REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE 208 OF 2008

IN THE MATTER OF THE ESTATE OF KAMAU NDEGWA *ALIAS* JOSEPH KAMAU NDEGWA (DECEASED)

GICUGU KAMAU NDEGWA…….....PETITIONER/RESPONDENT

VERSUS

JOHN MWANGI KAMAU……OBJECTOR/APPLICANT

JUDGMENT

The dispute in this cause is fairly straight forward and largely uncontroverted save for only one aspect that will become clear shortly. It is common ground that the deceased, Kamau Ndegwa *alias* Joseph Kamau who died intestate on 9th April, 1995 contracted a polygamous marriage, having married two wives. The first wife, Ruth Wangari Kamau predeceased him in 1963 and was survived by five children, four sons and a married daughter.

The 2nd widow, Jacinta Muthoni Kamau is alive and has nine (9) children, seven sons and two daughters whose marital status is not disclosed in the pleadings. The deceased had only one parcel of land being LR No.NYANDARUA/SABUGO/590, measuring 22½ acres.

Upon his death, the second son in the first house, Gicugu Kamau Ndegwa applied and was granted letters of representation, which was later revoked when the widow protested. A fresh grant was issued in the joint names of three dependants representing both houses.

By consent of the parties, it was agreed that the dispute be resolved by affidavit evidence. What is the dispute?

L.R. NO.NYANDARUA/SABUGO 590 is registered in the name of the deceased and is the only property comprised in his estate. It is conceded by both sides that before his death the deceased had distributed the estate as follows:

i) First house – 11 acres

ii) Second house 9 acres

The dispute is on the balance of 2½ acres. It is the contention of the first house that the deceased stated in his lifetime that should he die, the portion should be shared equally between the two houses, each getting 1¼ acres.

The widow has flatly denied such arrangement and maintained that the portion was to be inherited by her according to the wishes of the deceased. The only question in this dispute is simply – who is entitled to the portion measuring 2½ acres?

The first house is relying on two family meetings, the first one is alleged to have been called in 1990 by the deceased when the sons from the first house demanded from him that he distributes the land (No.590). In that meeting, according to an affidavit sworn by Ephantus Maina Wainaina, it was resolved that in view of the sloppy nature of the portion of the suit land occupied by the first house, coupled with the fact that it was not fertile, it was agreed that the first house would get a bigger portion than the second house which occupied a flat and fertile portion.

Although it is not in dispute that the deceased distributed the land in the manner explained earlier way back in 1990, the first house has not alluded to any meeting in 1990. The only meeting which is acknowledged by both sides, is that held on 6th March, 1995, again said to have been called at the insistence of the first house, demanding to know how the 2½ acres would be distributed in the event of the death of the deceased. The same Ephantus Maina Wainaina, has sworn that he was present and recorded the minutes of the meeting.

According to him and the first house, the deceased stated that the portion in question be shared equally between the two houses, a position contested by the widow. According to her the deceased was buried on her nine (9) acre portion and the sons from the first house donated a sheep (known in Kikuyu language as *Ngoima*) to the deceased to signify their acknowledgment and satisfaction with their distributed shares of 11 acres and no more.

The meeting of 6th March, 1995 took place barely a month before the death of the deceased. It is averred by Ephantus Maina Wainaina that it was the deceased person's deteriorating health that led to the meeting. According to the minutes, it is recorded that the deceased gave directions regarding the 2½ acre portion to the effect that:

"Mwangi has asked Muthoni whether there is anything she had been told by Joseph concerning that portion. She replied that she had never been told anything. After much probing *mzee* Joseph has said that the land is for his people – both houses."

Two questions arise from the forgoing. What is the effect of the foregoing? Did the deceased intend the portion to be shared equally?

In terms of the **Law of Succession Act**, unless a deceased person gifts his property or part of his property *inter vivos*, he can only dispose of it to that person by a will. An oral will is not valid unless it is made before two or more competent witnesses and the testator dies within a period of three months from the date of making the will. It is also a requirement that the testator must not be of unsound mind whether arising from mental or physical illness, drunkenness or from any other cause, as not to know what he was doing.

I have already observed that the deceased died one month later after the meeting. Although the minutes lists several people said to have been in attendance, only one independent witness has sworn an affidavit, the other affidavits having been sworn by the son and widow of the deceased who are not qualified as witnesses to a will. There is no suggestion though that the deceased was not of sound mind.

I come to the conclusion that the deceased did not leave an oral will. I am fortified in this conclusion by the fact that if he intended to distribute the portion in equal parts, nothing stopped him from proceedings in the manner he did with the other portions. It follows that the 2½ acre portion is part of the estate falling for distribution by the court.

The law on distribution of an estate of an intestate polygamous deceased person is clearly articulated in **Section 40** of the **Law of Succession Act** as follows:

"……..his personal and household effects and the residue of the net intestate estate shall, in the for instance, be divided among the houses <u>according to the number of children in each</u> house, but <u>also adding any wife surviving him as an additional unit to the number of children."</u>

(Emphasis supplied)

It follows from this provision that the first house comprised four children only as the first wife is deceased while the second house comprised nine children and the widow constituting an additional unit; translating to four versus nine plus one unit. The first house has proposed and indeed the share of the first house comprising 11 acres has been shared between three brothers, leaving out their sister, which therefore means it is three verses nine plus one unit.

The Law of Succession Act emphasis equity as opposed to equality and this court by dint of **Section 27** of the **Act** has absolute discretion in distributing the estate in an intestate cause. Is there equity in the first house comprising four (read three) children taking 12¼ acres while the second house of ten dependants taking 10¼ acres?

The Court of Appeal (Omolo,JA) in a leading decision on the question of distribution of net estate in an intestate cause where there are more than one house stated the law as follows:

"I had the advantage of reading in draft form the judgment prepared by WAKI, JA and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned Judge to be laying down any principle of law that the Law of Succession Act, Cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted by Mr. Gicheru. I can find no such provision in the Act……

(Cites Section 40(1) of the Act and continues)

My understanding of that Section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the Section that the number of children in each house be taken into account. Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied the Act does not provide for that kind of equality."

The demand by the first house to share equally the 2½ acre portion with the second house is a display of absolute insatiable, greed. The first house has even sacrificed their 9 acre portion for the burial of the deceased. There is no evidence that the portion occupied by the first house is less arable and sloppy.

For the reasons stated, it is ordered that the entire 2 ½ acres be and is hereby distributed to the widow Jacinta Muthoni Kamau in life interest and thereafter to devolve to her children.

I make no orders as to costs.

Dated, Signed and Delivered at Nakuru this 20th day of July, 2012.

W. OUKO
JUDGE