



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO.464 OF 1998

IN THE MATTER OF THE ESTATE OF SUSAN WAKONYO KAHIO

J U D G M E N T

The Deceased viz, Susan Wakonyo died on 25th November, 1997, at Ngorika, Nyandarua. The deceased died intestate and was survived by the following children viz:-

1. Jane Wangari - 60 years old.
2. Mary Mukami - 59 years old.
3. Anderson Ng'ethe - 55 years old.
4. Winnie Mbaire - 53 years old.
5. Monicah Waceke - 50 years old.
6. David Nguyai - 47 years old.

When the Deceased died she left behind the following assets whose values were estimated in 1998. That means that on average most of the assets must have appreciated.

ASSETS:

- (a) Land LR. NO.4083/2 Measuring 3271/2 Acres = Kshs49,125,000/-
- (b) Land LR. No.336/19 – 20 Acres at Ngorika = Kshs.3,000,000/-
- (c) Plot No.8836/130 – Nakuru West = Kshs.1,700,000/-
- (d) Land Plot No.3/737 – Nakuru West = Kshs.1,900,000/-
- (e) Land – Commercial Plot – Mbaruk Township
– (No title) = Kshs.120,000
- (f) Land Plot No.1 Kiambaa/Kihara = Kshs.800,000/-
- (g) **Bank Accounts**
- (i) National Bank of Kenya - Nakuru

(ii) Barclays Bank Nakuru East A/C No.27/1185596

(iii) Housing Finance Co. of Kenya A/C No.0340179

(h) **Shares**

(i) 674 shares - Barclays Bank of Kenya

(ii) 2000 shares - Housing Finance Co. of Kenya

(iii) 400 Shares - Kenya Commercial Bank Ltd

(i) **Vehicles**

(i) - KAB 808I = Kshs.400,000/-

(ii) - Tractor KSA 596 = Kshs.120,000/-

(j) **Liabilities** - Nil.

The Petition for letters of Administration Intestate was filed jointly by Anderson Ngethe, David Nguyai and Jane Wangari. Though this Succession Cause was partially heard by Hon. Justice Rimita he never completed the same by the time of his transfer. Consequently, the Court decided to proceed with the same De Novo. It was apparent from the word go that the sisters and brothers could not agree amicably to distribute the multi-million property of their mother. Due to the above each of them gave his/her own proposal on how the property should be sub-divided. During the trial, Mr. Mungai Mbugua represented the 3rd Administrator viz, David Nguyai, while Mr. Kimatta represented Anderson Ng'ethe. On the other hand, Mrs. Judy Thongori represented the "sisters" viz, Winnie Mbaire, Monica Kahio and Jane Wangare.

In his evidence the PW.1 – Anderson Ng'ethe Kahio explained that after the death of their mother, they met as a family to discuss the distribution of the Estate. Unfortunately, two sisters viz,

Monica Waceke and Mary Mukami were not present because both of them stay overseas. According to Ng'ethe the meeting agreed on the following distribution:-

- Land LR NO.336/19 - 20 Acres together with the homestead be given to Jane Wangari, Mary Mukami, Winnie Mbaire and Monica Waceke. The above comprised a Dairy, stores, and also had electricity and water.

The large farm that comprised 327 1/2 Acres was to be sub-divided as follows:- Jane Wangari - 10 Acres

Mary Mukami - 10 Acres

Winnie Mbaire - 10 Acres

Monica Waceke - 10 Acres

Anderson Ng'ethe - 152 Acres

David Nguyai - 137 Acres

According to Ng'ethe the survey was done on the above farm and beacons were fixed. In addition the Deed Plan was also prepared. Besides the above, Ng'ethe explained that he used to own Plot No.8836/130 - Nakuru West which comprises 2 flats with his late mother. Apart from the above, Ng'ethe explained at length that he and the Deceased used to do farming jointly and they used the farm proceeds to buy the two flats. He also explained that since 1971 he has been on the farm together with the mother. Ng'ethe

conceded that the Plot with the 2 flats 8836/130 – Nakuru West was registered in his mother’s name. That apart he also admitted that the mother had expressed her wish to have the LandKimbaa/Kiharu/1 be given to:

Jane Wangari, Mary Mukami, Winnie Mbaire and

Monica Waceke.

The said Plot was developed and the sisters have been collecting rents from the same even when the mother was alive. On the other hand, Mr. Ng’ethe has been collecting rents from the 2flots at Nakuru West.

As far as Plot No.3/737 – Nakuru West is concerned, Mr. Ng’ethe explained that the same comprises 4 houses and that two of them had been built by his brother viz, David Nguyai. According to Mr. Ng’ethe the family had agreed that the four houses be sold and the proceeds be divided among:-

Jane Wangari, Mary Mukami, Winnie Mbaire

Monica Waceke and David Nguyai.

The family also agreed that the two houses of David Nguyai should be valued separately. In addition he also stated that the family had agreed that the undeveloped Plot at Mbaruk should also be sold and the proceeds be shared among the above five beneficiaries.

As far as the Tractor Registration No.KSA 596 is concerned, Mr. Ng’ethe stated that the family had agreed that the same should be sold and that the proceeds should be shared equally among the above five. The said tractor had been valued atKshs.120,000/-. In relation to the pick-up Registration No.KAB 808L, Mr, Ng’ethe stated that the family had agreed that the same should be sold and that the proceeds should be shared among the above five. By then the value of the Pick- Up was aboutKshs.400,000/-. It was also agreed that the chaff cutter and power saw should also be sold and that the proceeds should be shared among the above five.

According to Mr. Ng’ethe it had also been agreed that he should retain the plough and the trailer. He also informed the Court that by October,2003, the state of the Bank Accounts were as follows:-

- HFCK - Kshs.353,277/-

- NBK - Nil

- Barclays Bank - Kshs.24,500/- and that the family had decided that the cash would be shared equally among the above.

The state of the company Shares are as follows:-

- 674 shares - BBK valued at Kshs.196,946/-

- 2,000 - HFCK shares valued at Kshs.25,000/-.

- 400 - KCB Shares valued at Kshs.26,000/-

Mr. Ng’ethe stated that the family had agreed that the above Shares be sold and the proceeds be shared among the above five. According to Mr. Ng’ethe he proposed that the cash in the Bank be used for processing

The Deeds, outstanding Rates and payment of Legal Fees.

On the other hand, Ms. Jane Wangari Kahiu who is the first born in the family stated clearly that they came to Court since they never agreed on the distribution of the properties. According to Ms. Jane Wangari, the Succession Law does not discriminate against any children and hence there should be equal distribution of the Estate. Ms. Jane Wangari explained that between 1969 to 1982 she was working at the Central Bank of Kenya. However, from 1999 she has been staying on the second property No.336/19 – Ngorika which has a farm house. Ms. Jane Wangari conceded that David Nguyai was allowed by their mother to build one house from which he has been receiving rents. She also conceded that she and her sisters have been receiving rents of Kshs.5,000/- from the Kiambu house and sharing equally. As of now they are receiving rent of Kshs.8,000/- per month. On the other hand Ms. Winnie Mbaire also conceded that they had failed to agree on the distribution of the property. She also supported her sister that the property should be divided equally since the estate had not been distributed during her mother's life time. She however, qualified the above that during her life time her mother had shown each of the children, the parts that he/she could use on the Land – LR No.408/2 – Ngorika. Ms. Mbaire also suggested to the Court that Ng'ethe should be left to remain with the house that he had built. While admitting that her sister viz, Mary Mukami is married she asserted that her status was not relevant.

In his evidence, Gibson Wahome Werugia who is a Private Surveyor testified that in 1996, he went to see the deceased viz, Susan Wakonyo Kahio who was by then alive. The deceased later instructed him to sub-divide her land LR Parcel No.4082/2 into a total of 7 portions. These were to be sub-divided as follows:-

- Anderson Ng'ethe to get 60.8 Ha
- David Nguyai to get 53.89 Ha
- 4 portions of 4 Ha.

Eventually, he complied with the above instructions which resulted into the following parcels of land:- - 4683/3 - covering 59.46 Ha. for Anderson Ng'ethe - 4683/5 - covering 3.966 Ha

- 4683/6 - covering 3.969 Ha
- 4683/7 - covering 3.968 Ha
- 4683/8 - covering 3.925 Ha

In his evidence, David Nguyai Ng'ethe who is one of the Administrators Conceded that there was a family meeting that was held on 20th February, 1998, at the Stem Hotel. Following the meeting he received the minutes – exhibit 1. David Nguyai was categorical that he and Monica Waceke never signed the minutes – Exhibit 1. Nguyai further explained that there was no consensus on how the estate was to be subdivided. However, Mr. Nguyai conceded that when their mother called a meeting in 1996, she expressed her wish that the land should be distributed as follows:- - 152 Acres - Anderson Ng'ethe

- 135 Acres - for himself
- 40 Acres - to be divided equally among the 4 sisters.

Besides the above Nguyai never objected to Ng'ethe continuing to occupy the residential house on the land LR. NO.4083/2. Nguyai also proposed that LR. No.336/19 - Ngorika should be given to the 4 sisters.

As far as Plot No.8836/130 - Nakuru West is concerned, Nguyai

Proposed that the same should be retained by Anderson Ng'ethe.

Plot No.3/737 - Nakuru West

Nguyai explained that their mother had encouraged him to develop two Family units on the land and

hence he feels that the property should be given to him.

Commercial Plot – Mbaruk Township

Nguyai suggested that the same should be sold and the proceeds should be shared equally between himself and the sisters.

Plot No.1 – Kiambaa/Kihara Nguyai suggested that the same be divided equally between himself and the four sisters.

NBK Account

The same has Kshs.24,500/-.

Housing Finance Co. of Kenya Account No.0340179

The above Account has Kshs.1,253,277/-. Nguyai suggested that he should be given the above funds to put up a house.

Company Shares

674 - BBK

2000 - HFCK

400 - KCB

Nguyai suggested that the same should be sold and divided equally between himself and the four sisters.

Motor Vehicle Reg. No.KAB 808L

Nguyai has suggested that the same should be assessed and that any beneficiary be given an option to purchase the same.

Tractor – Reg. No.KSA 596

Nguyai explained that he had used Kshs.100,000/- for the repair of the same. He prays that his costs be taken into consideration when the tractor is being sold.

After the parties had given their testimony, all the three Counsels made their submissions which dealt at length on the law of Succession Act Cap 160, Laws of Kenya As stated earlier, the deceased died intestate. The submissions by both Mr. Mungai and Mr. Kimatta were that the deceased distributed some of her property. In particular they emphasized on the large portion of land LR 4083/2 measuring 327½ Acres that seems to be the flagship of the Estate. To support their submissions, they referred the Court to the instructions of the deceased to the private Surveyor to subdivide the land.

Section 31 of the Law of Succession Act deals with Gifts in contemplation of death. The said Section states as follows:-

“ A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if:-

(a) the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and

(b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and

(c) there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and

(d) a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive that illness or danger; and

(e) the person making that gift dies from any cause without having survived that illness or danger; and

(f) the intended beneficiary survives the person who made the gift to him; Provided that:-

(i) no gift made in contemplation of death shall be valid if the death is caused by suicide;

(ii) the person making the gift may, at any time before his death, lawfully request its return.”

In this particular case, the Private Surveyor, viz, Gibson Werugia stated that he was called by the deceased sometimes in 1996 and instructed to survey the LR. No.4082/2 and sub-divide the same. It is not in dispute that the deceased died on 25th November, 1997. That was about one year after she had given the above instructions.

Section 31 of the Law of Succession Act specifically refers to the words “in contemplation of death.” Unfortunately, no evidence was led by any witness to assist the Court to make that conclusion. In the first place the Doctor treating the deceased was not called to give evidence of her condition at that particular time. The Court is left guessing about her condition at that.

Secondly, with due respect, the Counsels viz, Mr. Mungai and Mr. Kimatta never addressed the Court over the requirements of Section 31(a) to (f) to show how the same had been fulfilled.

Having stated the above, section 38 of the Law of Succession states as follows:-

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one or be equally divided among the surviving children.”

The key words in the above Section is “be equally divided”. That means that the Law of Succession does not discriminate either boys or girls.

It wants both of them to be treated equally. The Succession Act does not give any special treatment or preference to men. Obviously, the Succession Act was promulgated in conformity with Section 82 of the Kenya Constitution that protects citizens of this country from being discriminated on ground of race, tribe, sex, political opinions, colour and place of origin. Had the Legislature wanted men to inherit the lion’s share of estates of deceased persons nothing would have been easier than for them to have promulgated the same. In its wisdom the Legislature declined to discriminate against women.

That apart, Kenya is also a signatory to United Nations Conventions that prohibit discrimination on women and children. Specifically, Kenya has ratified the United Nations Convention on the Limitation of all forms of discrimination against women that was passed in 1999 by the General Assembly. The principles enunciated in those Conventions are universally accepted and should be considered and applied in our jurisprudence. Having stated the above, I hereby accept and concur with the “girls” who are the female beneficiaries that the Estate should be divided equally between all the beneficiaries. However,

there will be some small exceptions as will be shown below:-

- The two Parcels of land

- LR. No.4083/2 – Measuring 3271/2 and

- LR. No.336/19 - Measuring 20 Acres at Ngorika will have to be combined to a total of 3471/2 Acres. The same will be shared equally so that each beneficiary gets 57.916 Acres. However, the sub-division will have to take into account Ng’ethe’s house and the residential house for the Girls. These should not be interfered with at all.

Plot No.3/737 – Nakuru West

Since Nguyai built two houses on the Plot, he should be entitled to the same. In addition to the above, he should also be entitled to the other 2 Units to create some semblance of equity. The reason for the above is that Ngaruiya is the only beneficiary who never got any Residential house Built by the family unlike the others. So instead of compensating him through monetary terms he should take these two houses.

Plot No.8836/130 - Nakuru West

To be given to Anderson Ng’ethe because he built the same with the deceased through their farming activities.

Commercial Plot – Mbaruk Township

(No Title and Plot No.1 Kiambaa/Kihara to be sold and proceeds to be shared equally between all the beneficiaries.

Bank Accounts

Barclays Bank Nakuru A/C No.27/1185596

HFCK – A/C No.0340179

- Total amount of money to be shared equally after the 3 Counsels on record are paid Legal fees. In case of any dispute on the fees then the same will be taxed by the Deputy Registrar, Nakuru.

Vehicles

KAB 808I - Kshs.400,000/-

Tractor KSA 596 - Kshs.120,000/-

To be sold and the proceeds to be shared equally. In disposing any of the above properties, any interested beneficiary should be given priority.

To avoid opening a Pandora Box the rents collected prior to today should be kept by the respective beneficiaries.

Those are the orders of the Court. Right of Appeal explained.

MUGA APONDI

JUDGE

Judgment read signed and delivered in open Court in the presence of

Mr. Mungai Mbugua for 4th Administrator

Mr. Kimatta for 1st and 2nd Administrator

MUGA APONDI

JUDGE

22nd April, 2005