



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 175 OF 2012

**IN THE MATTER OF THE ESTATE OF MAGU MWENJE ALIAS PETER WANDI MWENJE
(DECEASED)**

JANE MUTHONI.....APPLICANT

AND

ELIUD MWENDIA WANDI.....PROTESTOR

JUDGMENT

1. This cause involves the estate of the late **MAGU MWENJE ALIAS WANDE MWENJE** (Deceased) who died intestate on 17th May, 1998. The estate in this cause comprises that property known as **KABARE/MUTIGE/20** measuring 1.2 ha or thereabout.
2. This succession cause has been a long protracted battle between the original petitioner – Annah Wanjiku Wandi now deceased and Jane Muthoni Wachira, a co-petitioner appointed at a later stage in the proceedings herein. The original petitioner died and was substituted by one of her children Eliud Mwendia Wandi who then was appointed a co-petitioner together with Jane Muthoni Muchira on 6th October, 2014. The said Jane Muthoni Muchira was brought into the cause as the second wife of the deceased herein despite objections from the original petitioner which was determined in the lower court on 4th November, 2002.
3. The proceedings show that petitioner being dissatisfied with the decision of the lower court moved to Embu High Court vide **Civil Appeal No. 81 of 2008** but the Hon. Judge in Embu overruled the petitioner and held that both Annah Wanjiku Wandi and Jane Muthoni Muchira were wives to the deceased and dependants as held by the lower court. The only issue was that Anna Wanjiku Wandi (deceased) had not been substituted properly in accordance with the law and the court ordered the same to be done. I do find from the proceedings that the applicant complied by bringing the summons dated 29th September, 2014 for substitution which was allowed by consent in this Court on 6th October, 2014 when Eliud Mwendia Wandi was duly appointed a co-administrator and jointly issued with a grant of letters of administration.
4. Both parties to this cause agreed to file written submissions on the application for confirmation of grant dated 3rd November, 2014 in view of the protest filed by the co-petitioner who still insisted that Jane Muthoni Muchira was not a wife to the deceased herein.
5. However, the issue of whether Jane Muthoni Muchira was a wife and/or dependant to the deceased herein has since been determined as indicated above. I do agree with the petitioner's learned counsel Beth Ndorongo that the law recognizes the petitioner and her children because the deceased recognized the children as his own and voluntarily assumed permanent responsibility in accordance with **Section 3 (2)** of the **Law of Succession Act (Cap. 160)**. Furthermore **Section 3 (5)** of the same Act provides as follows:

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act and in particular sections 29 and 40 thereof and her children are accordingly children within the meaning of this Act.”

6. A look at **sections 29** of the law gives descriptions/meaning of who a dependant is and from the proceedings I find that both the late Annah Wanjiku Wandu and her children named in this cause on one hand and Jane Muthoni Muchira and her children on the other hand were left behind by the deceased and are dependants within the meaning of **Section 29** of the **Law of Succession Act** save for the late Annah Wanjiku Wandu who is now deceased. The fact that Jane Muthoni Muchira and her children did not use the name of the deceased as their surnames is immaterial in law and is not a consideration when determining who a dependant is or is not.
7. Having determined who dependants are in this cause the only issue remaining is the mode of distribution but before I come to the issue of distribution the Applicant’s learned counsel pointed out an issue which requires clarification. The issuance of grant on 6th October, 2014 to the present petitioners was done by consent and that issuance cured the failure by the petitioner to formally file a formal application for issuance of grant through filing of Form 41 under **rule 25** Probate and Administration Rules. In any event the filing of the same was overtaken by events and under **Section 47** of the **Law of Succession Act** I find that the application for Confirmation of Grant is properly before Court and so is the protest which I have determined as aforesaid.
8. On distribution, **Section 40** of the **Law of Succession Act** 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 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.”

9. The children in the first house surviving the deceased are as follows:
 - i. Eliud Mwendia Wandu
 - ii. Alphan Njagi Wandu
 - iii. David Gicobi Wandu
 - iv. James Gitari Wandu
 - v. Justin Wanjohi Wandu &
 - vi. Euginia Koori Wandu

In the second house the children surviving the deceased are given as follows:

- i. Kelvin Wanjohi Muchira
- ii. Evans Muchiri Muchira
- iii. Susan Mutitu Muchira
- iv. Francis Machera Muchira
- v. Charles Mugambi Muchira

Jane Muthoni Muchira is the surviving widow to the deceased.

In accordance with the law as cited above, the grant issued on 6th October, 2014 is hereby confirmed and the estate comprised in that property known as **KABARE/MUTIGE/20** shall be distributed equally among the following:

1. Jane Muthoni Muchira
2. Eliud Mwendia Wandu
3. David Gicobi Wandu
4. James Gitari Wandu

5. Justin Wanjohi Wandu
6. Euginia Koori Wandu
7. Alphan Njagi Wandu
8. Kelvin Wanjohi Muchira
9. Evans Muchiri Muchira
10. Susan Mutitu Muchira
11. Francis Machera Muchira and
12. Charles Mugambi Muchira

10. In order to bring this long standing dispute to an end, I will make the following orders:

- a. The County/District Lands Registrar do dispense with production of identity cards or Personal Identification Numbers for those beneficiaries who may be reluctant to cooperate to facilitate transmission as ordered herein.
- b. The County/District Surveyor do visit the parcel forming the estate herein and mark out boundaries of each beneficiaries as per the confirmed grant and place beacons to mark out their respective boundaries.
- c. The O.C.S. Kianyaga Police Station shall provide security for the exercise.
- d. The surveyor's fees shall be paid evenly by all the beneficiaries.
- e. The Deputy Registrar or the Executive Officer of this Court shall execute requisite transfer forms for those beneficiaries who may be reluctant to cooperate.
- f. Each party shall pay own costs but if any of the parties fails to pay the surveyor's fees then he/she shall pay costs of this cause.

It is so ordered.

Dated and delivered at Kerugoya this 29th day of September, 2015.

R. K. LIMO

JUDGE

29.9.2015

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi Kiragu for protestor present

Ndorongo for Petitioner Gichimu holding brief.

COURT: Judgment signed, dated and delivered in the open court in the presence of Kiragu for Protestor and Gichimu holding brief for Ndorongo for Applicant.

R. K. LIMO

JUDGE

29.9.2015