



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 704 of 2008

IN THE MATTER OF THE ESTATE OF

MUTUKUI S/o NDUIGA alias WAMBUGU NDUIGA.....DECEASED

MWANGI WAMBUGU.....PETITIONER

-VERSUS-

RAHAB WANGARI WAMBUGU.....OBJECTOR

RULING

These proceedings relate to the estate of the late *Mulukui s/o Nduiga alias Wambugu Nduiga* deceased. He passed on sometimes on 24th December, 2003. At his death the deceased left the following surviving him according to the petition for letters of administration intestate filed in the Resident Magistrates court at Othaya by *Mwangi Wambugu*, hereinafter referred to as the petitioner:-

-Phirisia Wanjiru Wambugu-wife

-Rahab Wangari Wambugu-wife

-Wambugu Mwangi-son

-Stephen Kariuki Wambugu-son

-Simon Murithi Wambugu-son

-Hanna Wangari Wambugu-daughter

-Askah Wangui Maina-married daughter

-Wairimu Githinji Maina-married daughter

-Nyandia Wanjohi-married daughter

-Martha Muthoni Gitiche-married daughter

-Esther Wangari Mwangi-married daughter

-Mary Waruguru Mwangi-daughter in –law

On or about 31st March, 2008, the petitioner took out a petition for letters of administration intestate with respect to the estate of the deceased. **Rahab Wangari Wambugu** hereinafter referred to as “**the objector**” was cited. Pursuant to the citation she entered appearance and duly appointed **Messers Minda & Co. Advocates** to represent her. On 7th August, 2008, she filed an Answer to the petition. Her contention was that the petitioner was not the rightful person to administer the deceased’s estate being her step son. She was the widow of the deceased and was still alive and therefore the right person to petition for the grant. She also claimed that the petitioner had included his deceased mother as a heir to the estate.

On 13th November, 2008, **Mr. Onyina**, the Senior Resident Magistrate at Othaya Law Courts having considered what the petitioner and Objector had said with regard to the value of the estate of the deceased came to the conclusion that the value exceeded the jurisdiction of his court. He therefore exercised his discretion under **rule 62(1) of the Probate and Administration rules** and ordered the cause to be transferred to this court for hearing and final determination. On 3rd December, 2008, **Kasango J** ordered that the grant be issued to the petitioner on the basis that there was no objection. That however was not the case as indeed there was objection filed by the objector pending determination.

That notwithstanding the petitioner on 3rd June, 2009 through **Messers H.K.Ndirangu Advocates** filed summons for confirmation of grant. In the affidavit in support of the application, he stated that the deceased was married to the 2 wives **Phirisia Wanjiru Wambugu** (deceased) and **Rahab Wangari Wambugu**. He proposed that the only asset of the estate being land parcel **Othaya/Ihurio/191**, hereinafter referred to as the “**suit premises**” measuring approximately 10.2 acres be shared as follows:-

Himself	5.1 acres
Objector	5.1 to hold on her behalf and in trust for her family

That proposal did not go down well with the objector. She therefore filed an affidavit of protest. She deponed that she was the widow of the deceased. That the identification and shares of the persons entitled to the said estate had not been determined nor ascertained. That her objection filed earlier had not been dealt with. Finally she deponed that besides herself and petitioner there were other beneficiaries who were entitled to a share of the deceased estate. Subsequent thereto directions as to the hearing of the protest were given in terms that both the application for confirmation of grant and the protest would be heard simultaneously by way of affidavits and written submissions.

On 16th October, 2009, **Mr. Minda**, learned counsel for the Objector withdrew the objection to the granting of letters of

administration intestate to the petitioner that she had filed earlier on 22nd July, 2008. After all it had been overtaken by events. **Mr. Minda** further successfully applied for leave to file further affidavit to respond to the contents of the further affidavit filed by the petitioner.

In the petitioner's further affidavit he deposed in pertinent paragraphs that the deceased was married to 2 wives to wit **Phirisia Wanjiru Wambugu** who was the mother to the petitioner and his sister, **Hannah Wangari Mwangi**. The other wife was the objector that his proposed scheme of distribution was premised on the houses of the deceased and was the only legal way for the distribution of the estate of the deceased. However his sister aforesaid had ceded her interest in the estate to him as she was married. His said sister also swore a further affidavit. She confirmed that the deceased had 2 wives and that the distribution should be in accordance with houses and that her share in the estate should go to the petitioner.

Stephen Kariuki Wambugu and **Mary Waruguru Mwangi**, a son and daughter in law to both the objector and the deceased also swore further affidavits. In the main their contention was that the deceased died on 24th December, 2003 long after the death of the petitioner's mother. Indeed the petitioner's mother even before land consolidation and demarcation. It would be improper therefore for the petitioner to claim to be entitled to what would otherwise have been his mother's share when she had never occupied or used the suit premises. That it would be unjust to have 20 members of the deceased family share 5.1 acres while the petitioner and his sister takes the other 5.1 acre. They proposed that the suit premises be shared as follows:-

-Rahab Wangari Wambugu (widow)	0.2 acres
-Petitioner	2.5 acres
-Simon Murithi	2.5 Acres
-Stephen Kariuki Wambugu	2.5 acres
-Mary Wanguru mwangi	2.5 acres

Once the filing of the further affidavit by the parties herein were exhausted, their respective counsel filed and exchanged written submissions which I have carefully read and considered.

The deceased having died on 24th December, 2003, the administration of his estate is governed by the law of Succession Act. It is common ground that in his lifetime the deceased's had married 2 wives, **Phirisia Wanjiru Wambugu**, the mother of the petitioner and **Rahab Wangui Wambugu**, the objector. It is also common ground that the deceased died intestate. The dispute in this cause in my view is all about mode of distribution of the deceased's estate. Should the court adopt the mode of distribution proposed by the petitioner or that of objector proposed through the affidavits of **Mary Wabugu Mwangi** and **Stephen Kariuki Mwangi**?

Actually there is hardly any major difference in the modes of distribution proffered as aforesaid. They all agree that the distribution should be according to houses. However, I think they have all misapprehended the import or purport of **section 40 of the Law of Succession Act**. That section provides inter alia:-

“.....(1) where an intestate has married more than once under any section of law permitting polygamy, his personal estate and household effects and the residue of the intestate estate shall, in the first instance 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.....” My reading and understanding of this provision of the law is that the estate of the deceased has to be distributed according to the houses but

taking into account the number of children in each house. It is not as the petitioner thinks that the net estate should first be shared equally between the houses and thereafter it should fall upon the children in each house to determine how they should share out between themselves what has been allocated to them. That could not have been the intention of the legislature. It would be untenable and indeed absurd to treat the house with more children the same way as the house with few children or no children at all. This case clearly demonstrates that absurdity. If we were to go by the petitioner's understanding of the purport of **section 40 of the Law of Succession Act**, he will end up getting 5.1 acres as the only son of the 1st house; his sister having ceded her interest to him whereas the 2nd house with a total population in excess of 10 members will also end up with the same acreage to be shared among them. Further we must not lose sight of the fact that the mother of the petitioner predeceased the deceased. Indeed she passed on long before land demarcation and consolidation. She had never lived on the suit premises. I am convinced that by the legislature inserting the aforesaid provision of the law in the Act, it was alive and or conscious of the situation where there may be differentials in the number of children in each house.

From the objector's submissions it is apparent that her 5 married daughters have expressly declined to share in the estate of the deceased. However on the part of the petitioner, his married sister, **Hannah Wangari Wambugu** though interested in the estate would wish her share to go to the petitioner.

In my view therefore those who ought to share in the estate of the deceased are the petitioner and her sister from the 1st house. As for the 2nd house, the beneficiaries should be the objector, her 2 sons and her daughter in law, **Mary Wanguru Mwangi**, the widow of her other deceased son, **Peter Mwangi Wambugu**. The objector's share is on the basis that under **section 40 of the Law of Succession Act** aforesaid, she is deemed to be an additional unit in her house.

The suit premises measures 10.2 acres. The 1st house has 2 units being the petitioner and his sister, Hannah Wangari Mwangi whereas the 2nd house has 4 units. Accordingly the suit premises shall be shared equally between the 6 units in the ratio of 1.7 acres each. In other words the 1st house shall have 3.4 acres out of the suit premises. The same shall go entirely to the petitioner as his sister has surrendered her interest to him. The remainder of the estate measuring 6.8 acres shall go to the 2nd house to be shared as follows:-

-Rahab Wangari Wambugu-1.7 acres

-Simon Muriithi Wambugu-1.7 acres

-Stephen Kariuki Wambugu-1.7 acres

-Mary Wanguru Mwangi-1.7 acres

The grant shall accordingly be confirmed in those terms meaning therefore that I have rejected proposals as regards distribution by both the petitioner and objector. As the dispute involves close family members I shall make no order as to costs.

Dated, signed and delivered at Nyeri this 22nd Day of March, 2010.

ASIKE –MAKHANDIA

JUDGE