REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 530 of 2002

MARTHA WANJIKU WAWERU ……....……APPELLANT

VERSUS

MARY WAMBUI WAWERU ……...…… RESPONDENT

(From the judgment of J. B. A. OLUKOYE, Ag RM in Muranga Succession Cause No. 160 of 1997 dated 18th December, 1998)

JUDGMENT

The deceased, Timothy Waweru had two wives and four sons, two sons from each wife. He died on 13th September, 1990 intestate. His estate was established as consisting of two pieces of land registered as L. R. Loc. 8/Kaganda/928 and L. R. Loc.8/Kaganda/930. Evidence on record confirms that a third piece of land L. R. Loc.8/Kaganda/930 had already been registered in the name of one of the deceased's wives, Martha Wanjiku Waweru. Further evidence confirms that at the time of his death, the deceased had already announced that L. R. Loc.8/Kaganda/928 was to be registered in the name of his other wife Mary Wambui Waweru who already had taken possession of it while the deceased was still alive.

Mary Wambui Waweru petitioned the Muranga Senior Resident Magistrate's Court for a Grant of Letters of Administration on 4th August, 1997 after the deceased's death on 13th September, 1990. She clearly indicated that the dependants were his co-wife Martha Wanjiku and the two sons of each wife. The Grant was issued to her dated 16th December, 1997. The petition sought that the court confirms her proposal for distribution which was that the land L R. Loc.8/Kaganda/928 which her husband had allocated to her, be registered in her name. But in reference to L. R. 8/Kaganda/930, her proposal was that it be divided equally between the two wives or houses which were represented by their sons Isaack Kimani Waweru and Gibson Kimani Waweru who apparently were already in occupation of the land but not in equal shares.

By an affidavit of protest sworn on 10th June, 1998, Martha Wanjiku Waweru filed a protest against the proposed confirmation of the Grant issued to Mary Wambui Waweru on 16th December, 1997. Her objection was relating only to the proposal that L. R. Loc.8/Kaganda/930 be divided equally between the two houses of their deceased husband. .

The above protest and objection were heard by Ag. Resident Magistrate – Muranga Mr J.B. A. Olukoye between September and December 1998 and a judgment was delivered on 18th December, 1998. The judgment accepted the Petitioner's proposal that the said piece of land L. R. Loc.8/Kaganda/930 be divided equally between the houses or wives and not as per the wishes of the deceased who had divided

the same into two an unequal parts in the shares of 1.6 acres and 0.6, acres giving the petitioner's house the less share.

The Objector/Protester Martha Wanjiku Waweru appealed to this court.

The first ground of appeal is that the Ag. Resident Magistrate erred in dividing L. R. Loc.8/Kaganda/930 equally between the deceased's two houses, purporting to be complying with section 40 of the Succession Act, Cap 160 while the distribution actually, at the same time, complied with the wishes of the deceased.

I have carefully perused and considered the evidence on record from both sides. The appellant's evidence found on page 6 of the typed proceedings is to the effect that the deceased during his life time gave her L. R. Loc.8/Kaganda/929 and gave his co-wife, the Petitioner/Respondent L.R. Loc.8/Kaganda/928. He on the other hand subdivided L. R. Loc.8/Kaganda/930 to her son Nelson Mungai giving him a share of 1.6 acres and to Respondent/Petitioner's son Jeremiah Kariuki whom he gave a share of 0.6 of an acre. The rest he gave to his mother. There is adequate evidence that all members of the family respected this subdivision during the deceased's lifetime and for some period after his death, during which period the physical boundaries which the deceased had fixed were respected. It is in the appellant/objector's evidence that the deceased had subdivided the said parcel of land as he did, deliberately and according to his own wishes, apparently because he wanted to reward his son Nelson Mungai for looking after him when he had fallen ill and was taken to Thogoto Hospital. The Objector/appellant's evidence supports the position taken by the Objector.

On the other hand the Petitioner/Respondent's case was that Parcel No.930 should go to Jeremiah her son and Nelson the son of the appellant in equal shares. Under cross-examination, respondent/petitioner sufficiently admitted that during his lifetime the deceased subdivided parcel No. 930 giving her son Jeremiah a smaller portion while (Impliedly), giving Nelson the son of the appellant, a larger portion. She admitted (Page 3) that the deceased showed her the part to cultivate and that she herself, did not dispute the subdivision which the deceased had indicated. This court understood this to mean that the petitioner was admitting that the deceased deliberately subdivided parcel No. 930 according to his own wish, giving the appellant's house 1.6 acres and respondent's house 0.6 acres and that no one at the time protested that subdivision.

The respondent's witness, Hudson Kuria, who apparently is her son, admitted under cross-examination that the deceased subdivided the parcel No. 930 aforementioned and gave it to his two houses. He confirms that he would go with what his father had done (page 4).

I am satisfied that the deceased subdivided the parcel Number 930 aforesaid in such a way that he gave Jeremiah of the Respondent's house 0.6 acres while giving 1.6 acres to Nelson of the appellant's house. I am satisfied further from the evidence on record that all the members of the family from both houses were satisfied or acquiesced to what the deceased had done and no one raised a finger in protest. There is adequate evidence on the record that the two house, through Nelson and Jeremiah respectively utilized the land as subdivided for several years during the deceased's lifetime and thereafter for several years after he died. For example, although the deceased died on 13th September, 1990 Petitioner did not file petition until 4th august, 1997- a period of seven years. And yet there is no suggestion that during that period, there was any struggle or dispute over the piece of land. The dispute from what the records show only arose through the petition papers. It is my conclusion and finding accordingly that the deceased's wishes were as follows:-

a) That Parcel No. 929 goes to Appellant/objector

b) That Parcel No. 928 goes to Respondent/Petitioner

c) That Parcel No. 930 be subdivided so as to give the Appellant's house 1.6 acres and the Respondent's house, 0.6 acres.

Having come to the above conclusion, the only other question to resolve is whether section 40 authorised

or empowered the Honourable Ag. Resident Magistrate who tried the objection, to rule that Parcel No. 930 should be subdivided between the two houses of the deceased equally and against his clear wishes.

The trial magistrate came to the conclusion that there was no clear evidence that the deceased intended to give the parcel No. 930 to his sons in the shares found with them at the trial and that there was no documentary evidence to that end. With great respect to the Honourable Magistrate, the records do not support his conclusion. The deceased divided his three pieces of land i.e. parcels 928, 929 and 930 without any uncertainty. His intention was clear- that 928 should go to the Petitioner/Respondent; 929 to appellant/Objector; and 930 to his two sons of opposite houses in the shares of 1.6 and 0.6 acres. There is evidence that all the members of the family accepted deceased's decision as none, including the respondent/Petitioner, as admitted protested. The two sons took possession and continued cultivation for more than seven years after the deceased's death, without dispute. How can part of his wishes touching the divisions of his plots be implemented and other wishes be denied? It was not for the trial Magistrate to fantasize on the merits of the deceased grounds for dividing the land in the way he thought best. It was his land. He had power over it. He could divide it the way he thought best. He could indeed have put his wish in a Will. Could the trial magistrate have questioned the provisions of a Will if it provided more to one beneficiary than the other for his own good reasons?

The Honourable Trial Magistrate purported to apply Section 40 of the Succession Act Cap 160. In my view, while the section authorises a court to distribute an estate according to houses (in a polygamous situation) it does not provide that the shares given to each house must necessarily be equal. They can differ for good reasons recorded.

In this case the deceased had in his lifetime distributed his estate as he wished. He had power to do so. His family members did not protest or change his mode of distribution which they had opportunity to do during his lifetime. He fixed clear physical boundaries which no one interfered with at any stage even after is death. In my view his wishes should have been respected the by trial magistrate as respected by his family.

For the above reasons, I find that the other grounds of appeal have been resolved. The appeal has merits. It has to succeed. The final order is that the deceased's parcel of land L. R. Loc.8/Kaganda/930 shall be divided in the manner the deceased had subdivided it i.e. 1.6 acres to Nelson Mungai Waweru and 0.6 acres to Jeremiah Kariuki Waweru. Orders accordingly, with costs to the appellants.

Dated and Delivered at Nairobi this 23rd day of July, 2007,

D A ONYANCHA

JUDGE