



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 155 OF 2008

IN THE MATTER OF THE ESTATE OF DAVID MAINA KIGO (DECEASED)

LOISE NYAGUTHII MAINA.....PETITIONER

VERSUS

ROSE WAIRURI KIGO.....1ST PROTESTOR

PETER MWANGI KIGO.....2ND PROTESTOR

JUDGMENT

This succession cause is in respect of the estate of **David Maina Kigo** who died at Umass Memorial Health Centre in the United States of America on 17th March, 2007; he was domiciled in Kenya and his residence was at Nyeri. The deceased left behind a widow, the petitioner herein, and nine children two of whom are the 1st and the 2nd protestors herein. He died intestate and so on 25th March 2008, his widow petitioned this Court for grant of letters of administration intestate to his estate in her obvious capacity as the wife of the deceased; the grant was made to her on 2nd July, 2008.

Apart from the petitioner and the two protestors, the other persons named in the affidavit in support of the petition as having survived the deceased were:

1. Jemimah Njeri Kuria, daughter, aged 55
2. Mary Wangui Kamau, daughter, aged 49
3. Simon Ngunjiri Kigo, son, aged 47
4. Job Njeru Maina, son, aged 46
5. Ibrahim Ndegwa Maina, son, aged 43
6. Phoebe Njoki Maina, daughter, aged 39
7. Joshua Kariuki Kigo, son, aged 33

The deceased's estate comprised several assets which were listed in the same affidavit as follows:

1. Nyeri Municipality Block 1/360
2. Nyeri Municipality Block 111/57
3. Tetu /Unjiru/639
4. Muhito/Ruthanji/479
5. Loc. 14/Kiru/994
6. Nyandarua/Melangine/653
7. Nyandarua/upper Gilgil/109
8. Laikipia/Nanyuki/West Timau Block 2/359 (Matanya Marura)

9. Ruthanji/Njiruini Company Ltd, 508 shares
10. Kenya Grain Growers Co-operative Union Ltd, 32 shares
11. Tourism Promotion Services 500 shares
12. Tourism Promotion Services 500 shares
13. Kenya Commercial Bank Ltd , 88 shares
14. Kenya Commercial Bank Ltd , 1,912 shares
15. Kenya Commercial Bank Ltd , 66 shares
16. Kenya Commercial Bank Ltd , 50 shares
17. Kenya Commercial Bank Ltd , 50 shares
18. Kenya Commercial Bank Ltd , 1000 shares
19. Kenya Airways, 1000 shares
20. Kagima Farmers Co-operative Society Ltd, 9 shares
21. Kenya Electricity Generating Company, 6,431 shares
22. ICDC Investment Company Ltd, 281 shares
23. ICDC Investment Company Ltd, 31 shares
24. ICDC Investment Company Ltd, 459 shares
25. Standard Chartered Bank Nyeri Branch, A/C No. 0152045780100
26. Muhito/Mbiuni/785/90 3.84 hectares
27. LR 7623/142 Mweiga
28. Kenya Commercial Bank Ltd shares
29. Standard Chartered Bank Nyeri Branch, A/C No. 0142245780100
30. Akainga adjudication F/No 1542, 9 acres, Meru
31. Akainga adjudication F/No 5369, 11.16 acres, Meru
32. Antuamburi F/1778, 4.65 acres
33. 0.00598ha out of Karatina Town Block 1/247
34. ½ share out of Muhito/Mbiuni/785/63 Gakindu ss
35. ¼ share out of Plot No. 168 Gakindu-Gakindu(Njoki-ini)
36. Nyandarua / Ol Kalou 216
37. Plot No. 3777/279/37-Ol Kalou Town
38. Plot No. 3777/279/57-Ol Kalou Town

There were no liabilities to the estate and therefore, in the absence of any evidence to the contrary, these assets constitute the deceased's net intestate estate.

By a summons for confirmation of grant dated 8th July, 2010, the petitioner sought to have the grant confirmed; in that summons, she also sought to have the entire estate transferred to her.

It would appear that all her children, including the protestors, had no problem with this arrangement as they all consented to transfer of the deceased's estate to their mother. Except for Simon Ngunjiri Kigo and Phoebe Njoki Maina who were said to reside in the United States and who filed separate letters of consent executed in the United States, the rest of the deceased's children filed a joint consent form alongside the summons for confirmation of grant on 8th July, 2010.

On 19th September, 2011, the petitioner filed a further affidavit in support of the summons for confirmation of grant; in that affidavit she fundamentally departed from her earlier proposal to transfer the entire estate to herself and sought to have a portion of it transferred to her children. Under this new scheme, she proposed to have the estate distributed as follows:

- (1) Muhito/Ruthanji/479 to be transferred to Job Njeru Maina.
- (2) Loc. 14/Kiru/994 to be transferred to Job Njeru Maina and Joshua Kariuki.
- (3) Nyandarua Upper Gilgil/109 to be transferred to Simon Ngunjiri Kigo.
- (4) Laikipia/Nanyuki/West Timau Block 2/359 (Matanya Marua) to be transferred to Joshua Kariuki Kigo and Job Njeru Maina.

- (5) Muhito/Miuini/785/90 to be transferred to Peter Mwangi.
- (6) LR 7623/142 Mweiga to be transferred to Ibrahim Ndegwa Maina.
- (7) Akainga Adjudication F/No. 5369 to be transferred to Mary Wangui Kamau, Jemimah Njeri Kuria and Phoebe Maina.
- (8) Akainga Adjudication F/No. 1542 to be transferred to Simon Ngunjiri and Job Njeru Maina.
- (9) Antuamburi F/1778 to be transferred to Ibrahim Ndegwa Maina.
- (10) Karatina Town Block 1/247 (0.00598 ha thereof) to be transferred to Job Njeru Maina.
- (11) Plot No. 168 Gakindu-Gakindu (Gakindu shop) to be transferred to Joshua Kariuki and Job Njeru Maina.
- (12) Nyandarua/Ol Kalou Town 216 (a 1/5 thereof) to be transferred to Job Njeru Maina, Joshua Kariuki, Peter Mwangi Kigo, Simon Ngunjiri and Ibrahim Ndegwa.
- (13) Plot No. 3777/2791/37 Ol Kalou Town to be transferred to Job Maina Njeru.
- (14) Carclub Motors, Nyeri Limited Shares, Kagari/Weru/1369 (Embu) to be transferred to Rose Wairui Kigo.
- (15) Carclub Motors, Nyeri Limited Shares to be transferred to Pete Mwangi.
- (16) Gakindu Service Station to be transferred to Job Njeru Maina.
- (17) Tetu/Unjiru/Kamakwa plot to be transferred to Rose Wairuri Kigo.

The petitioner also proposed to transfer properties **Nyeri Municipality/Block 1/360** and **Nyeri/Municipality/Block 111/57** to Simon Ngunjiri Kigo but stated that she was retaining a life interest in the property. So was the ½ share out of Muhito/Mbiuini /785/63 which she proposed to transfer to Peter Mwangi but retain a life interest in the property at the same time. I doubt these latter proposals are legally viable since the property cannot be subjected to what in effect are competing interests; it is either the petitioner is the beneficiary of the properties subject to life interest or the properties are transferred to other beneficiaries but she cannot enjoy a life interest in those properties when they have been transferred to other parties. Conversely, the properties cannot be transferred to the any other person during the petitioner's lifetime if they are subject to her life interest.

Except for the foregoing assets, the petitioner sought to retain the rest of the estate in her name.

Still not satisfied with this proposal, the petitioner filed yet another further affidavit in which she sought to vary her proposals on the scheme of distribution of the deceased's estate. In this affidavit which she swore on 2nd February, 2012 and filed it in court on the following day, the petitioner sought to have Job Njeru Maina and Joshua Kariuki hold properties Loc.14/Kiru/994 and Plot No. 168 Gakindu-Gakindu (Gakindu) shop in trust for Joshua Kariuki's children. She also sought to have Simon Ngunjiri Kigo hold in trust plot No. Nyandarua, Upper Gilgil/109 on behalf of all the beneficiaries. In this new scheme, she also proposed to give Rose Wairuri Kigo properties referred to as **Kagaari/Weru/6119** and **Tetu/Unjiru Kamakwa Block 639 Plot 95**.

The change of heart from her original position which, as noted, was unanimously accepted by all the children did not go down well with some of these children; they were not satisfied with the manner in which their mother proposed to distribute the estate. Being so dissatisfied, five of them filed affidavits of protest; these were Rose Wairuri Kigo, Jemimah Njeri Kuria, Mary Wangui Kamau, Peter Mwangi Kigo and Phoebe Njoki Maina. They, however, changed their mind down the line and withdrew their protests

except for Rose Kigo and Peter Mwangi Kigo who chose to pursue theirs; it is these protests that are now the subject of this judgment.

The point in contention is fairly simple; that under the scheme proposed by the petitioner in the distribution of the deceased's estate, some beneficiaries (read the protestors) are disadvantaged because whatever the petitioner has proposed to give them is, in their view, far less valuable than what the rest of the beneficiaries are getting. This is the point they pursued when their protests came up for hearing; they asked the court to consider distributing the estate in such a way that whatever each one of them got was of equal worth.

To drive their point home, the protestors urged that the properties listed as item numbers 1, 2, 3,4,5,6,7,8,9 26,34,35,37 and 38 in the affidavit in support of the petition for confirmation of grant be registered in the names of the deceased's children in common in equal shares while the assets listed as item numbers 9 to 25, 28, 29, 43 and 44 be transferred to the petitioner.

The 1st protestor complained that what the petitioner proposed to give her was a semi-arid parcel of land at Embu and undeveloped plot at Kamakwa in Nyeri. She testified that her proposed share could not compare with such property as Nyeri Municipality/Block 1/360 which is proposed to be given to Simon Ngunjiri Kigo. According to her, this property is worth more than Kshs 80 Million. She attached particular figures to each of the properties as their value; however, she did not provide the basis from which she derived what, in effect, was a valuation of the assets.

The 2nd protestor adopted the course taken by the 1st protestor in his testimony. At his cross-examination, he was referred to a letter he filed in court withdrawing his protest. He denied having authored that letter and testified that his signature was forged.

On her part the petitioner testified that the property comprising the deceased's estate was acquired during the subsistence of their marriage. She also testified that together with her deceased husband they educated all their children and at the time of his demise they were either employed or doing various businesses.

On the question of distribution of the estate, she testified that the entire family agreed that she, together with her son Simon Ngunjiri, could distribute the estate amongst the deceased's survivors. Accordingly, the two came up with a scheme of distribution which she has presented to court for consideration and adoption. She added that the proposed distribution is consistent with the wishes of her late husband and none of her children is either favoured or disadvantaged. She, however, admitted that her children could not agree how the estate was to be distributed and this is why she had to sit with her son Ngunjiri and come up with a formula of distribution which has now been faulted by the protestors.

The law applicable to this contest is obviously the **Law of Succession Act, Cap 160** and in particular the intestacy provisions thereof, the deceased having died without a will. The facts to which this law should be applied are, to a large extent, clear: there is no dispute as to the identities and the number of the deceased person's survivors who are also beneficiaries to his estate. The extent of his estate is also ascertainable; though the protestors suggested in their affidavits of protest that there were certain assets whose ownership was in dispute, this allegation neither came out nor was it proved when they both testified.

The section in the Act that readily appeals to me to be applicable in these circumstances is **section 35** thereof; that section provides that:

35. (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

Part 1 (a) of this section is not in issue because there is no question or dispute over any personal effects that the deceased may have left behind. Section 40 of the Act also has no relevance because here since it deals with distribution of an estate where the intestate was polygamous.

Section 35 is as clear as it can be that a surviving spouse's entitlement to a deceased person's net intestate estate to the exclusion of any other person is beyond debate; the only caveat is that the surviving spouse's interest is limited to life interest and where the surviving spouse is a widow, that interest ceases whenever she remarries.

The petitioner's initial proposal to transfer the entire estate to her name, of course subject to a life interest, was perfectly consistent with this provision of the law; incidentally, it was a proposal which, as noted, was acceptable to all the deceased's children.

The petitioner changed her mind and despite her entitlement in law, she chose to retain part of the estate and distribute the rest amongst her children. However, it is evident that the latter have disagreed on the proposed scheme of distribution basically because they think the distribution is uneven and if it is implemented in its present form some members of the family will benefit more than others.

Ordinarily, where the net intestate estate devolves upon a widow as contemplated under **section 35. (1)(b)** of the Act, she retains the power of appointment according to which she may give any part of the estate to the surviving child or children during the subsistence of her life interest in the estate. This is provided for under section 35 (2) of the Act which states:-

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

Considering that the widow can distribute the estate amongst her children in exercise of the power of appointment vested in her under this provision, there is nothing wrong if she waives her right to exercise this power and distribute the estate to herself and the children at the confirmation proceedings. In my humble opinion, as long as the widow and her children are in agreement, the distribution of the estate at the confirmation proceedings achieves the same purpose that would have been achieved in exercise of the power of appointment.

Where there is a disagreement, as has turned out to be the case here, I am of the humble view that the best alternative open to this court is to revert to the strict application of **section 35(1) (b)** of the Act and transfer the entire net intestate estate to the petitioner subject, of course, to a life interest.

As noted, under **section 35(2)** of the Act, she has the right, during her lifetime, to exercise the power of appointment of all or any part of the capital of the net intestate estate and transfer it to her children.

Subsection (3) of **section 35** provides that where, in the opinion of any child, that power is unreasonably exercised or withheld, he may apply to court for appointment of his share; such appointment may as well vary any appointment that has hitherto been made. I think, it is in such an application for appointment that one may appropriately argue, as the protestors have submitted here, such issues as the inequalities in value of the respective shares of the estate which the petitioner has given them. It is also at that time that the court will make a determination whether in sharing out the estate, the petitioner unreasonably exercised her power of appointment or she has unreasonably withheld it to detriment of any child who feels that he has been left out. **Subsection 4** of **section 35** illustrates the extent to which the court can go in making its determination and the factors it will consider in arriving at such a determination; it says:

(4) Where an application is made under subsection (3), the court may award the applicant a

share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to -

- (a) the nature and amount of the deceased's property;*
- (b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;*
- (c) the existing and future means and needs of the applicant and the surviving spouse;*
- (d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;*
- (e) the conduct of the applicant in relation to the deceased and to the surviving spouse;*
- (f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will, if any; and*
- (g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.*

My reading of **section 35** of the Act is that it embraces some element of trust where a widow, notwithstanding that she has a life interest in her deceased husband's estate, is the trustee of the estate and the children are the *cestui que trust* except that they can only and ultimately benefit from the estate upon either their mother's remarriage or on her death. **Subsection 5** appears to accommodate this notion; it states as follows:-

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, remarriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

It is apparent that the child or children is the ultimate beneficiary of his or their father's net intestate estate but their interest is subject to the deceased's widow's life interest in the same estate.

I am satisfied that, in the face of the disagreement among the deceased's children and their dispute with their mother on the distribution of their deceased father's estate, there is a strong legal basis to have the entire net intestate estate transferred to the petitioner. Accordingly, I hereby order that all those assets comprising the deceased's net intestate estate in the affidavit in support of the petition for grant of letters of administration and which have been listed in this judgment as items 1 to 38 (both inclusive) shall, be transferred in the name of Loise Nyaguthii Maina subject to life interest. The grant shall be confirmed in those terms. Meanwhile, parties will bear their own respective costs.

Signed, dated and delivered in open court this 30th day of September, 2016.

Ngaah Jairus

JUDGE