REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 963 OF 2012

IN THE MATTER OF THE ESTATE OF DORIS WANJIKU JOHN MWIGARURI alias DORIS WANJIKU-DECEASED

JUDGEMENT

Doris Wanjiku John Mwigarurialias **Doris Wanjiku** (herein after referred to as the deceased) died intestate in 28th December 1995 leaving the following persons entitled to his estate, namely;

i. *John Muigaruri Nguitui- Husband.*
ii. *Elijah Maina Mwigaruri-Son*
iii. *Erastus Kibui Mwigaruri-Son*
iv. *Jane Wamuyu Muriuki-Daughter*
v. *Mary Wangui Mwigaruri-Daughter*
vi. *Simon Nduiga John-Son*
vii. *Joseph Mugambi Mwigaruri-Son*
viii. *Richard Waweru Mwigaruri- Son*

On 15th day of August 2012 the deceased's husband**John Muigaruri Nguitui** (herein after referred to as the Petitioner) petitioned for letters of administration intestate to the deceased's estate.Annexed to the said petition is a letter from the local chief dated 13.8.2012 naming the above named persons as heirs to the deceased's state. No consent or renunciation was attached duly signed by the above named persons. The only property listed in the affidavit in support of the said petition is **Nyeri/Naromoru/64.**The Petitioner states in the said Petition that she is the wife (widow) of the deceased.

On 19th September 2012 **Mary Wangui Mwigaruri**the protestor herein wrote to this court asking to be supplied with copies of the papers filed in this cause arguing that she is one of the beneficiaries and that her consent was not sought and obtained before filing this petition.

The Petition was gazetted on 13th September 2013 and the grant of letters of administration was issued on 15th October 2013. On 15th April 2014 the petitioner applied for confirmation of the said grant and annexed to the said application a consent signed by all the other beneficiaries to the said estate except the said **Mary Wangui Mwigaruri.**

In her affidavit of protest to the confirmation of the grant filed on 2.5.2014, the protestor states as follows:-

i. *The deceased was her mother who was the registered owner of Land Parcel number Nyeri/Naromoru/64 measuring 20.5 Acres.*

ii. *Prior to her death her mother had already applied for consent to sub-divide the said land into 5*

*portions measuring **4.00**acres, **4.00**acrea, **5.0**acres, **3.00** acres and **4.5** acres respectively and exhibited a copy of consent from the land control board and avers that the land was divided as aforesaid and that is the position obtaining on the ground.*

iii. *That as per the wishes of the deceased the land was to be shared as follows:-*
   a. *Mary Wangui Mwigaruri---4.5 acres*
   b. *Joseph Mugambi John—4.0 acres*
   c. *Simon Nduiga John---5.0 acres*
   d. *Richard Waweru John—3.0 acres*
   e. *Erastus Kibui John—4.0 acres.*

iv. *That she was allocated the portion measuring 4.5 acres and that is where she buried the remains of her mother and her brothers were allocated their portions as shown above.*

v. *That she was never consulted at the time of filing these proceedings and that now she is being given **2.0** acres contrary to her late mothers wishes instead of **4.5** acres her mother had given to her.*

Both parties were represented by advocates at the hearing which proceeded by way of oral evidence. The protestor testified that her mother shared the land as outlined above in or about 1985, and that she was allocated the compound measuring **4.5** acres, and that she has all along been in occupation, that her mother died before she could transfer the land to her. She relied on a document annexed to her affidavit which she said was her "*mother's wil"l* and insisted that the land should be shared as per her "*mother's wishes as per the said will*." On cross-examination she confirmed that the petitioner is her father and admitted that consent to transfer the said land was never obtained. She is opposed to the proposed mode of distribution proposed in the application for confirmation of grant because its giving her **2** acres as opposed to the **4 ½** given to her by her mother. She insisted that she recovered the document she is relying on "*i.e the said will"* from hermothers' house after her death.

Answering to questions from the court she confirmed that all the other siblings in the family are not contesting the confirmation of the grant herein and that all of them have teamed up against her.

The Petitioner's evidence was that the deceased was his wife and that the objector is his daughter, and they had seven children with the deceased including the protestor. Regarding the suit premises, the petitioners' evidence is that at time of acquiring the said land, he was working and since he was employed by the government he did not qualify to be allocated government land so it was allocated to his wife with his full knowledge and blessing. Because of the said government policy, he allowed his wife to be allocated the land. That was in or about 1963 of thereabouts.

The petitioners' proposed mode of distribution in the application for confirmation of grant is as follows :-

i. *John Muigaruri Nguitui- Husband…2 ½ acres*
ii. *Erastus Kibui Mwigaruri-Son……4 acres*
iii. *Mary Wangui Mwigaruri-Daughter…...2 acres*
iv. *Simon Nduiga John-Son……..5 acres*
v. *Joseph Mugambi Mwigaruri-Son……...4 acres*
vi. *Richard Waweru Mwigaruri- Son……3 acres*

He further testified that he gave *Elijah Maina Mwigaruri* a parcel of land at Ngarua, hence the reason why he is not factored in the above land and that the only other remaining person is *Jane Wamuyu Muriuki* who is married. He also testified that the protestor was also married but she came back and he has considered her and given her two acres in his proposed mode of distribution.

His evidence was that he prior to his wife's death, they discussed the said mode of distributing the land among their children and this discussion took place at his second home at Ngarua, and they were in agreement with his wife that they distribute the land as follows: *Kibui Mwigaruri-Son 4 acres, Simon Nduiga John-Son 5 acres, Joseph Mugambi Mwigaruri-Son, 4 acres* and *Richard Waweru Mwigaruri-*

Son, 3 acres. This left 4 ½ acres in his wife's name. The other son, Elijah Maina Mwigaruri was allocated land at Ngarua. The petitioner insisted that at the time they made the above decision, the protestor was married, was living in Nairobi and never used to come home.

He maintained that as the husband he is entitled to the portion of **4 ½** acres that remained in his wife's name but that notwithstanding he is ready and willing to give the protestor **2**acres out of the said land and he retains **4 ½** acres. He denied the existence of knowledge of the alleged will relied upon by the protestor.

The petitioner called *Elijah Maina Mwigaruri*his son as his witness who confirmed that the petitioner is his father and that the protestor is his younger sister. He confirmed that he is aware of the property in question, that he has not been given a portion of the said land because he preferred to be given land at Ngarua. He collaborated earlier evidence by the petitioner that the deceased owned shares at Sengera which entitled her to a parcel of land but after her death the protestor withdrew the equivalent in cash that effectively making the family lose the said land. He also supported his father's evidence that the petitioner used to live in Nairobi and was married and never used to come home. He denied the existence or knowledge of alleged *will* relied upon by the protestor and disagreed with the contents.

He further confirmed that the rest of the family members are in agreement with the petitioners proposed mode of distribution except the protestor who is not satisfied with the **2** acres given to her. He also confirmed that his late mother visited him and his father at Ngarua where they discussed the proposed distribution of the family land and that he was present in the said meeting and that his parents agreed that he himself settles at Ngarua, and that the protestor was getting nothing on the suit premises, that the **4 ½** acres were for their late mother, that his father proposes to give the protestor **2** acres out of it and all the siblings in the family are in agreement and have signed the consent to the confirmation except the protestor.The witness insisted that his father is entitled to decide what he wants to do with the land and that he himself had no problem at all with the proposed subdivision.

The issues for determination are:-

i. *Whether the deceased died intestate or left any valid will whether oral or written.*
ii. *Whether the deceased and the petitioner agreed to share the suit premises among the children prior to the deceased's death.*

iii. *Whetherthe petitioner is entitled to inherit the **4 ½** acres in the name of his late wife.*

iv. *Whether the mode of distribution proposed by the petitioner should be allowed to stand.*

v. *Whether the protest has a valid claim to the 4 ½ acres as alleged.*

I have looked at the document relied upon by the protestor which she says constitutes her late mother will or wishes as far as how the land was to be distributed. No one saw her write or sign the said document nor is it witnessed. None of her sons or her husband had heard about it or knew about. The protestor was not present when it was written if at all it was authored by the deceased. No witness was called to attest to the contents of the same. The protestor said she found it in the house. It's not signed by the deceased. I find that the said document raises more questions than answers. Intestinally, the only addition which makes it different form the evidence of the petitioner and his son is the inclusion of the protestors name under her mothers' name

It's not a valid will and this court cannot attach much weight to it. Section 11 of the Law of Succession Act provides that:-

No written will shall be valid unless:-

a. *The testator has signed or affixed his mark to the will or it has been signed by some other person in the presence and by the directions of the testator.*

b. *The signature or mark of the testator or the signature of persons signing for him is so placed that it shall appear that it was intended thereby to give effect of the will.*

c. *The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person, and each of witness must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary*

The evidence tendered by the protestor is manifestly in adequate to warrant this court to conclude that the deceased left a valid written will. The document does not conform to the above provisions section 11 cited above. On the contrary, the petitioners' evidence that they sat with his wife and agreed on how to share the land among their children is more convicting. I had the opportunity of observing the demeanour of the two give as they gave evidence in court, and I find that the petitioner despite his advanced age, was more composed, consistent and truthful and exhibited tremendous respect to the protestor despite her combative approach which was evident in court. I conclude that the deceased died intestate. I also find that after she sub-divided the land as agreed with her she retained the portion measuring 4 ½ acres in her name.

Having found that the deceased died intestate, and bearing in mind it is not disputed that the deceased was his wife, the deceased estate fell for distribution in accordance with part V of the Law of Succession Act. The deceased was survived by a husband and children and therefore the relevant provision is Section **35** of the Law of Succession Act which provides as follows:-

> *35. (1) Subject to the provision of Section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-*
>
> *(a) the personal and household effects of the deceased absolutely and*
>
> *(b) a life interest in the residue of the net intestate estate:*
>
> Provided that, if the surviving spouseis a widow, which interest shall determine upon her re-marriage to any person

"Life interest" is not defined in the Law of Succession Act. *Black's Law Dictionary* defines it as *"an interest in real or personal property measured by the duration of the holders or another person's life."*Discussing the same issue,**Justice Musyoka***in the case of Tau Katungi vs Margrethe Thorning Katungi & Antother* had this to say:-

> *"In the context of Section 35 it is an interest held but the surviving spouse during their life 'in the whole of the residue of the net interest estate. Its effect is that th surving spouse first enjoys rights over the property and at his or her death the property passes to other persons."*

The learned Judge in the above case went on to say as follows:-

> *"The effect of Section 35 (1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children's right to the property crystallises upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income she would be the person entitled exclusively to the income so generated.*
>
> *The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes*

directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance. The other aspect is that life interest ties up with the concept of matrimonial property; the said property would in most cases be part of property acquired during marriage and with the contribution of the surviving spouse. Direct devolution of such property to the children would deny the surviving spouse of enjoyment of their own property"

Life interest confers a limited right to the surviving spouse over the state. He or she does not enjoy absolute ownership over the property. They cannot deal with it as if it was their own. By virtue of Section 37 of the Act, a surviving spouse cannot during life interests dispose of any property subject to that life interest without the consent of all the adult children, co-trustees and the court. This is meant to safe guard the interest of the children who are the ultimate beneficiaries of the property the subject of the life interest. It is in this respect that the life interest operates as a trust over the property the subject thereof, a trust held by the surviving spouse for the benefit of the surviving children.

In the present case it is important to note that in the petitioners proposed sub-division, he has sought and obtained the consent of all the childrenexcept the protestor who has refused to consent demanding a bigger portion and disregarding the life interest conferred upon the petitioner under section 35 cited above.

Discussing a similar situation in the case of *in the estate of Jolly Jimmy Githieya-Deceased* **Musyoka J** had this to say:-

"The provision is very clear. The estate is not to be divided amongst the children while the surviving spouse is still alive. Distribution among the children should only happen upon her re-marriage or death. Neither of that has happened in this case and therefore the surviving spouse is entitled to continue enjoying life interest.

Life interest creates a trust in favour of the children. That is why during life interest the surviving spouse cannot deal with the property as if it belongs to them. However, the law does allow the surviving spouse to tinker with the life interest. Under Section 35 (2) of the Law of Succession Act, they may pass all or any part of the net estate by way of gift among the surviving child or children. In such case the gift would take effect immediately. This is called power of appointment. It is power exercisable by the surviving spouse at their discretion. The exercise of the power of appointment is not a right available to the children. Under Section 37 of the Act the surviving spouse has power during life interest to sell any property subject to that interest for their maintenance as provided for under section 37 of the Act.

It's about time that childrenunderstood that whatever they are entitled to from the estate of their deceased parents is just a token. It should not be a matter of life and death. Parents are not beasts of burden. It is not the parent's duty to accumulate wealth for their children to inherit. The law does not impose such a duty such a duty on the parents. Parents are only burdened with their children during their minority….."

For the evidence adduced in this case, I am persuaded that the deceased and the petitioner had prior to the death of the deceased agreed on how to distribute the land parcel number **Nyeri/Naromoru/64 and** that the deceased remained with a portion measuring**4 ½** acres portion comprising of the homestead, and gave his children the other portions but had not transferred by the time she died.

Having carefully considered the evidence on record and all the documents, and the relevant law, I find that the protestor has not raised valid grounds and that his protest has no merit and that the same is vexatious and not made in good faith. My answer to issues number (i) – (iv) is in the affirmative while the answer to issue number (v) is in the negative.

I accordingly dismiss the protest and order as follows:-

i. *That the grant of letters of administration made on **15th October 2013** to the Petitioner herein **John Muigaruri Nguitui** be and is hereby confirmed.*

ii. *That Title number **Nyeri/Naromoru/64 measuring 20.5 Acres** or thereabouts be sub-divided and shared among the following deceased's beneficiary as proposed in the petitioners affidavit n support of the application for confirmation of grant of letters of administration, namely;*

a. *John Muigaruri Nguitui……2 ½ acres*
b. *Erastus Kibui Mwigaruri……4 acres*
c. *Mary Wangui Mwigaruri……2 acres*
d. *Simon Nduiga John……5 acres*
e. *Joseph Mugambi Mwigaruri……4 acres*
f. *Richard Waweru Mwigaruri……3 acres*

iii. *No orders as to costs.*

Right of appeal 28 days

Dated at Nyeri this 30th day November of 2015

JOHN M. MATIVO

JUDGE