



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Succession Cause 2243 of 1999

IN THE MATTER OF THE ESTATE OF GATUHA MWANIKI (DECEASED)

RULING

Letters of administration herein were granted to Mary Wanjira Gatuha and Benson Mwaniki Gatuha on 18th June 2003. One of the two administrators, Mary Wanjira Gatuha is the widow of the deceased. The deceased also left children who are Wangari Gatuha a daughter who is married, Wanjira Ndungu also a daughter who is married, and lastly Benson Mwaniki Gatuha a son.

At the hearing on 26/4/2006 Mr. Macharia appeared for Mary Wanjira Gatuha while Mr. Nyaga appeared for Benson Mwaniki Gatuha. Both counsel made submissions before me.

When an application for confirmation of grant was filed all the daughters of the deceased consented to proposed mode of distribution. The son of the deceased Benson Mwaniki Gathua however (co-administrator) however Objected to the proposed mode of distribution. The proposed mode of distribution by the petitioner on the land is as follows:

- L.R. LOC. 1/MUKARARA/439 be shared equally between MARY WANJIRA GATUHA and BENSON MWANIKI GATUHA.
- L.R. LOC. 1/MUKARARA/T. 127 be registered in the name of MARY WANJIRA GATUHA as sole proprietor.

On the other hand, the objector Benson Mwaniki Gatuha has

listed in his affidavit sworn on 1/8/2005 and several assets, as being part of the estate. According to him, some of the assets had already been appropriated by the co-administrator. He proposed the following mode of distribution –

- (a) Plot Gatundu Development company measuring 2 acres to go to Mary Wanjiru Gatuha.
- (b) Plot Naivasha Nanga/Kihotu farmers to go to Mary Wanjira Gatuha solely.
- (c) Plot at Thika Nanga/Kihoto Farmers to go to Mary Wanjira Gatuha solely.
- (d) 3 cows have already been shared solely by Mary Wanjira Gatuha.
- (e) 3 Sheep had already been shared solely by Mary Wanjira Gatuha.

- (f) 3 bee hives have already been shared solely by Mary Wanjira.
- (g) L.R. No. Loc 1/Mukarara/439 measuring 2.3 acres be shared solely by Benson Mwaniki Gatuha.
- (h) L.R. No. LOC 1/Mukarara/T. 127 measuring 0.13 acres be shared solely by Benson Mwaniki Gatuha.

He deponed in paragraph 9 of his affidavit that as he and his seven sons reside and have homes on LOC 1/mukarara/439 from where his co-administrator has moved out from her own volition, he wanted items (g) and (h) to be shared as proposed.

It is obvious from the proposals of the objector that he wants the two plots of land in (g) and (h) above to be in his own name. Put another way, he does not want to share any of the plots with the co-administrator.

This matter has had some history. The objector Benson Mwangi Gatuha had applied for letters of administration, which were issued and confirmed. The said grant was later revoked by Hon. Justice Osiemo on 29th May 2001 on the application of Mary Wanjiru Gatuha, who is the co-administrator herein. The registration of title No. LOC/MUKARARA/439 in the name of BENSON MWANIKI GATUHA was also ordered to be cancelled by Hon Justice Osiemo.

In this matter, the other survivors do not appear to have a problem at all. It is only the objector who appears to have any problem with the proposed mode of distribution.

In paragraph 5 of his affidavit sworn on 1st August 2005, the objector seems to allude to an oral will. To him that will of the deceased would determine the mode of distribution herein. He does not say when exactly that will was made and whether there were witnesses to the will.

The validity of an oral will is determined by the provisions of section 9(1) of the Law of Succession Act (Act. 100). That Section provides that an oral will shall not be valid unless it is made before two or more competent witnesses. Secondly, the testator has to die within 3 months from the date of that will. The objector has not laid before this court any information that the will was made before at least two competent witness, nor has he stated the date when that will was made. In my view, he has not established that an oral will was made, as required by law. It is my finding that the deceased did not make an oral will.

In our present case, the deceased was polygamous. The mode of distribution of the estate on intestacy is governed by the provisions of Section 40 of the Law of Succession Act. The law provides that the net intestate assets are to be divided among the houses, according to the number of children. The only contestants to the estate are the two administrators herein. They come from different houses in a polygamous marriage. I am guided by the provisions of Section 35 (5) of the Law of Succession Act. That section envisages the equal distribution of the estates, among beneficiaries. Therefore, in my view, the properties in contest have to be divided equally. The fact that the objector has his family on the land is not enough reason to deny MARY WNJIRA GATUHA of her entitlement in law.

For the above reasons, I order that L.R. LOC. 1.MUKARARA/349; and L.R. LOC.1/MUKARARA/T. 127 be shared equally between the two administrators/beneficiaries MARY WANJIRA GATUHA and BENSON MWANIKI GATUHA. If it is not possible to divide the land, then market value of ½ share to be paid to respective beneficiary by the other. Either party at liberty to apply.

Consequently, I hereby confirm the grant of letters of administration herein and mode of distribution of the assets will be as above. Each party to bear own costs.

It is so ordered.

Dated and delivered at Nairobi this 25th day of May 2006.

George Dulu

Ag. Judge

In the presence of Mr. Macharia for applicant – Mr. Wambua for respondent.