IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 92 OF 2012

RUTH WAMAITHA NJUGUNA….....…….APPELLANT

VERSES

STANLEY NDUNGU NJUGUNA.....…….....RESPONDENT

Being an appeal from the original ruling of Hon B. M. Nzakyo Senior

Resident Magistrate delivered on 26th July 2012 in Githunguri

Senior Resident Magistrate Court in Githunguri Succession Cause

No. 41 of 2010 in the matter of the Estate of Njuguna Njihia Ngibu

JUDGMENT

1. The deceased NJUGUNA NJIHIA NGIBU died intestate on 20th June 2007. He left two widows, the appellant RUTH WAMAITHA and MARGARET WANJIKU NJUGUNA. The appellant was left with four sons and four daughters and MARGARET was left with two sons and one daughter. MARGARET was the first widow and the appellant was the second widow. On 19th May 2010, STANLEY NDUNGU NJUGUNA (the respondent), of the 1st house, and the appellant jointly applied for grant of letters of administration. The grant was issued on 30th September 2010. On 10th May 2011 the two applied for the confirmation of the grant. The deceased had left LR NO. Komothai/Igi/216 measuring 3.4 acres and four shares (share certificate No. 1357) in Thome Farmers No. 4 Ltd. In the affidavit in support of the application for confirmation, the parties proposed that each house gets an equal share in each of the properties. The shares were to be registered in the joint names of the two parties to hold for the rest of the members of each house.

2. On 19th August 2011 the appellant filed an affidavit protesting the mode of distribution in the affidavit in support of the Summons for Confirmation. Her case was that the family had agreed that her house gets a bigger share. She swore that MARGARET had abandoned the matrimonial home after getting only one child TABITHA NDUTA MUHIA. She remarried and from that marriage got three children – KIARIE, WACUKA and WANJA. The appellant's evidence was that these three were therefore not beneficiaries of the estate, and that the deceased had indicated as much. The family had sat after the deceased's death and decided that the appellant gets 2.4 acres of KOMOTHAI/IGI/216 and that the respondent gets 1 acre. The two were to equally share

the shares in Thome Farmers No. 4 Ltd.

3. On 26th July 2012 the Senior Resident Magistrate at Githunguri (where the petition was filed) made a ruling that the estate would be shared equally as proposed by the respondent. This is the decision that aggrieved the appellant who appealed to this court. The substances of the appeal was contained in paragraph 6 of the Memorandum of Appeal as follows:-

"5. THAT the Learned Senior Resident Magistrate erred in Law and in fact in his interpretation of section 71 & section 40 of the Succession Act, (Cap 160) Laws of Kenya upon which the application by the respondent for confirmation of the Grant of Probate was based."

4. Of course, this was not a grant of probate but a grant of letters of administration intestate which grant were confirmed in the ruling subject of the appeal.

5. It should be noted that the parties were not represented. The affidavit by the appellant opposing the mode of distribution was essentially saying that the house of MARGARET had only one beneficiary TABITHA NDUTA NJUGUNA and that her house had nine beneficiaries; that as a result of this the family had met and given her house 2.4 acres of the 3.4 acres in KOMOTHAI/IGI/216. The merits of this contention aside, under **Section 71** of the **Law of Succession Act (Cap 160):-**

> **"... 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 person beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares."**

It follows that the learned magistrate had the responsibility of determining the beneficiaries of the estate of the deceased, and the share of each of such beneficiaries. The court did not appreciate its task as it simply reduced the dispute into the following:-

> ***"Her grounds were that the family of the deceased had agreed to give her a bigger share of the estate for reasons that she is the one who spent enormous time and energy taking care of the deceased at old age together with his children."***

The dispute was bigger than that. She was saying that three of the children by MARGARET were not sired by the deceased and were therefore not beneficiaries of his estate. The court did not deal with the dispute. It was only after that that it could determine the share of each beneficiary.

6. The court accepted, without evidence, the position that the first house had four beneficiaries and the second house had nine beneficiaries. After that it proceeded as follows:-

> ***"Section 40 of the Law of Succession Act provides for the mode of distribution of his estate where the deceased had more than one wife by law is that the estate should be distributed according to the number of children including the wives in each house. The property to be distributed in this estate are Land No. Komothai/Igi/216 which measures 3.4 acres and four shares at Thome Farmers No. 4 Ltd. The value of the shares was not specifically indicated on the petition. The total number of dependants to the deceased is 13 in number. This is a very large number to share only 3.4 acres of land. It is basically impractical to sub-divide 3.4 acres of land among 13 dependants. The mode of distribution as earlier proposed by both administrators that the estate be shared equally is the more appropriate."***

7. **Section 40(1)** of the **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 net 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 serving him as an additional unit of the number of children."

It should be borne in mind that whoever was determined to be the child or wife of the deceased had an equal claim to his estate. All things being equal, therefore, if a deceased left two houses, one with, let us say, four children and the other with two children, the former house would get more from the estate.

8. It cannot be true that 13 people cannot share 3.4 acres of land. For instance, 8 people sharing 2 acres of land would mean that each gets ¼ of an acre. 13 people sharing 3.4 acres would mean each gets about 0.2 of an acre, or thereabouts.

9. Lastly, now that there was an objection of the proposed mode of distribution the Deputy Registrar needed to have asked the parties to come for directions under **rule 40** of the **Probate and Administration Rules** under the **Act** on the manner of hearing the objection. That was not done. It is possible that had directions been done, this was a matter that called for oral hearing of the evidence by the witnesses before a determination.

10. In conclusion, I allow the appeal. The ruling by the Learned Magistrate delivered on 26th July 2012 is hereby set aside and any certificate of confirmation that was issues is revoked to allow for fresh hearing and determination of the beneficiaries of the estate of the deceased NJUGUNA NJIHIA NGIBU and their respective shares. This is a family matter each side shall bear own costs.

11. The court at Githunguri should determine whether, in view of **Section 49** of the **Act**, it has jurisdiction to handle the dispute.

DATED and DELIVERED at NAIROBI this 30th day of July 2014.

A.O. MUCHELULE

JUDGE