



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE 155 OF 2001

J M1.....PETITIONER

VERUS

J M2.....OBJECTOR

: Law of Succession

**: Distribution of estate in a polygamous union – to each house, and
equally among the children of each house.**

: Reference by daughter life interest.

JUDGEMENT

The late **M G** alias **I G** who died on 5TH January 1995 at Nkubu Hospital was married to three wives, or had three houses. At the time of his death, his first and second wife had pre-deceased him but his third wife, **E G M** survived him. At the time of his death therefore he left the following surviving him –

FIRST HOUSE

1. **E M G** – daughter, married,
2. **M K** – daughter, married,
3. **K K** – daughter, married

SECOND HOUSE AND THIRD HOUSE

1. **J M1** – Son
2. **E M** – Son
3. **J M2**- Son
4. **T M M** – Son

5. J C – daughter - married
6. C K I – daughter- not married
7. P B G – Son
8. B N – daughter – married

At the time of filing the Petitioner for grant of letters of administration, the Petitioner, J M1 (a son from the third house) showed that the deceased left the following properties upon his death –

- (1) Title No.[particulars withheld] and
- (2)Title No. [particulars withheld]

Those also are the parcels of land referred to by the Chief of Kithangari Location, one John K. Manyara. After the usual lapse of 30 days after the Petition was gazetted, the Petitioner was issued with Letters of Administration on 31st August 2001. However, before his application dated 5th March 2002 for Confirmation of the Grant and therefore distribution of the estate could be heard, J M2, (of the 2nd House) filed an Application seeking leave of court to be heard outside the 30 days and dated 2nd July 2002 and a Cross-Petition on 16th August 2002.

In between the welter of these applications, the Petitioner J M1 died on 10th December 2007. An Application dated 20th December 2007 was made for his substitution. That application was granted or allowed on 3rd March, 2008, thus paving way for the hearing of the application dated 5th February 2002 for Confirmation of the Grant. In compliance with the order of Hon. Mr. Justice Lenaola made on 30.07.2007 the parties filed separate Affidavits or proposals for distribution of the estate.

Pending the confirmation of the grant to J M1, land parcel, Title No.[particulars withheld] was sold to one C M M to raise funds for payment of college fees for P B G, one of the brothers from he third house who was studying at the [particulars withheld] State University in the United States of America. That parcel of land having been sold, the only parcel available for distribution among the family of the late M Alias I G is land parcel Title No. [particulars withheld].

The objector, J M2 has in his proposals to distribute the estate dated 25th March, 2008, and filed through the firm of Mbaabu Inoti & Co. Advocates excluded–

- (a) P B G M
- (b) T M M and
- (c) E M M

from getting any share in land parcel No.[particulars withheld] on the ground that they sold their share in Title No[.particulars withheld]. Is this so in fact and in law? The answer to this contention must be in the negative and is to be found in the Replying Affidavit of the then Petitioner J M1, sworn on 13th April 2004 in reply to an application by the Objector for injunction to restrain the purchaser, C M from occupying and developing the land sold him, [particulars withheld]– wherein in paragraphs 5 thereof he deponed –

3. **THAT** L. R. No. [particulars withheld]was sold to one **C M M** with the knowledge of all members of the deceased family to defray costs of educating our brother in America who was supposed to get this land as his share of the deceased estate and also to defray the costs of this Succession Cause.

4. **THAT** the said **C M** has extensively and intensively developed this land and no one in the deceased family has any problem with that.

5. **THAT** the applicant has no **Locus Standi** to make any claim over the deceased property as he was provided for by the deceased before his demise.

The first point to observe and determine is whether M alias I G provided for the objector before his demise.

Section 42 of the Law of Succession Act (Cap 160, Laws of Kenya (the Act) enjoins the Court to bring into account any previous benefits by the intestate given, paid, or settled property, made by the intestate while alive, whether by will or gift to any child, grand child or house.

If the above contention were to be solely based on the Petitioner's averment in the said paragraph, without further or other particulars, it could not form the basis for disinheriting the objector. Other particulars are to be found in the Petitioner's Replying Affidavit sworn on 12th June 2002 in reply to the objector's application dated 8th April 2002, then, seeking leave to object, out of time, that application was allowed on 1.08.2002.

In the Replying Affidavit, the Petitioner, J M1, elaborated how the objector was provided for by the deceased father. The then Petitioner depones at paragraphs 8, 9, 10, 11 and 12 as follows –

6. **THAT before the death of the deceased the deceased left nothing to the objector because the objector demarcated and transferred land parcel title No.[particulars withheld] to his wife which was measuring 9.66 hectares or thereabouts.**

9. **THAT the wife of the objector subdivided the said parcel**

of land into two portions and transferred [particulars withheld] measuring 3.24 hectares where the few of us (reside). Photocopy of the register is annexed, marked "JM II",

10.**THAT the objector's wife was left with land parcel Title**

No. [particulars withheld] measuring 6.42 hectares. Annexed is a copy of the register marked "JM III"

11.**THAT the deceased before his death had sued the**

Objector and his wife jointly in High Court Civil Suit No. 76 of 1984 to have land parcel No. [particulars withheld] be transferred (back) to him so that he could share among his children equally. Photocopy of Plaintiff is annexed marked "JM IV" .

12.**THAT because of all these reasons the objector is not entitled for any share"**

In the event as observed above, the objector's application was allowed, and he filed these proceedings as an objector. Counsel did not explain to the Court the outcome of the HCC.No.76 of 1984, but from the various applications in this file, it is clear that the objector remained the beneficiary of title No. [particulars withheld]. The circumstances how he became the beneficiary of that portion of land are not only as explained by the then objector in paragraphs cited above, but also in the Plaintiff of HCC No. 769 1984, and in particular paragraphs 4, 5, 6, & 7 thereof –

4. **During the time of land demarcation in 1957 the Plaintiff caused the land Parcel Number [particulars withheld] which is a family land to be written in the name of the 1st defendant as a**

trustee be for be himself and other sons of the Plaintiff,

5. Consequently the 1st Defendant secretly and without the consent of Plaintiff transferred the aforesaid land parcel Number [particulars withheld]79 to the 2nd defendant,

6. The aforesaid parcel of land was then sub-divided into two portions i.e. [particulars withheld] and [particulars withheld] and at present 2nd Defendant is the registered proprietor of the land Parcel Number [particulars withheld] which contains by measurement 6.42 Hectares.

7. Despite repeated demands made in that behalf and notice of intention to institute legal proceedings in default, the Defendants have refused and/or neglected to transfer the aforesaid land with other two sons to the Plaintiff.

For those reasons the deceased M G sought a declaration that the said land [particulars withheld] is family land and that the first Defendant was registered as a trustee, and that the transfer of the said land to the 2nd Defendant was invalid and that an order be made for the transfer of the said land to the Plaintiff so that the Plaintiff (i.e. the deceased) could transfer the same among his sons.

In paragraph 12 of his Replying Affidavit, the then Petitioner, J M1 concluded that for all those reasons the objector was not entitled to any share in respect of the rest of the estate.

In subsequent Applications, (Notice of Objection and the Petition dated 2nd July 2003), Petition by way of Cross-Petition dated 16th August 2002, and Answer to Petition dated 16th August 2002, Chamber Summons dated 26th August 2002,) the Objector strenuously avoided answering any of the averments contained in the then Petitioner's Replying Affidavit of 12th June 2002. Irrespective of what happened to HCCC 76 of 1984, and in the absence of any contrary contentions, those averments remain unchallenged, and the Court will regard them as both accurate and true.

The answer to the first question whether the deceased M alias I G, provided for the objector while he was alive is that he did albeit indirectly provide for the objector, and that his share of the deceased's estate must therefore be taken into account. It is quite plain from the Affidavit of J M1, the then Petitioner that the Objector was allowed by his father to "gather" a large parcel of land in trust for the family. This is also further established by the subsequent sub-division of this large parcel [particulars withheld] which then became [particulars withheld] (where the Petitioner and their house were settled), and [particulars withheld] which the objector fraudulently in my opinion, procured to be registered, not in his name, but his wife's name to defeat the equities and claims of other members of a polygamous family.

In the circumstances, I am persuaded to hold, and I so hold, that where land has, during adjudication and demarcation been gathered by one son with the permission or consent of the father such gathering, and land subsequently registered in the name of the son, is held in trust for the family as is envisaged by 28 (b) and proviso thereto of the Registered Land Act (Cap 300 Laws of Kenya) which sub section provides that the rights of a registered proprietor are subject to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register and to any duty or obligation to which he is subject as a trustee.

Section 30 (g) aforesaid describes one of such rights as –

“(b) the right of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation save where inquiry is made such person and the rights are not disclosed.”

In this case, there is no challenge that Land Parcel No.[particulars withheld] was gathered by the objector with the consent or permission of his father, M G alias I G, and that is the reason why upon secret sub-division thereof, he transferred one portion, [particulars withheld] to his father, and the other [particulars withheld] to his wife. By such appropriation the objector fraudulently transferred part of the

family estate, which he held in trust both for his father and his brothers and sisters. He therefore gave himself preferential inheritance and settlement, which must be taken into account in terms of Section 42 of the Law of Succession Act. That disposes of the first issue.

The second issue concerns the sale agreement dated 23rd February 2001 between P B M and T M M on the one hand, and C M M, the purchaser of land parcel Title No.[particulars withheld].

It is acknowledged that the beneficiary of the said parcel and proceeds of the sale thereof was P B G who was proceeding for further studies in the United States of America. It is also acknowledged that that was the share of P B G, and he not to be entitled to any other share in the deceased's estate. He was to live by the wits of the higher education which he received at [particulars withheld] University in the USA.

It is also acknowledged and not challenged by the Objector that the purchaser C M M took possession of the land, and has made it into his home with extensive developments. Although at the time of sale the then Petitioner had not yet been issued with Letters of Administration, and could not therefore legally deal with the estate of his father, the exigencies of the time, and the consent of the majority of the survivors of the deceased, (and brothers of the Petitioner), all agreed that the one available portion of land is sacrificed in order to raise fees for one of them, P B G. This is a common and legitimate purpose in our Kenyan communities. The agreement being in writing, and the purchaser having paid the full purchase price and entered into possession is enforceable in law. The purchaser **C M M** is therefore entitled to land parcel Title No.[particulars withheld] and I so hold.

The third question is to what estate, and who among the sons and daughters of the deceased, are entitled to the intestate's net estate, that is to say, [particulars withheld]

According to the objector's proposals, dated 25th March, 2008, the said parcel of land should be divided equally among the sons and daughters of the 3rd house of the deceased, with slightly larger areas going to the widow and her unmarried daughters' and less to the sons or the unmarried daughters immediate brothers.

According to the objector's proposals the following daughters should inherit part of the available land, namely –

(1) Miss K M – unmarried

(2)Miss C K I – unmarried

However, according to the Affidavit in Support of the Petition for Letters of Administration, the only daughter who was unmarried at the time was Miss C K I. K K was listed as married. There is no sworn evidence to show that she was unmarried. Under Meru customary or common law, she would inherit from her husband, and if she is a returnee, she would be entitled to a life interest, after which the land reverts to the family.

Distribution of an estate in a polygamous family is governed by section 40 of the Law of Succession Act. The said Section provides –

40. (1) 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 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,

(2) The distribution of the personal and household effects and the residue of the net intestate estate within such house shall then be in accordance with the rules out in sections 35 to 38.

The only property of the deceased available for distribution is [particulars withheld] and should in

terms of Section 40 above be distributed equally among the three houses. However, the 2nd house of C M having been settled during the lifetime of the Intestate, is not entitled to any share of land parcel No. [particulars withheld] aforesaid. The only houses entitled thereto are the first house, (of B M), and the third house, (house of E G M).

According to the Application for Confirmation of the Grant (dated 9th March, 2002), Parcel No. [particulars withheld] was to be “**inherited**” entirely by the Purchaser, C M M. Title No.[particulars withheld] was to be shared equally among the sons of the 3rd house. No mention is made of any unmarried daughter. The Objector made reference to unmarried daughters of the deceased –

(a) Miss K M,

(b) Miss K M.

Miss K K is described as married in the Affidavit in Support of the Petition for Letters of Administration, and it is not clear whether she changed her marital status, and became a returnee to the home. Miss K is referred to as Miss C K M, and was described as unmarried.

An unmarried daughter has the same or equal share with the sons of an intestate. A returnee daughter still inherits from the husband unless there is shown dissolution of marriage and not merely a separation. A returnee will, in my opinion, be entitled only to a life interest in the father's net intestate. A deceased son's widow too will have a life interest to her deceased's husband's share and hold the balance in trust for any minor children of the deceased husband.

Parcel No. [particulars withheld] comprises 3.24 Ha. If the land were divided according to Section 40 of the Act, among the two houses according to the number of children, adding the wife as an additional unit, the first house would have one unit comprising of K K, and the third house would have six units, comprising the five children and widow.

On that basis, the total acreage (hectares) would be multiplied by the number of units in each house and divided by the total number of the survivors in all the houses, including the surviving widow – as an additional unit.

Applying this formula would yield the following allotments to the entitled beneficiaries-

(1) Miss K K being alone in the first house

Would be entitled to $\frac{1}{7} \times 3.24 = 0.464$ Ha.

(2) When the area of 0.464 Ha. is subtracted from 3.24 H.a (3.24 – 0.464) would have a balance of 2.772 Ha. When divided by six (2.772 / 6) would yield an area of 0.462 Ha or to the nearest decimal point would be 0.45 Ha.

In summary therefore, the net estate of the late M G, alias I G would be distributed as follows-

(1) For title Number [particulars withheld] – registered in the name of his wife A G J, to the objector, J M M,

(2) Title Number [particulars withheld]

(1) M K M – 0.46 Ha.

(2) Mrs e M – life interest – 0.45 ha.

(3) Miss C K M – 0.45 Ha.

(4) E M m –0.45 Ha.

(5)T M M – 0.45 Ha.

(6)P B G M – 0.45 Ha.

(7) J M wife of Joseph M M, Life Interest for herself and as trustee for minor children – K M, K M and N M

(8) Title NO.[particulars withheld], (0.42 Ha.) to the Purchaser – C M M.

Each party to bear the costs of subdivision, transfer, and the registration of own title. The purchaser will pay the costs of transfer and registration of his portion.

There shall be orders accordingly.

Dated delivered and signed at Meru this...22nd .day of...May.....2009.

M. J. ANYARA EMUKULE

(JUDGE)