that of Beatrice Wangari, she has no children. The second house is of Jane Nyambura, she has six (6) children, being Stephen Kihonge, Joseph Kung'u, Jecinta Njeri, Andrew Ng'ang'a, Elizabeth Muthoni and Susan Njoki. The third house is that of Tabitha Wairimu. She has four (4) children – Edwin Waweru, Pauline Wambui, George Kihonge and Isaac Muthaka. The last house is of the applicant, Lucy Nyambura, and she has three (3) children, being Michael Kihonge, Schola Njeri and Stella Wanjiku.
4. The assets identified by the applicant have been classified into agricultural and commercial plots. The agricultural plots are Naivasha/Mwichiringiri/Block 4/303, 304, 311, 312, 403, 2633, 2634 and 3298, Naivasha/Maraiguchu/Block 6/114 and Nyandarua/Ol'aragwai/550, 977 and 978. The commercial plots were identified as Plot No. 97 Gilgil Town, plot at Murungaru shopping centre, LR No. 1144/469 (Othaya Annexe Hotel), Naivasha/Maraiguchu/Block 1/921 and LR No. 1144/249 (Othaya Country Hotel). There is also a tractor whose registration details are not disclosed.
5. The distribution proposed by the applicant is that the first house gets Naivasha/Mwichiringiri/Block 4/303 and 304 and a quarter of LR No. 1144/469. She proposes that the second house gets Nyandarua/Ol'aragwai/550, 977 and 978, Naivasha/Mwichiringiri/Block 4/3298, the plot at Murungaru shopping centre and half share of LR No. 1144/249. The third house is allocated Naivasha/Maraiguchu/Block 6/114, Naivasha/Mwichiringiri/Block 4/2633 and 2634, Plot No. 97 Gilgil Town and half share of LR No. 1144/249. The fourth house gets Naivasha/Mwichiringiri/Block 4/311 and 312, three quarter share of LR No. 1144/469, and a tractor. There is also an allocation to one Jecinta Wanjiru, of

- Naivasha/Maraiguchu/Block 1/921. It is not explained who this Jecinta Wanjiru is, and why she was being given a share in the estate. The applicant explains that the deceased paired her with the first widow regarding the distribution of LR No. 1144/469 on the grounds that the two got along well.
6. The applicant has attempted to give reasons for the allocation that she has proposed in her application. The first house gets the agricultural land where the deceased's remains were buried, while the third house gets the agricultural land where it had a residence before the deceased died. The agricultural land allotted to the fourth house is justified on the grounds that the deceased had expressed the wish that the said property be inherited by his youngest wife. No reason has been given for the devolution of Nyandarua/Ol'aragwai/550, 977 and 978, Naivasha/Mwichiringiri/Block 4/3298 to the second house.
 7. Regarding the commercial plots, the applicant allots herself LR No. 1144/469 on the basis that she resided there with the deceased, before his death, she managed the building and the businesses in it and it was the deceased's wish that the asset be inherited by her and the first widow. The second and third house are allocated LR No. 1144/249 as that was the deceased's wish.
 8. In her affidavit, the applicant has asked the court to take into account that she is the youngest widow and her children are minors who still require a lot in terms of maintenance and support. She states too that she is the only widow who is not drawing any income from the assets, having been driven out of businesses in LR No. 1144/469 by members of the second and third households. She refers to a consent order recorded in the cause on 25th November 1993, which would have enabled her to have access to some income from some of the assets, but the other houses have ignored the same.
 9. The other widows/administrators have filed their respective responses to the proposals by the applicant. The second and third widows swore a joint affidavit on 13th October 1999. The first widow's affidavit was sworn on 7th October 1999.
 10. The two deponents of the affidavit sworn on 13th October 1999 have agreed with the applicant that the deceased was survived by seventeen (17) individuals, being - Beatrice Wangari, Jane Nyambura, Stephen Kihonge, Joseph Kung'u, Jecinta Njeri, Andrew Ng'ang'a, Elizabeth Muthoni, Susan Njoki, Tabitha Wairimu, Edwin Waweru, Pauline Wambui, George Kihonge, Isaac Muthaka, Lucy Nyambura, Michael Kihonge, Stella Njeri and Wanjiku Ndung'u. They are largely agreed on the assets available for distribution, but they have added to the list of assets. The new assets are Plot No. 4 Elburgon, Naivasha Town Plot No. 75 and half plot Njoro 662.
 11. They do not fully agree on the distribution proposed. According to them, the first house should get one quarter shares in LR No. 1144/249, Plot No. 4 Elburgon, Plot No. 662 Njoro, Nyandarua/Ol'aragwai/978, and joint share of tractor registration mark and number KHD 742, together with its trailer. The second house is allotted LR No. 1144/469, Nyandarua/Ol'aragwai/550 and Naivasha/Mwichiringiri/Block 4/3298. The third house is allotted Naivasha/Mwichiringiri/Block 4/303, 304, 311 and 312, Naivasha/Maraiguchu/Block 6/114, Nyandarua/Ol'aragwai/977 and Naivasha Town Plot No. 75. The fourth house is allotted three quarter shares of LR No. 1144/249, Plot No. 4 Elburgon, Plot No. 662 Njoro and Nyandarua/Ol'aragwai/978, and joint share of tractor registration mark and number KHD 742, together with its trailer.
 12. The two explain that they have taken into account the monetary values of the assets based on valuation reports that they have attached to the affidavit, the property occupied or possessed at present by the parties, and the friendship between the first and fourth houses. They state that deceased had expressed a wish to give Jecinta Wanjiru the property known as Naivasha/Maraiguchu/Block 1/921. He is also said to have had adopted one Peter Kariuki Ndung'u, and had expressed a wish that the said person be given Naivasha/Mwichiringiri/Block 4/2633 and 2634. They assert that the applicant moved out of the businesses on LR No. 1144/249

on her own accord. They deny the rest of the allegations in the affidavit of the applicant.

13. The first widow agrees totally with the applicant on the persons who survived the deceased and on the assets that make up the estate. She also agrees entirely with the distribution proposed by the applicant. The first widow says that she is the one who had always lived on Naivasha/Mwichiringiri/Block 4/304 with the deceased since 1979. She adds that the second widow had been settled on the Nyandarua lands by the deceased. She states that the third widow was settled by the deceased on Naivasha/Maraiguchu/Block 6/114 in 1990. The fourth widow is said to have been farming on Naivasha/Mwichiringiri/Block 4/311 and 312.
14. She adds that it was true that the deceased had expressed that the commercial property be shared as proposed by the applicant. She states that the applicant had been denied access to LR No. 1144/249, which was fully under the control of the third house with the first and second houses controlling LR No. 1144/469. She urges the court to take into account that she was the first of the four wives to be married by the deceased, and that she had immensely contributed to the acquisition of the assets which make up the estate. She urges that each house should be allowed to retain the agricultural land that they occupied and lived in both during and after the deceased's death.
15. There is on record an affidavit sworn on 3rd June 2010 by the third widow. It essentially says that the family had met and reached a settlement on the distribution of the estate. The terms of the settlement are set out in the affidavit. A handwritten copy of the settlement is attached, and it was purportedly signed by the widows and four children, being Pauline Wambui, Stephen Kihonge, Joseph Kung'u and Andrew Ng'ang'a.
16. The said settlement was reduced into a typed consent, which was signed by the four widows and dated 29th April 2005. It was lodged at this registry in the cause on 10th August 2005. The same was never adopted as an order of the court. An application by the second widow dated 23rd October 2013 to have the same adopted as an order of the court was filed on 24th October 2013, but the court declined to grant it on the grounds that the adoption of the consent needed the concurrence of all the parties.
17. The application dated 27th September 1999 was heard orally, commencing on 14th July 2015. The applicant and the first son in the second house testified.
18. The applicant in her testimony dwelt on the alleged settlement. She stated that she was in a desperate situation when she signed the settlement. She had allegedly been dictated to. There had been fights at home, and the sons in the second house had been harassing her. She said that she had been evicted from the estate property by the sons of the second house, assisted by the family of the third house. She had been driven out of the house she occupied before her husband died. She had also been driven out of her businesses and the farmland. The meeting was held at the house of the first widow, a venue that in her view did not provide a conducive atmosphere. She had not been in touch with anyone in the family, for the rest had the attitude that she was not justified to get inheritance from her late husband's estate. The negotiations leading up to the settlement were driven by the children in the second and third houses, at a time when her own children were minors and in school. When she got into the meeting place she just kept quiet and listened, for she had been threatened by the children from the second house, who had told her that if she did not comply with what they wanted they would deal with her. She was not allowed to contribute, and at the end of it she was asked to sign the document. The said document provided that she should buy the second widow out of LR No. 1144/469, yet she had no money to do so.
19. Stephen Kihonge Ndung'u testified for the respondents. He confirmed that the meeting that culminated in the contested consent was held at the house of the first widow. He described the place as the main house where the deceased used to live before he died, and where the fourth widow sometimes lived. He said that other family members would also reside there at times. He said he never used to live with his mother, and so he lived in that house. He denied that the

applicant was coerced to sign the settlement, accusing her of being the problem, for she did not want the matter to end. He said that she had an attachment to LR No. 1144/469. He denied the allegation that his family and the third house had evicted her from LR No. 1144/469.

20. In the distribution of an intestate estate, there are three factors for consideration, namely: the persons who have survived the deceased, the assets available for distribution and the manner the assets are to be distributed amongst the survivors. In the context of this cause, there is no dispute as to the persons who survived the deceased, and there is a general consensus as to the assets available for distribution. The main area of conflict is how the estate ought to be distributed.

21. The distribution of an intestate estate is the subject of legislation, that is for the estates falling within the purview of the Law of Succession Act. Intestate succession is governed by Part V of the Act. The deceased person in the cause died a polygamist. The relevant provision in Part V is section 40, which provides as follows:

'(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal estate 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.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.'

22. The deceased had married four times, therefore his family comprised of four houses. In the first house he was survived by a widow without children, which means that that house comprised of one (1) unit. In the second house, he was survived by a widow and six (6) children, which then means that that house comprised of seven (7) units. The survivors in the third house were a widow and four (4) children, making up five (5) units. The fourth house had a widow and three (3) children, translating to four (4) units. In total the household comprised of seventeen (17) units.

23. By virtue of section 40, the assets should first be divided into seventeen units, and thereafter allocated to the houses according to the number of children in each house, with the surviving spouse being added to the number of children. This would mean that the first house ought to be allotted assets equivalent to one unit, the second house assets equivalent to seven units, the third house assets equivalent to five units and the fourth house assets equivalent to four units. The objective is to ultimately achieve equal distribution amongst all the survivors of the deceased, for at the end of it each of the seventeen survivors end up with assets whose value amounts to one unit.

24. Of course, in distribution, the court has to be alive to other factors, such as where matrimonial homes are located, who occupies and utilizes which property, and the deceased person's preferences.

25. The estate herein comprises of both agricultural and commercial property. Three of the widows – that is to say the first, second and third - appear to have had matrimonial homes set up for them by the deceased in particular farms. The fourth widow does not appear to have had a matrimonial home established for her. She appears to have used the residence within the commercial premises in LR No. 1144/469 as her home, although she also appears to have regularly resided with the first widow at her home, where her children were sometimes cared for by the first widow. The widows with matrimonial homes in specific farms, apparently utilized those farms, and the same should be allotted to them.

26. In addition to that, the widows or their houses should be entitled to the lands that they had actively farmed or were close to their farms. Whereas there is no dispute as to the farms worked by the first three widows, there is serious contention as to the farm that the fourth widow utilized. It has been suggested that she was probably not doing any farming during the deceased's lifetime. Whatever the case, she and her house should be entitled to a share of the farms.

27. The main contest centres around the commercial assets. From the material before me it would appear that it was the first and last widow who used to operate or ran businesses on LR No. 1144/469. Indeed, the fourth widow used to live there. However, after the demise of their husband the *status quo* was disrupted, and the fourth widow ended up out of both the residence and the businesses that were being conducted from the said premises. It would appear that the first widow was also harassed in the process. The disturbances ended up with the second house having control of LR No. 1144/469. The fourth house was thrown out altogether, while the first house appears to have been left running some businesses there. The second house is blamed for the disturbances, which were apparently designed to bring it into control of property that it did not previously have access to.

28. All the four sides appear to be angling for a stake in the commercial assets. This is plain from the various proposals placed on the table by the party, that is the proposals made in the application, by the applicant and the respondents, as well as the alleged settlement dated 29th April 2005 which was never adopted as an order of the court. In distributing the estate of the deceased I will be guided by section 40 of the Act, and by the factors that I have referred to in the foregoing paragraphs of this judgment.

29. Some of the parties proposed distribution to two individuals, who are neither spouse or children of the deceased on the basis that the deceased had informally adopted them or had expressed a wish to have them benefit. The two are Jecinta Wanjiru and Peter Kariuki Ndungu. Only the deceased could benefit persons outside his immediate family by making gifts to them in a will. There is no will in respect of the estate of the deceased herein. It is not incumbent on administrators or beneficiaries to benefit persons who are outside the immediate family. In any event the said persons should have come forward to stake their claim to the estate through an application appropriately brought under section 26 of the Law of Succession Act. I do not find any legal basis upon which the court can take them into account in the distribution of the estate of the deceased.

30. In the end I direct that the estate of the deceased be distributed as follows:

- a. **That the survivors of the first and fourth houses (Beatrice Wangari, Lucy Nyambura, Michael Kihonge, Schola Njeri and Stella Wanjiku) shall share Naivasha/Mwichiringiri/Block 4/303, 304, 311 and 312, Plot No. 4 Elburgon, equally, with the tractor registration mark and number KHD 742 going to Beatrice Wangari and Lucy Nyambura jointly;**
- b. **That the survivors in the second house (Jane Nyambura, Stephen Kihonge, Joseph Kung'u, Jecinta Njeri, Andrew Ng'ang'a, Elizabeth Muthoni and Susan Njoki) shall share Nyandarua/Ol'aragwai/550, 977 and 978, Naivasha/Mwichiringiri/Block 4/3298, Plot No. 662 Njoro, plot at Murungaru shopping centre and Naivasha/Maraiguchu/Block 1/921, equally;**
- c. **That the survivors in the third house (Tabitha Wairimu, Edwin Waweru, Pauline Wambui, George Kihonge and Isaac Muthaka) shall share Naivasha/Maraiguchu/Block 6/114, Naivasha/Mwichiringiri/Block 4/2633 and 2634, Plot No. 97 Gilgil Town and Naivasha Town Plot No. 75 equally;**
- d. **That LR No. 1144/249 and LR No. 1144/469 shall be shared equally amongst all the seventeen (17) survivors of the deceased, that is to say, Beatrice Wangari, Jane Nyambura, Stephen Kihonge, Joseph Kung'u, Jecinta Njeri, Andrew Ng'ang'a, Elizabeth Muthoni, Susan Njoki, Tabitha Wairimu, Edwin Waweru, Pauline Wambui, George Kihonge, Isaac Muthaka, Lucy Nyambura Michael Kihonge, Schola Njeri and Stella Wanjiku;**
- e. **That any other property that has not been distributed here above shall be sold and the proceeds of sale thereof shared equally amongst all the seventeen (17) survivors of the deceased;**
- f. **That in the event of the survivors being unable to agree on the sharing and management of the premises standing on LR No. 1144/249 and LR No. 1144/469, the same shall be sold and the proceeds of sale thereof distributed equally between all the seventeen (17) survivors;**
- g. **That the shares of the minor children in the fourth house shall be held by their mother, Lucy Nyambura, until all the said children attain the age of majority; and**

h. That there shall be no order for costs.

DATED, SIGNED and DELIVERED at NAIROBI this 10TH DAY OF JUNE, 2016.

W. MUSYOKA

JUDGE