



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Succession Cause 247 of 1999

IN THE MATTER OF THE ESTATE OF BERNARD

IN THE MATTER OF THE ESTATE OF BERNARD NDUNGU NJOROGE – DECEASED

MARY LYDIA WANJIRU MUGO.....APPLICANT

VERSUS

THE ASSISTANT ADMINISTRATION GENERAL.....RESPONDENT

JUDGMENT

The deceased, **Alex Bernard Ndungu** died on the 8th January, 1998. On the 18th May, 1999, the Public Trustee petitioned to be granted letters of administration to administer the estate of the said Alex Bernard Ndungu (*hereinafter referred to as the deceased*). In the said petition, the public trustee listed the beneficiaries of the deceased as follows:

- (i) *Grace Waithera Njoroge – widow*
- (ii) *Naomi Muthoni – daughter (17 years)*
- (iii) *Teresia Wambui – daughter (14 years)*
- (iv) *Samuel Githaiga – Son (1½ years)*
- (v) *Mary Lydia Wanjiru Mugo – widow*
- (vi) *Stephen Ndungu – Son (9 years)*
- (vii) *Samuel Mugo – son (6 years)*
- (viii) *Naomi Angeline Muthoni – daughter (4 years)*

The properties of the deceased were listed as:

- (i) *Plot No. 75 – Elburgon 2.5 acres*
- (ii) *Amount deposited at Barclays Bank of Kenya – Kshs.18,193/50.*

(iii) Amount at Timsales Ltd... Kshs.53,758/=.

The Public Trustee was issued with the letters of administration intestate on the 26th May, 1999. The Public Trustee could not however distribute the estate of the deceased due to the fact that Mary Lydia Wanjiru Mugo filed an application under **Section 76** of the **Law of Succession Act** seeking the revocation of the grant issued to the Public Trustee on the grounds that the Public Trustee had omitted certain properties of the deceased and had also included persons who were not entitled to inherit the properties that comprise the estate of the deceased. Mary Lydia Wanjiru Mugo listed the properties of the deceased as follows:

- (i) Provided fund with Timsales Ltd – Kshs.315,000/=.
- (ii) Terminal dues with Timsales Ltd. – Kshs.53,738/=.
- (iii) N.S.S.F. dues – Kshs.63,000/=.
- (iv) Shares/savings with Wanambao Co-operative Credit Society (value not disclosed).
- (v) Savings account with Barclays Bank – Nakuru Branch – Kshs.18,000/=.
- (vi) Land parcel title No. Rare/Naishi/Block 1/75 (2.5 acres).

Lydia deponed that the deceased's only beneficiaries were her three children and herself. She deponed that the deceased was not married to Grace Waithera Njoroge. She did not therefore recognise the children of Grace as dependants of the estate of the deceased. Grace Waithera Njoroge did not accept to be excluded as a beneficiary of the estate of the deceased. She deponed that she was a wife to the deceased. She was supported by the mother of the deceased, Naomi Muthoni, who swore an affidavit deponing that the said Grace Waithera Njoroge was the 1st wife of the deceased.

On the 17th July, 2006, the parties to these proceedings agreed to have the issues in dispute determined by this court hearing *viva voce* evidence from the parties. The parties further agreed that the evidence that would be adduced would be in respect of the determination as to who dependants of the deceased are and the mode of distribution that should be adopted by the court. Mary Lydia Wanjiru Mugo and Grace Waithera Njoroge recognised the mother of the deceased, Naomi Muthoni Ndungu as a beneficiary of the deceased estate. Mary Lydia Wanjiru Mugo (*hereinafter referred to as the petitioner*) and Grace Waithera Njoroge (*hereinafter referred to the objector*) agreed to file further affidavits laying the basis of their respective claims to the deceased estate.

The objector testified as PW1. Grace testified that she was married by the deceased in December, 1977. Upon their marriage, Grace testified that she cohabited together with the deceased as husband and wife. They were blessed with three children: two boys and a girl. She recalled that the deceased married the petitioner in 1987 as a second wife. Grace did not object to the deceased marrying a second wife. She explained that she could not refuse the deceased to marry a second wife. She maintained that as the first wife of the deceased, she was entitled to be considered as a beneficiary of the estate of the deceased. She denied the suggestion by the petitioner which was to the effect that when the petitioner was married, the deceased had not disclosed to the petitioner that he (*the deceased*) was already married to another wife. Grace reiterated that when the deceased died, the petitioner became hostile and refused to acknowledge her and her children as the beneficiary to the deceased's estate.

The mother of the deceased, Naomi Muthoni Ndungu (*Naomi*) testified that the deceased was married to two wives, namely, Grace Waithera Njoroge and Mary Lydia Wanjiru Mugo. She testified that she did not recognise the first born child of the petitioner because the said child (*son*) was not named after her husband. She reiterated that the wives of the deceased and their children should inherit the deceased's estate. Naomi was however unwilling to have the estate of the deceased distributed equally unless the petitioner disclosed a plot which Naomi claimed was purchased by the deceased at clayworks Nairobi. Naomi maintained that her son had the right to marry as many wives as he could support. She insisted

that she was entitled to remain in occupation of the house that her son had constructed for her at his (*the deceased's*) parcel of land.

On her part, the petitioner testified that when she got married to the deceased in 1987, the deceased did not disclose to her that he was married to another wife. She testified that during the period that she was married to the deceased, no one, including the mother of the deceased told her that the deceased had another wife. She recalled that it was only when the deceased was taken in ill in 1997 that a girl called Naomi Muthoni came to see the deceased demanding to be given school fees to enable her attend secondary school. The petitioner testified that during her stay with the deceased, she only heard rumours that the deceased was once married to another wife but she did not see the person who was claimed to be the wife of the deceased. She recalled that it was after the death of the deceased that Grace appeared at the scene and started making claims that she was a wife to the deceased. The petitioner testified that Grace and her children should **not** be recognised by this court as the beneficiaries of the estate of the deceased.

I have carefully considered the evidence adduced by the parties to these succession proceedings. I have also had the occasion to read through the entire pleading and affidavits filed in these proceedings. The issues for determination are two fold: the first issue is the determination of who the beneficiaries of the estate are; the second issue is the distribution of the estate of the deceased. On the first issue, it is the petitioner's case that Grace and her children are not the beneficiaries of the deceased. In support of her case, the petitioner adduced evidence which established that when she was married to the deceased in 1987, she did not find another wife at the house of the deceased at Elburgon. She further testified that the deceased did not disclose to her that he was married to another wife. The petitioner however conceded that she had heard rumours at the time that the deceased was previously married to another wife.

On her part, the objector insisted that she was married to the deceased and was the deceased's first wife. She testified that their marriage was blessed with three children. She maintained that when the deceased married the petitioner, she had no choice but to accept his decision. She stated that she accepted the petitioner as the second wife of the deceased. The mother of the deceased, Naomi Muthoni stated that she recognised the petitioner and the objector as the wives of the deceased. She only had reservation on one child of the petitioner whom she claimed was not named after her husband.

I have carefully evaluated the evidence adduced regarding the issue as to who is the wife of the deceased. It is clear to this court that the deceased married the objector before their relationship soured. It is clear from the evidence adduced, that the deceased was not living with the objector at the time he married the petitioner. The objector was residing elsewhere. It was not possible for this court to deduce from the evidence before it where the objector lived. What is however clear that is the mother of the deceased recognises both the petitioner and the objector as the wives of his late son. The petitioner testified that she was the only one who should be recognised as the wife of the deceased since the objector had been separated from the deceased at the time he married her. The petitioner did not tell the court why she was of the view that the children of the objector should similarly not be considered as the beneficiaries of the estate of the deceased.

Having evaluated the evidence adduced in these proceedings, it is clear to this court that the objector and the petitioner are wives of the deceased for the purposes of succession under the **Law of Succession Act**. This is because the **Law of Succession** recognises former wives of deceased persons as beneficiaries. **Section 29** of the **Law of Succession Act** provides that;

“For the purposes of this part, “dependant” means –

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) ...”

In the present case therefore, I do hold that the petitioner and the objector together with all their children

are dependants and beneficiaries of the deceased. The petitioner and the objector did at the beginning of these proceedings, recognise the mother of the deceased as a beneficiary of the deceased.

The second issue for determination is the distribution of the deceased's estate. The deceased owned one parcel of land, namely **Lare/Naishi Block 1/75** measuring 2.5 acres or thereabout. The deceased built a house for the petitioner on the said parcel of land. The mother of the petitioner testified that she is residing on a three roomed home which was built for her by the deceased on the same parcel of land. I hereby direct that the said parcel of land shall be inherited as follows; the petitioner together with her children shall inherit 1½ acres of the said parcel of land. It has been established that the mother of the petitioner has other parcels of land. I hereby direct that the mother of the petitioner, Naomi Muthoni shall reside on the three roomed house in the said parcel of land during her life time. She shall have a life interest in the said house. Upon her death, the said house shall revert to the objector. The objector shall inherit the remaining one acre portion. For the avoidance of doubt, the petitioner shall inherit the 1½ acres within which the house which the deceased built for her is situate.

As regard the amount due to the estate of the deceased, I hereby direct that the said amount shall be distributed at the ratio of 50:40:10 *i.e.* the petitioner shall inherit 50% of the amount, the objector 40% of the amount whilst the mother of the deceased shall inherit 10% of the amount.

This being a succession cause, there shall be no orders as to costs.

Dated a Nakuru this 26th day of October, 2007.

L. KIMARU

JUDGE