



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 696 OF 2012

**IN THE MATTER OF THE ESTATE OF THUKU KAMAU alias ELIAS THUKU KAMAU
(DECEASED)**

JUDGMENT

1. The deceased herein died intestate on 19th August 2011.
2. A petition was lodged at the registry herein by Pauline Wanjiku Thuku and Joseph Nduati Thuku, in their alleged capacities as widow and son, respectively of the deceased. The deceased was expressed to have been survived by the widow and eight (8) children, being four (4) sons and four (4) daughters. Three (3) of the children were said to be minors as at the date of the petition. The nine (9) children were said to be Joseph Nduati, Dorcas Njeri, Priscilla Wambui, Harrison Kamau, Hellen Njeri, Erick Njoroge, Kennedy Njuguna and Maureen Nyambura. The deceased was expressed to have died possessed of four assets, being Loc. 16/Gatura/1692 and 1693, and shares in Njunu and Ngere tea factories. There is an additional name in the list in the Chief's letter dated 16th February 2012, that of Esther Wanjiru Thuku. The Chief does not state the status of the said Esther Wanjiru Thuku. A grant of letters of administration was then made to the two petitioners on 14th July 2013, and a certificate to that effect was duly issued.
3. The administrators appointed as stated in the foregoing paragraph have now moved the court by a summons for confirmation of grant dated 10th February 2014. Esther Wanjiru Thuku is described in the application as having been cohabiting with the deceased, an affair which produced five (5) children, being Harrison Kamau, Hellen Njeri, Erick Njoroge, Kennedy Njuguna and Maureen Nyambura. The assets listed in the petition - Loc. 16/Gatura/1692 and 1693, and shares in Njunu and Ngere tea factories – are proposed to be distributed between the alleged sole widow and her three (3) children. It is stated that Esther Wanjiru Thuku and her children had been settled by the deceased during his lifetime on Loc. 16/Gatura/1487, which he then transferred to them.
4. Esther Wanjiru Thuku has protested the proposed distribution through an affidavit she swore on 26th March 2014. She avers to be a second wife of the deceased. She states that Loc. 16/Gatura/1487 was in her name, but asserts that she bought the same from the deceased, and therefore the same does not form part of the estate of the deceased. She asserts further that the deceased had been survived by two (2) widows and eight (8) children. The assets she lists in her affidavit tally with those listed by the administrators, save that she adds two more, being shares in KTDA Farmers Company Limited and through Founder Share Certificate No. A01765. She proposes that the first house, comprising of Pauline Wanjiku Thuku and her children should get Loc. 16/Gatura/1693 and shares in Njunu Tea Factory Limited; while she and her children get Loc. 16/Gatura/1692 and the shares in Ngere tea Factory Limited, KTDA Farmers Company Limited and Founder Share Certificate No. A01765. The protestor has attached to her affidavit several documents. There is copy of an affidavit allegedly sworn on 31st October 2005 by

the deceased, stating that he had in 1985 married the protestor under Kikuyu customary law. There is also a document made under the Land Control Regulations, dated 28th October 2005, purportedly consenting to a sale by the protestor and the deceased of Loc. 16/Gatura/1487 to the protestor. In her affidavit she laments that representation to the estate ought to have been committed to the two houses of the deceased instead of being granted to just one side of eth family.

5. Directions were given on 1st April 2014 for the disposal of the confirmation application. It was directed that the same be heard orally.

6. The hearing commenced on 1st July 2015. The protestor and the first administrator testified. The first to go was the administrator. She testified that the deceased had married her in 1972, and that they had three (3) children. He then married another wife and began to harass the administrator and her children, forcing her to flee the matrimonial home, file for divorce and division of matrimonial property. She stated that in those proceedings the deceased denied having another wife. She testified that the deceased had subdivided the land into two portions, measuring three (3) acres and two (20 acres; where he retained the three (3) acres and allotted her two (2) acres. According to her, the three (3) acres were given to the other wife. She asserts that the other wife was, in the instant proceedings, seeking to get the remaining two (2) acres from her. She testified that the deceased then subdivided the two (2) acres further into two (2) with an intent to sell one part, but she placed a caution on the title to stop the subdivision. She would like the two (2) acres to come to her, so that she and her daughter have one (1) and the other goes to her son. He case is that the other wife should get nothing, for her and her children benefited from the three (3) acres allotted to them by the deceased earlier.

7. During cross-examination, the first administrator could not recall when the protestor was married by the deceased, save that she came with two (2) children, and bore two (2) more with the deceased. She stated that she did not omit the protestor's name from the papers she initially filed in court to disinherit her, but because she had already gotten her share of the estate. She stated that her cohabitation with the deceased ceased in 2004 and she moved away. The deceased never used to visit her family on the one side of the farm, although he lived on the other part with the protestor. She said that she never visited the deceased when he was ill as he did not want to see her.

8. The protestor on her part testified that the deceased had married her in 1985 under Kikuyu customary law, and that they had five (5) children. She acknowledged the first administrator as a widow of the deceased. She asserted that all her children had been sired by the deceased. According to her, the two (2) families of the deceased both lived on the same land, until 2004, when the first administrator left. She claimed that the latter moved as she alleged that she did not have young children, and she was not ready to assist her raise them. It was stated that she left at the point the deceased fell ill and needed assistance. The first administrator allegedly left with her children, and was not present when the deceased passed on. After the deceased's death, the protestor testified, the two (2) families went to the Chief's office for the letter to introduce them to the court, and it was agreed that the deceased had two (2) wives. However, the administrator decided to move the court excluding her.

9. In the distribution of the estate, she proposes that Loc. 16/Gatura/1692 should go to the first administrator and her family, while Loc. 16/Gatura/1693 should be given to her. Regarding Loc. 16/Gatura/1487, she explained that she had bought the same from the deceased for Kshs. 200, 000.00. She asserted that she had given money to the deceased for it. Adding that she had been looking after him, and they agreed that he gives it to her.

10. During cross-examination, the protestor conceded that the original property was Loc. 16/Gatura/799, which was then subdivided into two (2) portions. One portion, Loc. 16/Gatura/1487, was registered in the joint names of the protestor and the deceased, while the other, Loc. 16/Gatura/1486, was registered in his sole name. She testified that Loc. 16/Gatura/1486 was the larger of the two (2) parcels of land. She asserted that the deceased had distributed his property to her in 2005, and she did give him money for it. She asserted that she has developed Loc. 16/Gatura/1487. It was her testimony that the first administrator had occupied the other portion before she left.

11. At the end of the trial, I directed the parties to file written submissions. I have on record detailed written submissions by both sides. The parties have analyzed their respective cases, but none of them submitted on points of law.

12. I only wish to comment on the submissions by the administrators. To those submissions are attached two (2) documents – copy of a petition for dissolution of marriage filed at the lower court at Thika, and an affidavit filed in a matrimonial cause filed at the High Court at Nairobi. Written submissions are court papers that are not on oath. They should not carry any evidence. The submissions ideally should be on points of law, meant to persuade the court one way or the other. It is an abuse of court process to attach any form of evidence to written submissions.

13. The application for determination at this stage is for confirmation of the grant herein. Section 71(2) of the Law of Succession Act, Cap 160, Laws of Kenya, states how the court should dispose of an application for confirmation of grant. The said provisions state as follows:

‘The court to which application is made, or to which any dispute in respect thereof is referred, may –

a. If it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

b. If it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or

c. ...’

14. It is clear from the above provision, that other than distribution of the estate, the court should also be satisfied as to whether there was proper appointment of administrators.

15. What emerged from the proceedings that were conducted herein on 1st July 2015 was that the first administrator herein stated on oath that the deceased had married the protestor. She repeatedly talked of her husband having married the protestor and explained that that was what caused the problems in their marriage. She went on to allege that the second house of the deceased had already been allotted their share of the estate. The above runs counter to the contents of the papers that the first administrator had filed herein, asserting that the protestor was not a wife of the deceased. She appears to have had changed her stance by the time the matter came up for oral hearing. In view of the above, there cannot be any good reason for the protestor not having been listed in the petition as a surviving spouse of the deceased, alongside her children. It is not disputed seriously that the protestor was a spouse of the deceased regardless of the system of law under which their marriage was contracted. The grant on record ought to have been made in a manner that would have ensured that the second house was represented in the administration.

16. The second issue that I ought to address concerns distribution of the estate. In distribution, the court is guided by the proviso to section 71(2) of the Law of Succession Act, which says as follows –

‘Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled: and when confirmed the grant shall specify all such persons and their respective shares.’

17. The court should identify the persons who are entitled to a share in the estate of the deceased, identify the assets available for distribution, and state how such assets are to be distributed.

18. Regarding the persons entitled to a share in the estate there is little dispute. The papers lodged herein by the administrators identified all the survivors of the deceased, save for one, Esther Wanjiru Thuku. The oral proceedings herein have without doubt resolved the issue of her status as a survivor of the deceased,

for the first administrator had been fairly categorical in her testimony that the protestor had been married by the deceased.

19. The issue of the status of the first administrator did not arise. I found it curious though that she did state that she had filed for divorce and for division of matrimonial property. She did not adduce evidence as to the status of those two suits as at the date of the deceased's death. She was obliged to. She was under a duty to fully disclose to the court all the facts surrounding this cause, including disclosing to the court the outcome of those court cases that no doubt have a bearing to the outcome of these proceedings. I will however leave the matter at that for it was not pursued by the protestor.

20. On the assets, according to the protestor the deceased died possessed of much more than what had been disclosed by the administrators. The failure by the administrator to list all the assets would be understandable given that it was the protestor who was living with the deceased right up to the point of his death. The assets not disclosed are the shares set out in the papers filed by the protestor.

21. There is the issue of Loc. 16/Gatura/1487. The administrators' case is that the property initially belonged to the deceased, but was transferred to the protestor and her family during lifetime. The court is asked to take that into account as it distributes the estate. The administrators explained that they did not include the protestor in the proceedings on account of having been given this property during the deceased's lifetime, and in their view; therefore, she was not entitled to more property from the estate.

22. The protestor, on her part, conceded that she did indeed receive Loc. 16/Gatura/1487 from the deceased. However, the explanation she gave of what exactly happened is a little muddled. On the one hand, she said she bought the property from the deceased, and appeared to say that the same was sold to her as consideration for her having taken care of him during his illness. She appeared to suggest that it was an *inter vivos* gift for her having taken care of him during his illness.

23. The history of this property, from the material before me, appears to be that it was a subdivision from Loc. 16/Gatura/799, which produced Loc. 16/Gatura/1486 and 1487. Loc. 16/Gatura/1486 was further subdivided into Loc. 16/Gatura/1692 and 1693. It would appear that Loc. 16/Gatura/1487 was initially transferred to the joint names of the deceased and the protestor, and thereafter to the sole name of the protestor. The protestor is settled on Loc. 16/Gatura/1487, while the first administrator occupied or still occupies what was initially Loc. 16/Gatura/1486, now Loc. 16/Gatura/1692 and 1693.

24. According to the record from the Land Control Board, the transfer to the name of the protestor happened in October 2005. The documents on record indicate that that same October 2005 is when the deceased swore an affidavit to state that the protestor was his wife. Earlier that year, February 2005 to be specific, the first administrator had petitioned for dissolution of her marriage with the deceased. It was in the same year that she had moved for division of matrimonial property, which property included Loc. 16/Gatura/1487. Given that background, I am persuaded that the alleged transfer to the protestor was a move designed to take away Loc. 16/Gatura/1487 from the reach of the court seized with the matter on division of matrimonial property. I am therefore not persuaded that the protestor acquired it by way of sale. She provided no proof of sale, either by producing a sale agreement or evidence that any money changed hands between her and the deceased.

25. I shall treat it an *inter vivos* gift. I shall take it into account in distribution. I am directed to do so by section 42 of the Law of Succession Act, which provides that –

'Where –

a. An intestate has, during his lifetime or by will, paid, given, or settled any property to or for the benefit of a child, grandchild or house; or

Property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35,

That property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.'

26. The deceased died a polygamist. His estate fell for distribution under section 40 of the Law of Succession Act. It would appear, however, that he had distributed his property during his lifetime. From the oral evidence, it is clear that after subdividing Loc. 16/Gatura/799 into Loc. 16/Gatura/1486 and 1487, he settled the first house on Loc. 16/Gatura/1487 (which he subdivided into Loc. 16/Gatura/1692 and 1693) and the second house on Loc. 16/Gatura/1487. Loc. 16/Gatura/1487 was transferred to the name of the protestor, so it is not available for distribution. The only landed property available for distribution would be Loc. 16/Gatura/1692 and 1693, which accrue to the first house as per the deceased's scheme of distribution during his lifetime.

27. I am cognizant of the fact that the second house is larger in terms of membership compared with the first house. The first widow has three (3) children, while the second widow has five (5). The parties did not provide accurate evidence on the size of the two (2) parcels of land shared between them. I was persuaded that they were more or less equal. That distribution would be schewed in favor of the first house. That imbalance ought to be cured in the distribution of the shares.

28. The orders that I make in the end are as follows:-

a. That I will remove Joseph Nduati Thuku as an administrator of the estate and substitute him with the protestor, Esther Wanjiru Thuku;

b. That the grant of letters of administration intestate dated 19th July 2013 shall be rectified to accord with (a) above

c. That I hereby declare that the survivors of the deceased are Pauline Wanjiku Thuku, Esther Wanjiru Thuku, Joseph Nduati Thuku, Dorcas Njeri Thuku, Priscilla Wambui Thuku, Harrison Kamau Thuku, Hellen Njeri Thuku, Kennedy Njuguna Thuku, Erick Njoroje Thuku and Maureen Nyambura Thuku;

d. That the assets available for distribution are Loc. 16/Gatura/1692 and 1693, and shares in Njunu and Ngere tea factories, shares in KTDA Farmers Company Limited and Founder Share Certificate No. A01765;

e. That the said assets shall be distributed as follows-

i. Loc 16/Gatura/1692 and 1693 - to Pauline Wanjiku Thuku during lifetime and thereafter to her children – Joseph Nduati Thuku, Dorcas Njeri Thuku and Priscilla Wambui Thuku – in equal shares;

ii. Shares in Njunu Tea Factory Limited (3752 No. R00002293 and 3085 No. B00009336) - to Pauline Wanjiku Thuku absolutely;

iii. Shares in Ngere Tea Factory Limited (7832 No. G0002534, 1000 No. 444, 3614 No. R0000331 and 1000 No. 943) – to Esther Wanjiru Thuku, absolutely;

iv. Five (5) shares through Founder Share Certificate No. A01765 – to Esther Wanjiru Thuku, absolutely; and

v. Shares in KTDA Farmers Company Limited (certificate no. 127268) - to Esther Wanjiru Thuku absolutely;

f. That the grant made on 19th July 2013 and rectified as ordered here above is hereby confirmed in the terms of (e) hereof;

g. That the bulk of the estate is situated within Murang'a County, consequently I do hereby direct that the cause be transferred to the High Court of Kenya at Murang'a; and

h. That there shall be no order as to costs.

29. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 26TH DAY OF OCTOBER, 2016

W. MUSYOKA

JUDGE