



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 835 OF 2012

IN THE MATTER OF THE ESTATE OF DAVID MUCHIRI KAGIA-DECEASED

HANNAH MUGURE MUCHIRI.....PETITIONER

VS

WILLIAM KAGIA MUCHIRI.....1ST PROTESTOR

GRACE MUTHONI MUCHIRI.....2ND PROTESTOR

JUDGEMENT

This dispute involves **Hannah Mugure Muchiri (the petitioner)** the deceased's widow and her step children **William Kagia Muchiri** and **Grace Muthoni Muchiri** (hereinafter referred to as the **protestors**).

After evaluating the affidavit and oral evidence submitted by both parties and the submissions tendered by both counsels, I find that two key issues fall for determination, namely, **(a) Whether or not *George Njoroge Muchiri*, a son to the petitioner and *Bridget Mugure Wanjiku*, a granddaughter to the petitioner are entitled to a share of the deceased's estate and (b) How should the deceased estate be distributed among to the beneficiaries.**

The deceased's first wife died leaving behind the protestors herein. The deceased re-married and it is admitted that at the time of the second marriage the petitioner had two children, namely, the above named son and a deceased daughter who is survived by the said grandchild. The protestors argument is that the said son and grandchild are not dependants of the deceased because they never lived with the deceased and that the deceased never accepted them while the petitioner maintains that they are lawful dependants and are entitled to benefit from the deceased's estate.

Both parties strongly argued their respective positions, but in my humble view, the answer to this first issue lies in the contents of the petitioners affidavit dated 29th October 2015 filed in support of her application for confirmation of the grant issued on 22nd May 2015. Even though in paragraph 2 of the said affidavit the petitioner listed her son and granddaughter among the children surviving the deceased, in paragraph 5 of the same affidavit she proposed her preferred mode of distribution but ironically she never made any provision at all for her aforesaid son and granddaughter. No explanation has been offered why she proposed nothing for the two or when and why she changed her mind. It has not been said that the said omission was an error. In fact the contents of her affidavit are very clear. I do not think it was a mistake that she omitted her son and granddaughter while making the proposal referred to above. It is unlikely that she erroneously omitted to include them. Had the Respondents conceded to her proposal at that point in time, the distribution would have been done and concluded. If she changed her mind (which

is unlikely) then she ought to have filed a supplementary affidavit and explain the circumstances and offer reasons. Parties are bound by their pleadings.

As mentioned above, in paragraph two of the affidavit, the petitioner listed her son and granddaughter and the respondents herein as the children surviving the deceased, but carefully omitted to include her son and granddaughter in paragraph 5 as stated above. That position speaks volumes and being a mother for her to make such an omission, she knew what she meant, that it, the two were to be excluded, and having made the exclusion herself, and having made no explanation at all as to why she made the said proposal and now prefers otherwise, I am tempted to conclude that she meant what she swore on oath, namely, that the two were not entitled to benefit. Perhaps I should also add that her application for confirmation and the said affidavit were drawn by a lawyer, hence she had the benefit of legal advice on the contents and consequences of her averments.

It is also clear that **George Njoroge Muchiri** is an adult. He has not filed any papers in these proceedings expressing his interest (if any) to the deceased's estate. He has not claimed as a dependant.

The inconsistencies between the oral evidence and the affidavit evidence tendered by the petitioner on this issue is so fundamental and material to the issue under determination that unless the inconsistency is adequately explained, it leaves the court with no option but to treat her oral evidence as an afterthought. In view of the said inconsistencies between the affidavit evidence of the petitioner and her oral testimony, I am persuaded that there serious doubts as to whether **George Njoroge Muchiri** and **Bridget Mugure Wanjiku** were dependants of the deceased. Nothing prevented the petitioner from including them in her proposal as beneficiaries, so it is safe to conclude as I hereby do, she was fully conscious of her decision and she knows the reasons why she did not include them in her affidavit and this raises doubts as to whether or not they were dependants. The court will respect her decision and find that **George Njoroge Muchiri** and **Bridget Mugure Wanjiku** are not entitled to benefit from the deceased's estate.

On the second issue, I have carefully examined the mode of distribution proposed by the petitioner and the protestors. It is admitted that the deceased was married twice in his life time. Section **40 (1)** of the Law of Succession Act^[1] provides as follows:-

"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 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"

Section **34** of the Act provides that:-

"A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect."

No evidence was adduced to show that the deceased made any will or shared his property during his life time. Having found that the deceased died intestate, and bearing in mind it is not disputed that the deceased married twice, the deceaseds' estate falls for distribution in accordance with Part **V** of the Law of Succession Act.^[2] The appropriate provisions applicable in this case are Sections **35** and **40** of the Act.

It's also not disputed that the deceased was survived by his second wife, the petitioner herein and the Respondents herein. Section **35** of the Law of Succession Act caters for a situation where the deceased is survived by a spouse and children. The surviving spouse is entitled to the deceased's chattels and a life interest on the residue. The deceased in this case was survived by a spouse and two children from the first wife. Under Section **35** of the Act, upon determination of a life interest the estate should be shared equally between all children. The issue that would arise in the instant case is whether the surviving spouse can exercise life interest over property that ought to devolve to children other than her own.^[3]

Discussing a similar position, **Musyoka J** observed that Section **35** appears to apply only to cases where the deceased had married only once, in other words, he had only one wife throughout.^[4] Section **40** on

the other hand appears to address the case of a polygamist where the deceased had several wives at some stage of his life. The Act does not appear to have provisions to govern circumstances where a monogamous deceased person ends up with two households consequent upon re-marriage following the death of the first wife.[5] It would appear that in dividing the estate of such person, the court should be guided by the provisions of both Sections 35 and 40 of the Act.[6]

Under Section 40 of the Act, if the deceased had several wives, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the Act, the children would divide the estate equally among themselves. In my opinion, Section 40 would be more applicable in the present case.

The spirit of Part V, especially Sections 35, 38 and 40 is equal distribution of the estate amongst the children of the deceased. The provisions are in mandatory terms, "*the property shall be equally divided amongst the surviving children.*" However, equal distribution does not always do justice and sometimes it is difficult to achieve equality.[7]

I have carefully considered the mode of distribution proposed by both parties and doing the best I can to maintain equality, justice of the case and taking into account that it is not always easy to achieve equality in cases of this nature as was observed in the case of *Rono vs Rono*[8] and considering that what may be fair in one case may not be fair or applicable in another case. After due consideration, I find that it is in the interests of justice and fairness that I order and decree as follows:-

- a. That the grant of letters of administration intestate made to the said **Hannah Mugure Muchiri, William Kagia Muchiri and Grace Muthoni Muchiri** in this cause on 22nd May 2015 be and is hereby confirmed.
- b. *L.R. No. Nyeri/Ngaringiro/1141 be registered in the name of Hannah Mugure Muchiri absolutely.*
- c. *L.R. No. Mau Summit/Molo Block 1/581 be registered in the name of William Kagia Muchiri and Grace Muthoni Muchiri in equal shares.*
- d. *L.R. No. Nyeri/Ngaringiro/1461 be registered in the name of Hannah Mugure Muchiri absolutely.*
- e. *L.R. No. Nyeri/Ngaringiro/1462 be registered in the names of William Kagia Muchiri and Grace Muthoni Muchiri in equal shares.*
- f. *Motor vehicle registration KUS 623-Datsun be registered in the names of William Kagia Muchiri and Grace Muthoni Muchiri.*
- g. *Motor vehicle registration KAL 249 R-Toyota Surf be registered in the names of William Kagia Muchiri and Grace Muthoni Muchiri.*
- h. *Motor vehicle registration KAY 800 D-Toyota Premio be registered in the name of Hannah Mugure Muchiri.*
- i. *Motor vehicle registration KAB 931 Q-Land Rover 110 be registered in the name of Hannah Mugure Muchiri.*
- j. *Motor cycle registration number KMCB 889N-Yamaha be registered in the name of Hannah Mugure Muchiri.*

k. Motor vehicle registration **KAG 673 K-Iveco Fiat** be registered in the names of **William Kagia Muchiri, Grace Muthoni Muchiri and Hannah Mugure Muchiri.**

i. Money in Account no. **005050022703** at K-Rep Bank- Nyeri Branch to be shared equally between **Hannah Mugure Muchiri, William Kagia Muchiri and Grace Muthoni Muchiri.**

ii. Money in Account no. **0120025106800** at Consolidated Bank- Nyeri Branch to be shared equally between **Hannah Mugure Muchiri, William Kagia Muchiri and Grace Muthoni Muchiri.**

iii. Money in Account no. **0110100193225** at Equity Bank- Nyeri Branch to be shared equally between **Hannah Mugure Muchiri, William Kagia Muchiri and Grace Muthoni Muchiri.**

iv Money in Account no. **064320-00087** at Biashara Sacco Society Ltd to be shared between **Hannah Mugure Muchiri, William Kagia Muchiri and Grace Muthoni Muchiri.**

v Money in Account no. **0120025064300** at Consolidated Bank- Nyeri Branch to be equally between **Hannah Mugure Muchiri, William Kagia Muchiri and Grace Muthoni Muchiri.**

vi. Money in Account no. **0173195011860801** at Ecobank Bank- Nyeri Branch to be equally between **Hannah Mugure Muchiri, William Kagia Muchiri and Grace Muthoni Muchiri.**

vii. Shares in Central Hotels Limited to be registered in the names of **William Kagia Muchiri and Grace Muthoni Muchiri** equally.

viii. Shares in Kirimara Security Company Limited to be shared equally between **Hannah Mugure Muchiri, William Kagia Muchiri and Grace Muthoni Muchiri.**

ix. Pension benefits from NSSF to be shared equally between **Hannah Mugure Muchiri, William Kagia Muchiri and Grace Muthoni Muchiri.**

x. No orders as to costs.

Right of appeal 30 days

Signed, Delivered and Dated at Nyeri this 27th day September of 2016

John M. Mativo

Judge

[1] Cap 160, Laws of Kenya

[2] **Ibid**

[3] See Musyoka J in Re Estate of John Musambayi Katumanga-Deceased, HC Succ Cause No. 399 of 2007

[4] **Ibid**

[5] Ibid

[6] Ibid

[7] See sentiments of Omolo J in Rono vs Rono {2005} 1 EA 363

[8] Supra