



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 705 OF 2012
IN THE MATTER OF THE ESTATE OF G T-DECEASED

W W G..... PETITIONER

VERSUS

D K GPROTESTOR

JUDGEMENT

G T N (herein after referred to as the deceased) died intestate on 31st May 2008 aged of 81 years. On 11th July 2012, **W W G** (hereinafter referred to as the petitioner) issued citations to refuse or accept letters of administration to **G W G**, **D G**, **G W G**, **E M M** and **N M**.

On 8th day of August 2012 **W W G** (hereinafter referred to as the petitioner and **D K G** (hereinafter referred to as the protestor) jointly petitioned for letters of administration to the deceased's estate.

The only properties listed in the affidavit in support of the petition is **Aguthi/Mungaria/[particulars withheld]** measuring approximately **1.05 Ha**. The petition was gazetted on 2nd November 2012 and the grant was issued to both petitioners jointly on 18th December 2012.

On 6th October 2014 the petitioner herein applied for confirmation of the said grant and proposed that the above land be shared equally between **G W G**, to hold in trust for her children on one side and the petitioner on the other hand to own the other portion. My understanding of this proposal is that the petitioner prefers the estate to be shared as per the number of the deceased's wives as opposed to the number of children.

Another application for confirmation of the grant dated 22nd November 2014 was filed by both administrators on 16th December 2014. However, the said application was withdrawn on 12th March 2015 leaving the application dated 6th October 2014 referred to above for determination.

The protestor filed an affidavit of protest to the application dated 6th October 2014 stating that the deceased had two wives, namely **W W** whose children are **W W G**, the petitioner herein and **R N** and the second wife was **G W W** whose children are **D K G** (the protestor), **V G**, **G W G**, **E M M**, **G W G** and a grandson -Minor.

The protestor stated that prior to his death the deceased had apportioned each person his/her share of land

out of **Aguthi/Mungaria/[particulars withheld]** measuring **1.05 Ha.** and proposed that the land be shared into **8** equal portions among the beneficiaries and that all the siblings except the petitioner herein and **R N** are agreeable to the said proposal. In his further affidavit, the protestor proposed that he holds the share for the minor who is a son to his late brother **C M G** . He insisted that the deceased never divided his land into two as stated by the petitioner. In a nutshell, this proposal as I understand it prefers distribution as per the number of children including the surviving spouse **G W G** .

On record are three further affidavits filed by counsel for the petitioner on 7th October 2015 one sworn by the petitioner herein and the others by **J W K** and **P K N** respectively. The last two deponents claim that the land in question was divided into two portions for the deceased's two wives and that the deceased and his mother allegedly told them that each house should be allocated a portion of the said land. The petitioner insists in his further affidavit that the deceased shared his land into two portions.

Both advocates agreed to have this case determined on the basis of the affidavits on record and written submissions.

Counsel for the protestor submitted that there was no evidence to confirm the deceased distributed his land as alleged and insisted that the deceased died intestate and urged the court to be guided by the provisions of section **40** of the Law of Succession Act[1]since the deceased was polygamous and urged the court to uphold the mode of distribution proposed by the protestor.

The petitioner's counsel submitted that the property be shared according to the number of wife's. Thus, counsel submitted that half of the estate should go to the deceased's surviving widow to hold in trust for herself and her children and the other half be registered in the name of the petitioner representing the other wife. Counsel also insisted that the further affidavits referred to above do confirm that the deceased divided his land prior to his death.

The issues for determination are **(a)** whether the deceased divided his land prior to his death, **(b)** The mode of distribution to be applied in these proceedings.

With regard to the first issue, I am fully aware that it is possible for a person to distribute properties during his/her lifetime. However, sufficient evidence to prove that a deceased person distributed his properties during his life time is necessary. Such proof cannot be mathematically precise and certain and so the test should be one of satisfaction of a prudent mind in such matters. The onus must be on the person alleging and there must be clear and convincing evidence and absence of suspicious circumstances surrounding the case. The necessity of proof always lies with the person who alleges. I find that the evidence tendered by the petitioner especially the two affidavits in my view falls short of the required standard to clear the doubts in the mind of the court that the deceased ever distributed his land during his life time. First, the two affidavits were introduced very late in these proceedings long after counsel for the protestor had filed his submissions raising doubts as to why such crucial evidence was withheld until the eleventh hour if at all it existed. The court notes that the petitioner had the opportunity to file a replying affidavit to the affidavit of protest but never did so instead waited until 7th July 2015 long after the opponent filed his submissions.

Further, the petitioners further affidavits leave serious gaps like when the deceased divided the land, who was present, whether the deponents witnessed the exercise or whether the clan elders were involved. Other than being introduced late in the hour, it is not clear on pertinent issues such as when the land was divided and whether family members were involved.

I am aware that the law seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. They are to be honoured and effected.[2] But it must be proved beyond doubt that indeed the deceased gave out the property or gift during his/her life time.

There is no tangible evidence to demonstrate that the deceased divided his land into two portions as alleged and gave a portion to each of the surviving wives. The evidence tendered by the petitioner in the

said affidavits is manifestly inadequate to warrant this court to conclude that the deceased divided his land during his life time. I conclude that the deceased in this case died intestate.

Section 34 of the Law of Succession Act[3] 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."

Having found that the deceased died intestate, and bearing in mind it is not disputed that the deceased had two wives, the deceased's estate falls for distribution in accordance with the provisions of section 40 of the Law of Succession Act[4] which provides as follows:-

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

(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 section 35 to 38.'

Section 40 of the Act address the case of a polygamist where the deceased had several wives at some stage of his life. 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 entire 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 amongst themselves.

The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is "equally" as opposed to "equitably". This is the plain language of the provisions. The provisions are in mandatory terms – the property "shall ... be equally divided among the surviving children." Equal distribution is envisaged regardless of the ages, gender and financial status of the children.

I have considered the issues raised in the protest and in my humble view, I find the protest has merits. As stated above, the deceased's estate falls for distribution as provided under section 40 of the Act. I accordingly I allow the protest and order that title number **Aguthi/Mungaria/[particulars withheld]** be divided into 8 equal portions to shared among the surviving widow and all the children of the deceased as follows:-

- a. G W G -----Wife.
- b. W W G -----Son.
- c. R N -----Daughter.
- d. D K G -----Son.
- e. V W G -----Daughter.
- f. G W G -----Son.
- g. E M M -----Daughter.

h. D K G to hold in trust for N M --Grand-son, minor

No orders as to costs.

Right of appeal 30 days

Signed, Delivered and Dated at Nyeri this 22nd day September of 2016

John M. Mativo

Judge

[1] Cap 160, Laws of Kenya

[2] See the Judgment of A. Mabeya J. in **Succession Cause No.43 of 2002, In the matter of the Estate of Noah Wanjala Kimawachi-Deceased**

[3] Cap 160, Laws of Kenya

[4] Ibid