



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT EMBU

Civil Appeal 15 of 2007

SAWERIA WAMURUANA MUCHANJI.....APPELLANT

VERSUS

JINARO NGARI .....RESPONDENT

JUDGMENT

This appeal arises out of the Judgment of the ***Senior Resident Magistrate in Kerugoya Succession Cause No.117 of 2003***. In that Judgment which is dated 1/10/2004 the learned trial Magistrate ordered that the estate of the deceased be sub-divided and shared equally between his 2 houses. Consequently, the Respondent herein one Jenaro Ngari got half of the estate since he was the only surviving child from his mother's house while the appellant herein was left with half share of the estate to share between herself and her sons who constitute the second house. Being aggrieved by that Judgment, she filed this appeal. She relies on the amended memorandum of appeal dated 20/4/2007. She is represented by Ms Njeru Advocate while the Respondent is represented by Gathii and Co. Advocates. According to the appellant, her main contention is that the learned trial magistrate erred in law and misdirected himself in his interpretation of Section 40 of the Law of Succession Act. Mr Gathii did not say much but only asked the court to reaffirm the interpretation of the Senior Resident Magistrate Kerugoya on Section 40 (1) of the Law of Succession Act. This appeal is in my considered view very straight forward indeed it boils down to the correct interpretation of Section 40 (1) of the Law of Succession Act. Both parties herein are in agreement that the law applicable in the distribution of the deceased's estate in this matter was Section 40 of the Law of Succession Act. My interpretation of Section 40 (1) of the Law of Succession Act will put this appeal to rest. Section 40 (1) provides as hereunder:-

***“ 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 on additional unit to the number of children.”***

This in plain, simple unequivocal language means that the estate shall be sub-divided equally amongst the surviving children of the deceased adding the widow as a unit. It does not say that the estate (in most cases land) should first be shared equally among the houses and then later be distributed equally among the children within each house.

I have noted that this particular magistrate applies that interpretation and it is in my considered view wrong. He has misunderstood the proper meaning and purport of Section 40 (1) of the Law of Succession Act. For emphasis, I repeat that according to Section 40 (1) of the Law of Succession Act, the estate of

deceased who dies intestate must be distributed equally among the surviving children regardless of which house they are born in. The widow is then added as an extra unit to her house. This is the interpretation that has been applied in the High Court as well as in the Court of Appeal. The Court of Appeal in the celebrated case ***of RONO-V-RONO and Another (2005) 1 EA 363***, upheld this interpretation and held that the estate of a polygamous deceased person should be distributed according to the number of the children and not the number of houses. Clearly therefore, the learned trial magistrate erred in law in this matter and his Judgment must therefore be quashed and set aside. This Appeal therefore succeeds. The Judgment of the Senior Resident Magistrate Kerugoya is hereby set aside. Any certificate of confirmation of grant which may have been issued to that effect is hereby cancelled. The estate of the deceased i.e land parcel No **INOI/NDIMI/102** be shared equally among the surviving children of the deceased getting an equivalent share as per her proposal in paragraph 6 of the Grant dated 6/5/2004.

Each party will bear its own costs of this appeal and of the succession cause in the lower court.

Orders accordingly.

**W. KARANJA**

**JUDGE**

Delivered, signed and dated at Embu this 29th ..day of ...July....2008.

In presence of:-