



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 253 of 2000

IN THE MATTER OF THE ESTATE OF JOSIAH MACHARIA THANGU – DECEASED

AND

EPHANTUS MWANGI JOSIAH PETITIONER

VERSUS

ESTHER NYAWIRA MACHARIA PROTESTOR

J U D G M E N T

Josiah Macharia Thangu hereinafter referred to as “*the deceased*” passed on sometimes on 30th May 1998 and was survived by two wives namely Esther Nyawira Macharia and Monica Nyambura, nine sons, Ephantus Mwangi Josiah, Joseph Kimunya, Kinyua Josiah, Josephat Njeru, Simon Murimu, Patrick Maina, Robertson Njogu, Kimunya Macharia and Ndegwa Macharia. The deceased was also survived by eight daughters to wit; Margaret Wambui, Muthoni Macharia, Njuguini Macharia, Wangari Macharia, Wambui Macharia, Wamaitha Macharia, Gladys Nyaguthii and Esther Gathoni. Prior to his death the deceased had been married to three wives. Apart from the widows aforesaid there was also **Wanjeri Josiah** who passed on earlier in 1957. She was survived by three children. The estate of the deceased from the judgment of **Justice Okwengu** on the objection proceedings consisted of

- (i) Laikipia/Marmanet (Nyahururu East Block 1/ Raichiri/10
- (ii) Marmanet/North Rumuruti Block 2/Ndutumo/3479
- (iii) Iriaini/Karia/667
- (iv) Nyandarua/Leshau Block 5/78 and
- (v) Pesi (referred to as Thagana land)
- (vi) ½ share of a plot at Karura market.

On 21st July 2000, **Esther Nyawira**, one of the deceased’s wives and hereinafter referred to as “*the protestor*”, petitioned for the grant of letters of administration intestate for the Estate of the deceased. On the same day, the petitioner caused a citation to be issued to **Ephantus Mwangi Macharia** hereinafter referred to as “*the Petitioner*” and her co-wife **Monica Nyambura**.

On the 1st August 2000, the Petitioner filed an objection to the making of a grant to the Protestor on the grounds that the deceased had 3 wives and the grant therefore ought to have been issued jointly to the protestor, himself and the deceased's 3rd widow **Monica Nyambura**. Subsequent thereto, the Petitioner filed a petition by way of cross-application for a grant of representation to the estate of the deceased under rule 17(5) of the Probate and Administration Rules. On 21st October 2003, the court gave directions for the objection to be determined by way of viva voce evidence. **Justice Okwengu** presided over the proceedings and in a well written judgement held that it was apparent from the evidence adduced by both the protestor and petitioner that the deceased had married three wives and had children with all of them. His marriage was thus polygamous. The deceased therefore had 3 households. However since the 3 households had not agreed on how the estate should be administered, it was appropriate that both the protestor and petitioner who belong to 2 different households be appointed joint administrators. The learned judge therefore proceeded to order that the protestor and petitioner be appointed joint administrators of the estate of the deceased.

On 7th February, 2006 the Petitioner applied for the confirmation of the grant. In the affidavit in support of the application the Petitioner proposed that the deceased entire estate be subdivided into three equal portions and be shared by himself, Monica Nyambura and the protestor.

The protestor could hear none of the aforesaid proposals. Accordingly she filed an affidavit of protest to the summons for confirmation of grant. Her counter proposal was that Laikipia/Marmanet/Nyahururu/East Block 1/Raichiri /10 should go to herself and her children; Marmanet/North Rumuruti Block 2/Ndutumo/3479 should go to the Petitioner absolutely, Iriaini/Kairia/667 should go to the Protestor absolutely; Nyandarua/Leshau/Block 5/78 should go to Monica Nyambura Macharia for herself and children, the land at Pesi (Thagana) to Monica Nyambura Macharia; $\frac{1}{3}$ share, Karura plot to the Protestor and finally that the shares in Raichiri Farmers Company Limited go to the Protestor. This according to the protestor was in accordance with the wishes of the deceased.

The matter was then set down for the taking of directions. On 24th October 2007 directions to the effect that the application for confirmation of grant and affidavit of protest were to be heard simultaneously and that they would be heard by way of affidavits only were given. Pursuant to these directions, the protestor filed a further affidavit in which she deponed that the deceased had prior to his death handed over the documents of title to the respective beneficiaries. That her proposed mode of distribution was in accordance with the way the deceased had distributed the documents of title. That it was not the deceased wish that they share each parcel of land together but each house was to get separate parcel of land to the exclusion of the other.

Essentially what I am being called upon to do is to distribute the estate of the deceased as both the petitioner and the protestor have been unable to agree on the mode of distribution. According to the protestor the deceased had

determined how his estate should be distributed during his lifetime. Towards this end he had even taken the trouble to have the title documents given out to the respective three houses. These averments have not been challenged and or controverted at all by the Petitioner. Parties agreed that the issue of distribution herein be determined by affidavit evidence. Since what the protestor has deponed to as aforesaid has not been challenged and or countered by the Petitioner it must be taken to be true.

However much as the deceased may have distributed his assets in his lifetime, the court cannot endorse such distribution if it will result in an injustice and or unfairness to the other beneficiaries. It is common ground that the deceased had three wives with whom he had children. Both the protestor and the petitioner have not been able to tell this court the number of children in each household. So that if the court was to endorse the wishes of the deceased without looking at the number of children in each house, it may work an injustice to some beneficiaries. From the affidavits filed herein it is clear that Petitioner represent one house. However he has not been able to say whether the house he represents had any sisters or brothers. Indeed from his own preferred mode of distribution he is the sole beneficiary of the estate of the deceased

from that house. He will get a share of every asset of the deceased's Estate. This cannot be fair or just. The other houses are represented by the protestor and Monicah Nyambura. They too have children. However we are not told the number of children in each house. Again if we were to go by the wishes of the deceased as claimed by the protestor, she will end up getting a lion's share of the estate. I think that for the ends of justice to be met in the circumstances of this case, the wishes of the deceased if true as alleged by the Protestor ought to be ignored as if implemented, may work injustice to the members of the other households. One may never tell under what circumstances the deceased may have been led to make decisions as to how his estate should devolve upon his death. The same goes for the scheme of distribution proposed the petitioner. It will also work injustice to other beneficiaries.

The evidence tendered by both the protestor and the petitioner during the hearing of the objection proceedings and which I have had occasion to read is of no assistance to me in the resolution of this difficult task at hand. It is to be noted that none of the parties drew my attention to those proceedings even in their own affidavits. In those proceedings there was no agreement as to whether the deceased had distributed his estate during his lifetime as claimed by the protestor. There was also no agreement as to whether following the death of the deceased the clan sat and agreed and directed on how the estate of the deceased should be distributed.

That being the scenario, the justice of this case would demand that I invoke section 40(1) of the law of succession Act in the distribution of this estate. Accordingly the net estate of the deceased being:

- (a) Laikipia/Marmanet/Nyahururu East Block 1/ (Raichiri)/10,
- (b) Marmanet/North Rumuruti Block 2/Ndurumo/3479,
- (c) Iriaini/Karia/667,
- (d) Nyandarua/Leshau Block 5/78,
- (e) Pesi (referred to as Thagana land),
- (f) ½ share of a plot at Karura market.

Shall be divided equally among the three houses according to the number of living children in each but also adding any wife surviving the deceased as additional unit to the number of the children. The grant shall thus be confirmed on that basis. However before that is done the Petitioner and Protestor are directed within seven (7) days of delivery of this judgment to provide to this court a joint list of living children and wives of the deceased in each of the three households.

As the dispute herein pitted members of the same family against each other, I make no order as to costs.

Dated and delivered at Nyeri this 20th day of November 2008

M. S. A. MAKHANDIA

JUDGE