REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 104 OF 2002

(IN THE MATTER OF THE ESTATE OF STEPHEN KININI THITA (DECEASED))

DAVID GITHAIGA KININI…………PETITIONER/APPLICANT

VERSUS

SAMUEL THUITA KININI………PETITIONER/PROTESTOR

JUDGMENT

The deceased in this cause died on 2nd July, 1998 aged 80; he was then domiciled in Kenya and his last known place of residence was at Rabura in Nyeri County. The applicant and the protestor are sons of the deceased and they both petitioned for letters of administration intestate of their father's estate on 13th March, 2002; on 27th August, 2002 they were appointed as joint administrators of the deceased's estate and the grant of the letters to this effect was made in their joint names.

It is apparent from the affidavit sworn by the petitioners on 28th February, 2002 in support of the petition for letters of administration that the deceased was survived by two wives named as **Martha Nyawira Kinini** and **Milka Wambui Kinini;** they are respectively mothers to protestor and the applicant.

Besides his widows and the two sons, the deceased was also survived by several other children who are named in the affidavit as follows:-

i. Jane Nduta, daughter, aged 54

ii. Stephen Wangondu Kinini, son, aged 41

iii. Isaac Thuita, son, aged 41

iv. Jacob Kingori, son, aged 39

v. Daniel Thirikwa, son, aged 38

vi. John Itere, son, aged 36

vii. Mary Wangechi, daughter, aged 36

viii. Esther Wangari, daughter, aged 36

ix. Hannah Wahinga, daughter, aged 34

x. Edith Wangari, daughter, aged 33

xi. Harrison Maina, son, aged 31

xii. Beth Muthoni daughter aged 29

xiii. Ruth Nyawira, daughter, aged 23

xiv. Esther Waithira, daughter, aged 18

xv. Gladys Wangechi, niece, aged 29

xvi. Chrisphen Kinini Rahab, grandson, aged 17

The inventory of assets comprising the deceased's estate were listed in the affidavit as **Title No. Mahiga/Kamoko/337 (Kamoko)** measuring **1.29 ha** and **Plot No. 1634 Block A Mutukanio Farm Ngarua(Ngarua)** both estimated to be worth **Kshs 500,000/=.** The deceased, according to the affidavit, had no liabilities.

By a summons dated 7th July, 2003, the applicant applied to have the grant confirmed; he proposed to have the parcel of land referred to as **Title No. Mahiga/Kamoko/337** transferred to the deceased's two widows for themselves and for the benefit of their children.

The protestor, who as noted, is a co-administrator and a son to the deceased, protested against the proposed distribution; he filed an affidavit of protest to that effect on 9th December, 2009. He deposed that applicant deliberately omitted **Plot No. 1634 Block A Mutukanio Farm Ngarua** from the assets available for distribution in his proposal yet this particular asset forms part of the deceased's estate.

According to the applicant the entire house of **the Milka Wambui Kinini,** including the applicant, have always lived on this parcel of land measuring approximately 3 acres while the protestor's house were settled on the parcel referred to as **Title No. Mahiga/Kamoko/337** which also measures 3 acres and which the applicant wants it shared equally between the deceased's two houses.

The protestors case is that each house should get that share of the estate where they are settled; in particular, Milka Wambui Kinini, the applicant's mother should be registered as the proprietor of **Plot No. 1634 Block A Mutukanio Farm Ngarua** in trust for herself and for the benefit of her children while the land parcel, **Title No. Mahiga/Kamoko/337** should be transferred to Martha Nyawira Kinini in trust for herself and for the benefit of her children.

When the protest came for hearing, both parties recounted what they had sworn in their respective affidavits. The protestor added that he belonged to the first house and that each house has six children although the first house initially had seven children but one died. He also testified that his step-mother came and constructed a house in **Title No. Mahiga/Kamoko/337** in 2001 after the deceased's demise; this house was in the form of a timber structure whose photograph was availed in court. However, she never lived in the house.

The applicant admitted that the second house moved to Ngarua in 1982 and since then, his mother lived there. It was his testimony that it is the deceased who bought the land and moved them there; before then they lived with the deceased together with the first house in Kamoko. Apart from the two parcels of land the applicant said that there was also a parcel known as **Laikipia/Ngobit/Supuko Block 2/1291** measuring two acres and which is being used by Jacob Kingori from the first house. He also admitted that the land in Ngarua is **3 acres** and that is where his mother has always lived.

It was the applicant's case that the deceased had divided **Title No. Mahiga/Kamoko/337** in two equal portions to be shared equally by the two houses; however, he admitted that he was not present when his late father divided the land. He also admitted that he could not recall when the photographs of the houses

which he produced in evidence were taken.

Joseph Mukubwa (DW2) testified for the applicant and said that he was the deceased's nephew; he testified that he was present when the deceased divided his land and that this was around 2007. He could not remember when the deceased died though. He was not able to tell from the photographs whether there was any line dividing **Title No. Mahiga/Kamoko/337**.

He could also not tell how old he was when the second house moved to the land in Ngarua.

The extent of the deceased's estate and the number of survivors who survived him are issues which ought not to be in dispute; this is so because the disputants clearly indicated the assets comprising the deceased's estate and his survivors in their joint petition. Once they were clear in their minds of the extent of the deceased's estate from the very beginning, it was not open to the applicant to deliberately omit from distribution one of these assets when he sought to have the grant confirmed.

I gathered from the evidence at the trial that the applicant was driven to leave out **Plot No. 1634 Block A Mutukanio Farm at Ngarua** from his scheme of distribution of the deceased's estate mainly because that is where his family, which is the second of the deceased's two houses, is settled and has always been settled since the year 1982. He confirmed this in his evidence which I find was consistent with the protestor's testimony that the deceased himself purchased this particular parcel of land, constructed a house and moved the second house there.

The protestor's mother, Martha Nyawira Kinini, being the deceased's widow from the first house, was married before the applicant's mother. She lived with the deceased on **Title No. Mahiga/Kamoko/337** for the entire period of her life with the deceased together with their children. The applicant himself confirmed that she still lives on this particular parcel of land to date.

Both the applicant and the protestor were in agreement that two parcels of land in which their respective houses are settled are approximately three acres each; although the applicant appeared to suggest that **Title No. Mahiga/Kamoko/337** is more productive than the land on which his mother is settled and therefore more valuable, there was no evidence of such variation in value. Without any concrete evidence such as a valuation report by an expert, I would not accept the contention that either of the two parcels was more valuable than the other simply because one particular crop could grow on one and not on the other. In any event, the total value which both the applicant and the protestor attached to both these parcels as their estimated worth in their joint petition was Kshs 500,000/=. They did not indicate in that petition how much of the estimated value given was the price for either of the two parcels of land so that one could easily tell from the very outset that one was more valuable than the other.

My assessment of the entire evidence brought forth by the parties is that it is in bad faith for the applicant to seek to distribute that part of the estate on which the first house is settled between the two houses and deliberately omit from his proposed scheme of distribution the estate on which his house is settled.

I also find that the applicant's testimony that the deceased divided **Title No. Mahiga/Kamoko/337** into two equal portions between the two houses was not proved; I say so because, first, the applicant himself admitted that he did not witness such division and, second, the person who is alleged to have witnessed this distribution, **Joseph Mukubwa (DW2),** testified that the land was divided in 2007 yet the deceased had died almost ten years earlier and thus he could not have been dividing his land in 2007. I found it curious that this particular witness who testified that he was so close to the deceased that the latter invited him to witness the division of his land could not even remember when the deceased died. It is worth of note that he could not identify the boundary purportedly shown in the photographs which the applicant produced to demonstrate that the land had been divided into two equal parcels.

The house which is alleged to belong to the first house was constructed by **Milka Wambui Kinini** in 2001 after the deceased's death; if the deceased had wanted her to settle on that land I did not find any explanation by the applicant why he moved her to Ngarua in the first place and why he could not himself construct her a house at Kamoko during his lifetime. The existence of this structure on the land at

Kamoko could not, in humble opinion, be a basis upon which the first house could lay any claim on this land.

The applicant also purported to introduce another property in the estate which he identified as **Laikipia/Ngobit/Supuko Blk 2/1291 (Wiumirire)** which he alleged belonged to the deceased and that one of the sons of the first house was benefitting from. The certificate of official search which he produced in proof of this fact did not, however, support his contention; it showed that the purported land is registered in the name of the Government of Kenya and at no time has it ever been owned by either the deceased or any of his sons. In any case, one wonders why the applicant omitted this property from those assets constituting the deceased's estate when he petitioned for letters of administration and when he subsequently filed the summons for confirmation of grant if he believed this particular property was part of the deceased's estate. If, by the late introduction of this property, the applicant intended to show that the first house had benefited more from the deceased's estate than the second house, and therefore the second house was entitled to a share of the land at Kamoko, then he has failed in this endeavour.

Coming back to the question of distribution of the estate, it is not in doubt that the deceased died intestate and therefore the distribution of his estate is subject to intestacy provisions of the **Law of Succession Act, Cap. 160**; **section 40** of that Act which lends itself to me as the most appropriate guide in this instance states as follows:-

> ***40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate 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.***

That the deceased was polygamous is not doubt. There was also evidence by the protestor, and which evidence I did not hear the applicant rebut, that each house had almost an equal number of children.

The application of **section 40** of the Act to the distribution of a deceased person's intestate estate where it is proved that he was married more than once or was polygamous was discussed by the Court of Appeal in **Eldoret Civil Appeal No. 66 of 2002, Mary Rono versus Jane Rono & William Rono (2005) eKLR** which I have always found a useful guide whenever this question arises. In that appeal, **t**he learned counsel for the appellant urged that in a polygamous set up each house must bear an equal measure of the liabilities as much as it should benefit from an equal share of the deceased's estate; in other words, the liabilities and assets of the deceased's estate must be distributed in such a way that they are shared out equally between or amongst the houses, depending on the number of the houses surviving the deceased. The respondents' learned counsel was of the contrary view; he was of the opinion that the first house should get a larger share of the estate considering, amongst other factors, that it contributed more to the acquisition of the estate.

The court addressed these competing arguments and in the leading judgment by Waki, J.A., the learned judge held:-

> ***"I think, in the circumstances of this case there is a considerable force in the argument by Mr Gicheru (for the appellant) that the estate of the deceased ought to have been distributed more equitably taking into account all relevant factors and the available legal provisions. I now take all that into account and come to the conclusion that the distribution of the land, which is the issue falling for determination must be set aside and substituted with an order that the net estate of 192 acres of land be shared out as follows…"***

Although the learned judge appeared to agree with the argument by the learned counsel for the appellant that the estate should be shared out ***equally,*** he nevertheless stated that the estate ***"ought to have been distributed more equitably…"*** and proceeded to do exactly that ***"taking into account all relevant factors and the available legal provisions."***

While agreeing with the leading judgment of Waki, J.A., Justice Omolo J.A. discounted any notion that

the estate should have been distributed amongst the beneficiaries in equal shares because, in the learned judge's view, there is no such requirement under the Act. The learned judge said:-

> "***I had the advantage of reading in draft form the judgment prepared by Waki, J.A., and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned Judge to be laying down any principle of law that the Law of Succession Act, cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr Gicheru. I can find no such provision in the Act."***

The learned judge proceeded to quote **section 40(1)** of the Act and held that:-

> ***"My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has discretion to take into account the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.***
>
> ***"Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in a case of young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality."***

The learned judges essentially espoused the principal of *fairness* and *equity* in distribution of a deceased's estate between or amongst persons beneficially entitled to such an estate in a polygamous family set-up. While the number of children in a particular house is an important factor in the determination of the share to be allocated to each house, it is not the only factor; neither is it the controlling factor. The share each house gets is not contingent upon the number of children in any particular house; there are other considerations which will guide the court's discretion in the distribution of the estate; for instance, the age of the children and their station in life are factors that the court will necessarily take into account.

In the present cause the children are almost evenly distributed in each house; they are all adults and going by their ages provided in the affidavit in support of the petition the youngest of them should now be aged 31. The deceased's children are therefore adults who are settled in life and therefore the question whether some are entitled to a larger share of the estate than others by virtue of their age does not arise; their station or status in life does not count. In any event this aspect of factors for consideration did not feature in the parties' evidence.

I have also noted that each house is settled on a particular parcel of land; the younger of the deceased's two house has settled on parcel **Plot No. 1634 Block A Mutukanio Farm at Ngarua** for the last 34 years while the first house has been on land parcel **Title No. Mahiga/Kamoko/337** for an even longer period. Going by the evidence of both the applicant and the protestor, the two parcels are equal in acreage.

Taking all these factors into account and, considering the principle of equity and fairness espoused in **Rono versus Rono** (supra) and taking into account the fact that it will not be in the best interest of either of the two houses to uproot them from where they have settled for decades and relocate them elsewhere, I am disposed to distribute the estate as proposed by the protestor and which proposal appeals to me to be consistent with the prescribed scheme of distribution in section 40 of the Act except that the transfer of the properties to the deceased's widows shall, according to section 35 of the Act, be subject to their life interest; accordingly, I hereby uphold the protest and distribute the estate as follows:-

1. **Title No. Mahiga/Kamoko/337** shall be transferred and registered in the name of **Martha Nyawira Kinini** subject to her life interest.

2. **Plot No. 1634 Block A, Mutukanio Farm** at Ngarua shall transferred and registered in the name **of Milka Wambui Kinini** subject to her life interest**.**

The grant of letters of administration intestate of the estate of Stephen Kanini Thuita issued by this Court on 27th August, 2002 is confirmed in the forgoing terms. Parties will bear their own respective costs. Orders accordingly.

Dated, signed and delivered in open court this 29th July, 2016

Ngaah Jairus

JUDGE