



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.362 OF 1993

AND

SUCCESSION CAUSE NO.639 OF 1993

IN THE MATTER OF THE ESTATE OF ESTHER WANJIKU MAINA (DECEASED)

AND

(IN THE MATTER OF THE ESTATE OF MAINA KABUTHA – DECEASED)

(As consolidated)

**HARRISON KARIUKI MAINA.....
.....PETITIONER**

VERSUS

**ROBINSON GATHII MAINA & OTHERS.....
OBJECTORS**

JUDGMENT

Maina Kabutha (deceased) was married to two wives. The first wife Jane Njeri Maina died in 1972. She was blessed with six (6) children namely: Ephantus Gathii ((deceased) – (he was survived by a wife and children), Robinson Gathii Maina, Wilfred Kamau Maina, Harrison Kariuki Maina ((deceased) – he was survived by a wife and children), Moses Wanjigi Maina and Hannah Wanjiku Maina. The second wife Esther Wanjiku Maina was married by the deceased in 1960. According to the evidence adduced before court, at the time of her marriage, she already had a son, Harrison Kariuki Maina (the Petitioner). However, there is no dispute that the deceased Maina Kabutha adopted him as his own son. The deceased and Esther lived together as husband and wife until 1992 when they both died. Prior to his death, the deceased had transferred certain properties to his second wife. He had also transferred certain properties to some of the children of the first wife. The dispute for determination before this court is in respect of essentially two questions:

- I. What is the extent of the estate of Maina Kabutha (deceased); and
- II. Whether the properties that were transferred by the deceased during his lifetime to his second wife Esther Wanjiku Maina constitutes part of the estate of Maina Kabutha (deceased), and if so, whether the said properties should be inherited by all the children of the deceased irrespective of whether they were born of the first wife or the second wife.

In respect of the first issue for determination, it is the Objectors' case that all the properties registered in

the names of Maina Kabutha (deceased) and Esther Wanjiku Maina (deceased) are properties which are available for distribution to all dependants of the deceased. In a schedule filed in court, the Objectors listed the said properties as follows:

- a. LR. No.209/1645 Pangani (in the name of Esther Wanjiku Maina)
- b. LR. No.Location 14/Gakurwe/811 (in the name of Esther Wanjiku Maina)
- c. LR. No.Location 14/Gakurwe/1269 (in the name of Esther Wanjiku Maina)
- d. LR. No.Location 14/Gakurwe/1265 (in the name of Esther Wanjiku Maina)
- e. Kathereini Adjudication Section Plot No.1079 (in the name of Esther Wanjiku Maina)
- f. Plot No.12 Ongata Rongai Township (in the name of Esther Wanjiku Maina)
- g. LR. No.36/XVII/410 Eastleigh (in the name of Maina Kabutha)
- h. LR. No.209/2763/37 New Pumwani Nairobi (property sold by the Objectors and proceeds thereof shared equally between themselves)
- i. LR. No.209/2763/38 New Pumwani Nairobi (agreed to be inherited by the Petitioner)
- j. LR. No. Location 14/Gakurwe/506 (in the name of Maina Kabutha)
- k. LR. No. Location 14/Gakurwe/389 (In the name of Maina Kabutha)
- l. LR. No. Igembe/Tigania/1072, 1205, 2005, 1424, 3448, 2723, 3762, 1079, 3646, 3349 and 1581 (all registered in the name of Maina Kabutha)
- m. Monies in the bank in the names of both deceased.

According to the schedule provided by the Objectors, there were other properties which the deceased Maina Kabutha had transferred to his children during his lifetime. Apparently, no dependant objects to the transfers that were done by Maina Kabutha (deceased) to his sons. The Objectors listed these properties with a view to guiding the court in regard to how it should fairly and equitably distribute the available properties to the beneficiaries after taking into consideration the bequest that the deceased Maina Kabutha made during his lifetime. The said properties are:

1. Location 15 Gathukeini/1621 transferred to Nancy Wanjiku Kabutha, the widow of Ephantus Kabutha Maina (deceased)
2. Location 15 Gathukeini/1622 transferred to Robinson Gathii Maina
3. Location 15 Gathukeini/1623 transferred to Wilfred Kamau Maina
4. Location 15 Gathukeini/1624 transferred to Susan Wambui Kariuki, the widow of Harrison Kariuki Maina (deceased)
5. Ngong/Ngong/4672 transferred to Harrison Kariuki Maina (Petitioner)
6. LR.No.CIS-Mara/Sakutiek/353 transferred to Harrison Kariuki Maina (Petitioner)
7. LR.No.CIS-Mara/Sakutiek/363 transferred to Harrison Kariuki Maina (Petitioner)
8. LR.No.CIS-Mara/Sakutiek/154 transferred to Harrison Kariuki Maina (Petitioner)
9. Ongata Rongai Plot No.605 (in the name of Harrison Maina Kariuki)
10. Ongata Rongai Plot No.605B sold by Harrison Maina Kariuki.

According to the Objectors, two of the beneficiaries, namely Moses Wanjigi Maina and Hannah Purity Wanjiku Simel did not benefit from the transfer of any property to them during the lifetime of the deceased.

On his part, it is the Petitioner's case that the properties registered in the name of Esther Wanjiku Maina (deceased) is not part of the estate of Maina Kabutha (deceased) and is therefore not available for distribution to the children of the first wife Jane Njeri Maina (deceased). It is the Petitioner's case that being the only child of Esther Wanjiku Maina (deceased), he should be the sole beneficiary to her properties. In that regard, the Petitioner stated that the following properties were therefore not available for distribution to the children of the first wife:

1. LR. No.209/1645 Pangani
2. LR. No. Location 14/Gakurwe/1265
3. LR. No. Location 14/Gakurwe/1269
4. LR. No. Location 14/Gakurwe/811
5. Plot No.12 Ongata Rongai

6. Plot No.1079 Kitharene Adjudication Section Tigania – Igembe District

In the documentary evidence filed in court, it became apparent that the properties registered as LR.No. CIS – Mara/Sakutiek 355 and 353 were registered in the name of the Petitioner, Harrison Kariuki Maina in 1980. Parcel No.CIS-Mara/Sakutiek /154 was also registered in the name of the Petitioner. It is not clear from the evidence presented to court when the Petitioner was so registered as the owner of this parcel of land. However, this court, upon evaluation of the evidence holds that these properties belong to the Petitioner Harrison Kariuki Maina and are not available for distribution to the dependants of the estate of Maina Kabutha (deceased). Investigations were conducted by Ms. Wasp Security Guards & Investigation Limited on 29th May 2008 in respect of the property known as Plot No.605 Ongata Rongai. According to the report, this property is unregistered. However, in the records of the then County Council of OlKejuado, the owner is Maina Kabutha (deceased). It was apparent that some effort was made to have the property transferred from the name of the deceased to the Petitioner and thereafter to two other persons. According to the investigator, this attempt was unsuccessful because the transfer was not given effect to. This property is therefore available for distribution to the dependants of the estate of Maina Kabutha (deceased).

During the hearing of the succession dispute, it became apparent to this court that the dispute between the Petitioner and the Objectors started when the Objectors challenged the last Will of Maina Kabutha (deceased) that was allegedly written on 29th June 1989 with two codicils dated 14th February 1990 and another one dated 10th July 1991. The Objectors challenged the validity of the Will and the codicils on the ground that Maina Kabutha (deceased) lacked the requisite mental capacity to make such Will and codicils. Etyang A.G.A, J (as he then was), after a full hearing, noted the evidence adduced by Dr. Onyango. This is what he observed at Page 12 of the Judgment:

“From the evidence above, I hold that the deceased had, before his death, a medical history of mental disorder both described by Dr. Onyango (DW1) and the Objectors and their witnesses. I hold that the deceased did not have the mental capacity to make a valid Will (Petitioner’s Exhibit No.1) and the codicils (petitioner’s exhibit 2 and 3), as by reason of his mental disorder and unsoundness of mind, he was not able to know what he was doing. I do declare the deceased’s Will dated 29th June, 1989, the 1st codicil dated 14th February, 1990 and the second codicil dated 10th July, 1991 to be invalid, null and void.”

The Learned Judge then declared that the deceased died intestate and the distribution of his estate shall be in accordance with the **Law of Succession Act**. It is apparent that the Petitioner did not challenge this decision.

From the evidence adduced before this court, it was clear that the half share in the property known as LR.No.209/1645 was transferred by Maina Kabutha (deceased) to his wife Esther Wanjiku Maina (deceased) on 9th June 1989. Now, if the court held that at the time the deceased is alleged to have written the impeached Will dated 29th June 1989 he lacked mental capacity to do so, what about the transfer that he is alleged to have effected on 9th June 1989? Applying the same reasoning, if Maina Kabutha (deceased) lacked mental capacity to write a Will, then he lacked the requisite mental capacity to transfer the particular property. This also applies to any transfer of property which may have been effected after the said 9th June 1989. Therefore this court holds that the transfers of the properties known as LR. Nos. Location 14/Gakurwe/1265, Location 14/Gakurwe/1269, Plot No.1079 Kitharene Adjudication Section and Plot No.12 Ongata Rongai were fraudulently effected because Maina Kabutha (deceased) did not have the requisite mental capacity to so transfer the said properties. This court therefore holds that the said properties belonged to Maina Kabutha (deceased) and are therefore available for distribution to the dependants of his estate.

Section 29(a) of the **Law of Succession Act** defines dependants of the deceased to include all the children of the deceased whether or not maintained by the deceased immediately prior to his death. **Section 28(d)** of the **Act** requires this court, when considering what provision a dependant shall have, to take into account any advancement or other gifts that the deceased made to the particular dependant

before his death. In the present case, there is no dispute as to who are the dependants of the deceased. For avoidance of doubt, this court hereby identifies the beneficiaries of the estate of the deceased as follows:

1. Ephantus Gathii ((deceased) – he was survived by a wife and children),
2. Robinson Gathii Maina,
3. Wilfred Kamau Maina,
4. Harrison Kariuki Maina ((deceased) – he was survived by a wife and children),
5. Moses Wanjigi Maina
6. Hannah Wanjiku Maina (also known as Hannah Purity Wanjiku Simel)
7. Harrison Kariuki Maina (Petitioner)

Section 40(1) of the Law of Succession Act provides thus:

“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.”

In the present case, none of the wives of the Maina Kabutha (deceased) are alive. Where a child of the deceased has died, his share shall be inherited by his widow and children in equal shares. This court was not persuaded by the argument advanced by the Petitioner to the effect that where the property of Esther Wanjiku Maina (deceased) is in issue, then, he should solely inherit the said property as her only child. As already held above, this court has found as a fact that the properties which were previously registered in the name of Maina Kabutha (deceased) and were transferred to Esther Wanjiku Maina (deceased) after 9th June 1989 were so transferred fraudulently because Maina Kabutha (deceased) lacked the requisite mental capacity to execute such transfers. Any property that was transferred to Esther Wanjiku Maina (deceased) prior to 1989 shall be inherited by the Petitioner, Harrison Kariuki Maina.

In the premises therefore, the following properties shall be inherited by all the seven (7) dependants jointly and in equal shares:

- I. LR. No.209/1645 Pangani
- II. LR. No.36/XVII/410 Eastleigh
- III.LR. No.209/2763/37 (share)
- IV.LR. No.209/2763/38
- V. LR. No. Location 14/Gakurwe/1269
- VI.All parcels of land at Kitharene Adjudication Section Tigania – Igembe District (Also known as LR. No. Igembe/Tigania/1072, 1205, 2005, 1424, 3448, 2723, 3762, 1079, 3646, 3349 and 1581).
- VII.LR. No. Location 14/Gakurwe/389
- VIII.LR. No. Location 14/Gakurwe/506
- IX.Plot No.605 Ongata Rongai
- X. Monies in the Bank in the names of Maina Kabutha (deceased) and Esther Wanjiku Maina (deceased).

The following properties registered in the name of Esther Wanjiku Maina (deceased) shall be inherited by Harrison Kariuki Maina (Petitioner):

- I. LR. No. Location 14/Gakurwe/1265
- II. LR. No. Location 14/Gakurwe/811
- III.Plot No.12 Ongata Rongai
- IV.Plot No.1079 Kitharene Adjudication Section Tigania-Igembe District

All the properties transferred to the sons of the deceased prior to his death, save as adjusted herein by the court, shall constitute gift *inter vivos*. Any other property that is registered in the name of Maina Kabutha (deceased) that has not been specifically mentioned by the court shall distributed jointly and in equally

shares to all the seven (7) beneficiaries.

Since this was a family dispute, there shall be no orders as to cost i.e. each party shall bear their own cost.
It is so ordered.

DATED AT NAIROBI THIS 9TH AUGUST 2016

L. KIMARU

JUDGE