



REPUBLIC OF KENYA

HIGH COURT AT NYERI

SUCCESSION CAUSE 67 OF 2002

IN THE MATTER OF THE ESTATE OF

DONATAS WANG'OMBE GACHAGI – DECEASED

BETWEEN

PATRICK IHIGA MUGWARA PETITIONER

VERSUS

HELLEN NJERI 1ST RESPONDENT

DAVID GACHAGI 2ND RESPONDENT

AND

AGNES WANJIRU WANGOMBE APPLICANT

R U L I N G

On 13th July 2004, **Patrick Ihiga Mugwara** took out a summons for confirmation grant. He sought that the grant of letters of administration intestate made to him on 22nd July 2002 be confirmed. In support of the application, he deponed that the deceased was survived by a widow by the name of **Hellen Njeri** and several children whose names he did not know. Following the death of the deceased – **Donatos Wang'ombe Gachagi**, neither the widow and or children took any steps to obtain the grant of letters of administration until the petitioner who was a mere purchaser of a portion of the deceased land, **Thegenge/Karia/1560** measuring, 0.25 acres did so. It appears that the deceased in his lifetime entered into a land transaction with the petitioner involving the aforesaid suit premises. The agreed purchase price was Kshs.250,000/= and the petitioner is said to have paid Kshs.244,100/=. However the deceased passed on before he could transfer to the petitioner the portion he had so bought. Since the petitioner was still interested in the transaction and hoping that he could get the portion of land aforesaid through succession proceedings, he commenced the instant proceedings. He was duly issued with the grant. Thereafter he filed an application for confirmation of grant. On 18th July 2003, **Khamoni J** dismissed the said application. He further directed that the estate of the deceased do refund to the petitioner the sum of Kshs.244,100/= which sum has since been paid. Indeed in his own written submissions the applicant states that he is a mere holder of a grant of letters of administration. He has no interest in the estate but he wishes to have the same confirmed.

In his affidavit in support of the application, the Petitioner proposed that estate of the deceased consisting of **Thegenge/Karia/1560** be shared equally between the two widows of the deceased namely

Helen Njeri and Agnes Wanjira Wangombe. That application was met with a joint affidavit of protest filed by **Helen Njeri** and **David Gachagi**. Whereas **Helen Njeri** is the wife of the deceased, **David Gachagi** was his son. They contended that the deceased's entire estate should go to them and the other three sons of the deceased. That the instant application is an abuse of the court process as a similar application had been rejected. **Wang'ombe** who the applicant seeks to give half the portion of the suit premises had separated with the deceased way back in 1962. She later sued the deceased in Nyeri HCCC NO. 247 of 1991 claiming ownership of the suit premises. That suit was on 30th July 1992 dismissed.

Agnes Wanjiru Wang'ombe too filed an affidavit in which she deponed in pertinent paragraphs that she was related to the deceased by way of being his wife, having married him in 1954. The deceased had another wife by the name of **Helen Njeri** who deserted him for over 17 years upon her marrying the deceased. With the deceased they had 6 children. In so far as she was concerned the suit premises ought to be shared equally between the two houses. Before the death of the deceased, she had been involved in a legal tussle owing to his inclination to sell family assets vide Nyeri HCCC No. 247 of 1991. That the said suit, it was clearly acknowledged and captured in he ruling that she was a wife of the deceased.

On 19th May 2009, the cause came up for directions. Parties agreed that the dispute be heard and disposed off by way of the affidavits. Parties would thereafter file and exchange written submissions. This was subsequently done. I have carefully read and considered the said written submissions.

In dismissing the application for confirmation of grant aforesaid **Khamoni J** also granted leave for a similar application to be filed limited however to the benefit of the lawful beneficiaries. It is I think on that basis that the applicant has again filed the instant application. He has been careful to state that he no longer has interest in the estate. All that he wants is to have the grant confirmed. I believe the application is made for lawful beneficiaries as directed by **Khamoni J**. To my mind it is no longer an issue therefore that a similar application had previously been filed, entertained and rejected by this court as deponed too by the Protesters.

The issue for determination in this application is whether, **Agnes Wanjiru Wang'ombe** is a wife of the deceased and therefore entitled to a share of his estate. Evidence is abound that indeed she was such a wife. The Petitioner; the protesters as well as **Agnes Wanjiru Wang'ombe**, whom I will hereinafter refer to as "*the respondent*" all acknowledge in their affidavits that indeed the respondent was at some point married to the deceased. In her further affidavit, dated 11th April 2007 the 1st protester categorically states that the respondent deserted the deceased in 1962 and was never a dependant as envisaged by the law. Similarly in an affidavit sworn by the 2nd Protester dated 10th July 2006, he states that the respondent separated with his deceased father way back in 1962. She later sued the deceased in Nyeri HCCC 247 of 1991 claiming ownership of the suit premises. From the foregoing it is quite clear that the protesters acknowledge that the respondent was a wife of the deceased with a caveat however that the later separated from the deceased.

On her part the respondent has deponed that she married the deceased in 1954. However she does not state under what regime of the law. She claimed that having so married her, her co-wife, the 1st respondent deserted the deceased for 17 years. The respondent and deceased had a total of 6 issues.

In the suit filed by the respondent against the deceased as aforesaid, though the court went on to dismiss the same, it did however make a categorical and factual finding that the respondent and the deceased were man and wife. There is therefore no basis for this court to depart from that finding. Indeed on the facts presented, I would reinforce **Tunoi J's** as he then was, finding in the above case that indeed, the respondent was the deceased's wife. It matters not that they may have separated at some point as claimed by the Protesters and disputed by the respondent. The desertion must be under a recognised regime of law. The Protesters have not been able to satisfy me on that aspect of the matter. The fact of the respondent's marriage to the deceased is even acknowledged by the provincial administration vide its letter dated 23rd May 2007 annexed to the affidavit of the respondent dated 16th May 2008.

As correctly submitted by **Mr. Karweru**, it is now settled law that where a deceased had more than one

wife and dies after the commencement of the law of succession act, his estate in lieu of a will and or agreement shall be shared equally amongst the houses with the surviving wives being added as a beneficiary in the respective houses; to hold a life interest in the estate. Yes, the deceased may have married the 1st Protester under statute. However that fact cannot come into play to defeat the respondent's right to inherit a portion of her deceased's husband's estate. Clearly section 3(5) of the law of succession Act envisaged and or contemplated this and of scenario. The case of **Hotensia Wanjiru Yawe v/s Public Trustee C.A. No. 13 of 1976** cited by the Protesters in support of their position in this case is irrelevant and of no assistance to them. The situation here is that we are not dealing with presumption of marriage, rather we are dealing with valid marriage entered into by the deceased and the respondent which all parties herein have somehow acknowledged. That relationship brought forth six siblings all named in accordance with kikuyu culture. As already stated and having considered at length the evidence by the parties by way of affidavits, I am satisfied that the deceased was married to two wives, the 1st Protester and the respondent.

The respondent does not wish to disturb the scheme of distribution proposed by the Petitioner. Indeed she is in complete agreement and endorses it. The Petitioner too has not reneged on his proposal. It is understood however that the 1st protester has since passed on. So that the estate of the deceased shall be shared between the house of the respondent and the 2nd Protester representing the other house. It would appear also that the estate of the deceased is not limited **Thegenge/Karia/1560** only, going by the annexures on the affidavit of the respondent. There is also land parcel **Laikipia/Nanyuki/Marura/Block III/Sweet Waters/552**. The Petitioner too has acknowledged this fact in his written submissions. The surviving protester as not disputed this fact. That being the case I will hold that the deceased's estate consisted of **Thegenge/Karia/1560** and **Laikipia/Nanyuki/Marura Block III/Sweet Waters /552**.

Accordingly the grant is confirmed as sought by the applicant on the basis that the two parcels of land forming the estate of the deceased shall be shared equally between the houses of the respondent and that of the late **Helen Njeri** represented by the 2nd Protester. Each party shall bear their own costs of this litigation.

Dated and delivered at Nyeri this 17th day of September 2009

M. S. A. MAKHANDIA

JUDGE