



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 261 OF 2010**

**IN THE MATTER OF THE ESTATE OF JOSEPH MAGONDU WAWERU (DECEASED)**

**MARGARET WANJIRU NDUNGU.....OBJECTOR**

**VERSUS**

**SERAH NYAMBURA MAGONDU.....PETITIONER**

**R U L I N G**

1. The deceased whose Estate this protest relates to is Joseph Magondu Waweru, who died intestate on 7<sup>th</sup> December 2009. Serah Nyambura Magondu (hereinafter the Petitioner), applied for and was granted letters of Administration intestate on 30<sup>th</sup> July 2010. Before the grant was confirmed Margaret Wanjiru Ndungu (hereinafter the Objector), filed an affidavit of protest dated 17<sup>th</sup> January 2013, the subject of these proceedings.

2. The estate of the deceased comprise three properties as follows:

L.R. No. Ngong/Ngong/38099

Ngong Township Plot No. 342

L.R. No. Ngong/Ngong/5023

The contention is on the manner in which the distribution of the properties set out above should be done.

**Objector's Case**

3. The Objector stated that she was married to the deceased in 1993 under Kikuyu Customary Law and moved to live with him on his parcel of land comprised of title No. Ngong/Ngong/38099 where she still lives to date. The Objector complained that she was not informed of the succession cause herein and neither did she consent to the appointment of the Petitioner as the administrator, or to the mode of distribution.

4. The Objector also contended that neither she nor her children were mentioned as beneficiaries of the estate despite being depedants. She argued that the implication of this would be to disinherit her. In this regard she sought, together with her two sons to be enjoined as beneficiaries of the estate and be given a fair share of the estate.

**Petitioner's Case**

5. According to her marriage certificate the Petitioner in the proceedings herein is the widow of the deceased, having celebrated a church marriage with the deceased in October 1954. The Petitioner testified that she and the deceased set up a matrimonial home which remains to date, on L.R. Number Ngong (Bulbul) plot No. 432.

6. The Petitioner contended that the Objector is still married to a man known as Mr. Ndungu of Muranga County since their marriage has never been dissolved. That they have three children who live with Mr. Ndungu. That the Objector moved to Nairobi in 1993 and met the deceased who had separated but not divorced the Petitioner and together they got two children.

### **Issues for determination:**

7. Having perused the grounds of the protest, together with the rival submissions and proposals for the distribution of the estate, I have identified the following issues for determination:

1. Whether the Petitioner and the Objector are both widows of the deceased.
2. The mode of distribution of:
  - i. Plot No. 432 Residential Bulbul Trading Centre
  - ii. Plot originally known as Ngong/Ngong 5023
  - iii. L.R. No. Ngong/Ngong/38099

### **Whether the Petitioner and the Objector are both widows of the deceased**

8. There is no dispute that the deceased and the Petitioner married each in a church wedding in October 1954, and together they sired 9 children. There is also no dispute that the deceased filed for a divorce sometime before his demise, which he did not however, prosecute before he died.

9. For all intents and purposes therefore the Petitioner is still his lawful wife although they spent the last two and half decades apart. The deceased having contracted a monogamous marriage with the Petitioner, lacked capacity to enter into another marriage contract with the Objector without having had the first marriage dissolved.

10. Evidence was led however, that the Objector depended on the deceased for her upkeep and that of the two children of their union. That it was for that reason that they subdivided and sold Ngong/Ngong/5023 which the deceased and Petitioner bought together. They also collected the rental income from plot No. 432. They utilised all these proceeds without giving the Petitioner a penny until the deceased's demise.

### **Plot No. 432 Residential Bul bul Trading Centre**

11. The evidence of the Objector was that she was married to the deceased in the year 1993 after which she and the deceased were allotted by the City Council in the year 2001, the Plot 432/Residential – Bul bul Trading Centre. The Objector has attached a letter of allotment dated 1<sup>st</sup> March 2001 to prove this.

12. In the opinion of the Objector plot No. 432 Bul bul Trading Centre therefore, belonged to the deceased and the Objector absolutely and at the demise of the deceased this property should only go to the Objector. The Objector argued that the Petitioner never contributed in any way towards the acquisition of this parcel of land and cannot be heard to say that the parcel of land should devolve to her absolutely.

13. Learned Counsel Ms Winnie Tallam filed brief submissions on behalf of the Objector and urged with regard to Plot No. 432 Bul bul Trading Centre, that it had not been disputed that the Petitioner left the deceased in the year 1982. That she has never returned and currently lives in Kibera. Counsel argued

that at the time of acquisition of this property the Petitioner was not with the deceased and therefore she should not get this parcel of land. That in the circumstances this property should devolved absolutely to the Objector.

14. The Petitioner in her oral evidence stated that after she and the deceased got married in 1954 they cohabited in Nakuru. In 1964 they established a matrimonial home on plot No. 432 Bul bul Trading Centre in Ngong which existed until 2014 when it was gutted by fire. The Petitioner explained that although this plot was allotted to the deceased in 1964, the actual subdivision thereof was done in the year 2000.

15. The Petitioner testified that she helped to develop plot No. 432 by putting up tin shacks for rental. That the deceased beat and chased her away when he married the Objector in 1982 and she stayed away for ten years. That when she returned to the plot it still comprised of the same old tin shacks she left behind when she went away. She built additional structures upon her return. The deceased and the Objector had not made any additional developments on the plot.

16. Learned Counsel Mr. P. K. Njoroge for the Petitioner submitted that the deceased owned Plot N. 432 which is the matrimonial home of the Petitioner and that the Petitioner to date had no other matrimonial home. Counsel submitted that the Petitioner is an elderly woman who is frail in health and who should be allowed to retain her matrimonial home and get a little income from the six tenants in the makeshift tin structures. That the plot measures quarter of an acre and should devolve to the Petitioner as a whole.

17. I have perused the testimonies of the parties and the rival submissions of counsels herein with regard to plot No. 432 Bul bul. I observe that in her testimony the Objector admitted that:

**“I was married by the deceased in 1993. We lived in plot No. 432. There was already in existence a house there”.**

The Objectors evidence in this respect is in consonance with the evidence of the Petitioner who told the court that:

**“Wanjiru first moved into my house on plot No. 432 in which I had left all my clothes and household effects”.**

From the foregoing the Petitioner’s argument that she worked for this plot cannot therefore, be gainsaid.

18. The Objector also confirmed during her cross-examination that the documents to the plot which according to her measures 1/8 acre (50ft x 100ft) were issued much later in 1998. This was in consonance with the Petitioner who told the court that plot No. 432 was allotted to her husband by Ol Kajiado County in 1964 but the physical subdivision was done later in the year 2000. The Objector herself exhibited an allotment letter issued in the year 2001.

### **Parcel No. Ngong/Ngong/5023**

19. M/s Tallam urged on behalf of the Objector that this parcel of land forms part of the estate of the deceased and should be shared equally among the two houses. She argued that a copy of the letter by Hamilton & Mathews Advocates dated 20<sup>th</sup> April 1979 does not show that Benson Waweru, son of the deceased and Petitioner made any payments therefor. That no evidence was brought to court to show that he worked for Kenya Power and Lighting Company to prove that he had income to pay the loan, if at all there was an outstanding loan.

20. Counsel contended that there was no receipt in Benson Waweru’s name showing that he made payments to Hamilton & Mathews the banker’s advocates, nor was there evidence to show that payments were made either as a lump sum, instalments, in cash or by cheque.

21. Counsel maintained that the Petitioner’s son did not provide any evidence of the amount of loan he

said he paid off or of the Objector having sold any of the family properties, or that she sold it together with the deceased. She asserted that the deceased could not therefore, have rewarded his son with a parcel of land.

22. Mr. Njoroge contended for the Petitioner that contrary to the suggestion of the Objector, the Petitioner cannot build her house on the plot allocated to her son by the deceased, since the said plot was a gift, or reward by the deceased to his son. Counsel urged that the Petitioner's son gave financial assistance to the deceased in 1987, 1988 and 1989.

23. The said financial assistance stated above enabled the deceased to clear a bank loan and obtain the discharge of L.R. No. Ngong/Ngong/5023. That the deceased in acknowledgment, sub-divided the property into four plots, and gave his son one plot where he lives with his family to date.

24. Benson Waweru the son of the Petitioner and the deceased testified for the defence that the deceased called him to save this property which was at the risk of being auctioned, for non-repayment of a loan the deceased took and used the said plot as collateral. That having repaid the loan the deceased subdivided the original plot L.R. Ngong/Ngong/5023 and rewarded him with one plot therefrom.

### **Parcel No. Ngong/Ngong/38099**

25. The Objector's counsel argued that this parcel of land cannot be open to distribution as it is matrimonial property between the Objector and the deceased. The Objector herself testified that this plot should be shared in half between the two houses as should plot No. 432.

26. I have considered the affidavit of protest and the rival submission herein. I note that for a period of almost 30 years the petitioner worked alongside the deceased to invest in the estate. She was employed as a nursery school teacher. That in particular she developed plot No. 432.

27. The court noted that neither the Petitioner nor the Objector had included the deceased's son's plot in the list of the assets forming the estate of the deceased. There is therefore acknowledgment that this plot belongs to the Petitioner's son and in the view of this court, the son did give consideration for it by helping the deceased to pay the bank loan to save the plot. In any case he has lived on the land for more than 25 years without any family members raising any complaint with him or the deceased while he was still alive.

28. Plot No. 38099 was inherited from the deceased's father. The Objector and the deceased had a house in this parcel of land in which they lived with their two children before the deceased died. The Objector continues to live with her children.

29. After a careful consideration of the grounds of the protest, the rival submissions and the proposals on the mode of distribution of the estate the court made a finding that the Objector was not a wife to the deceased, but was a dependant. The court also finds that there is nothing to be gained by joining the objector as a co-administrator at this point.

30. The court further found that the mode of distribution that lends itself to the circumstances of this estate and which the court now order is as follows:

i. Ngong Township plot No. 342 to go to Sarah Nyambura absolutely.

ii. L.R. No. Ngong/Ngong/38099 to be divided into two equal shares.

Margaret Wanjiru and her two children to get the half share that comprises her matrimonial home.

Sarah Nyambura and her nine children to get the balance of L.R. No. Ngong/Ngong/38099.

iii. L.R. No. Ngong/Ngong/16350 hived out of the original Ngong/Ngong/5023 to remain with

Benson Waweru.

There are no orders as to costs.

**SIGNED DATED and DELIVERED** in open court this **16<sup>th</sup>** day of **November, 2016**.

.....

**L. A. ACHODE**

**JUDGE**

**In the presence of .....Advocate for the Objector**

**In the presence of .....the Petitioner**