



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 150 OF 2018

1. BETH NJERI WAWERU.....1ST APPELLANT/PETITIONER

2. LUCY WAMBUI WAWERU.....2ND APPELLANT/PETITIONER

=VRS=

SAMUEL MWANGI WAWERU.....RESPONDENT/PROTESTOR

{Being an appeal against the Judgement of Hon. N. M. Kyanya Nyamori - RM Thika dated and delivered on the 25th day of October 2018 in the original Thika Chief Magistrate's Court Succession Cause No. 157 of 2007}

JUDGEMENT

The deceased to whose estate this appeal relates is WAWERU GACHIE alias PETER WAWERU GACHIE who died intestate on 18th February 2006 domiciled in Kenya. From the record the deceased who was polygamous was survived by his two wives and six children as follows: -

1st House: -

1. Lucy Wambui Waweru – Widow
2. Samuel Mwangi – Son
3. Ruth Wanjiru Waweru – Daughter
4. Paul Muniu Waweru – Son

2nd House: -

1. Beth Njeru Waweru – Widow
2. John Kihugu Waweru – Son
3. Esther Wanjiru Waweru – Daughter
4. Paul Ng'ang'a Waweru – Son

The deceased left behind several assets. Whereas the beneficiaries generally agreed on the list of assets, Samuel Mwangi Waweru, the respondent herein protested and alleged that the property described as Thika SSS 13/87 – Block 3/87 did not belong to the deceased but to himself the deceased having transferred it to him way back in the year 2004 as a gift *intervivos*. He also protested the proposal by the two widows of the deceased to distribute the estate equally between themselves and thereafter to the children and demanded that his own share in his mother's house be identified and transmitted to him directly. The record of the lower court further shows that on 25th January 2017 Counsel for the parties recorded a consent to have the said property Thika SSS/13/57 (3/87) included as part of the properties of the deceased. However, there still was no agreement on the mode of distribution of the estate and so the matter proceeded to hearing. After considering evidence from the administrators and the protestor, the trial Magistrate distributed the estate as follows: -

“Name

Description of Property

Share of Heirs

1ST HOUSE

SAMUEL MWANGI WAWERU	LOC2/MAKOMBOK1/330	SOLELY
SAMUEL MWANGI WAWERU	LOC2/MAKOMBOK1/326	SOLELY
SAMUEL MWANGI WAWERU	COMMERCIAL PLOTS MAKOMBOKI 11 B	SOLELY
SAMUEL MWANGI WAWERU	THIKA MUNICIPALITY/BLOCK 20/2462 (Ngoingwa)	SOLELY
LUCY WAMBUI WAWERU	LOC2/MAKOMBOK1/309, 642, 1126, 326	SOLELY
LUCY WAMBUI WAWERU	COMMERCIAL PLOTS 2A & 19A	SOLELY
LUCY WAMBUI WAWERU	THIKA MUNICIPALITY/BLOCK 20/2463 (Ngoingwa)	SOLELY
LUCY WAMBUI WAWERU	THIKA MUNICIPALITY/BLOCK 20/2464 (Ngoingwa)	SOLELY
LUCY WAMBUI WAWERU	THIKA MUNICIPALITY/BLOCK 20/2466 (Ngoingwa)	SOLELY
LUCY WAMBUI WAWERU		
SAMUEL MWANGI WAWERU		
RUTH WANJIRU WAWERU		
PAUL MUNIU WAWERU.....	THIKA 4953/14/93 (1/2 SHARE) TO SHARE	EQUALLY
LUCY WAMBUI WAWERU		
SAMUEL MWANGI WAWERU		
RUTH WANJIRU WAWERU		
PAUL MUNIU WAWERU.....	TITLE NO. EWASO NYIRO/11 PAJETA/ BLOCK 1/420	TO SHARE EQUALLY
LUCY WAMBUI WAWERU	IKUMBI TEA FACTORY CO.LTD CERT NO. R 04289	SOLELY
LUCY WAMBUI WAWERU	KTDA FARMERS CO.LTD CERT NO. 104866	SOLELY
LUCY WAMBUI WAWERU	MAKOMBOKI TEA FACTORY CO. LTD CERT NO. R 01658	SOLELY
LUCY WAMBUI WAWERU	MAKOMBOKI TEA FACTORY CO. LTD CERT NO. 1995	SOLELY
LUCY WAMBUI WAWERU	ICDC INVESTMENT CO.LTD CERT. NO. 87570	SOLELY
LUCY WAMBUI WAWERU	500 SHARES IN EQUITY BANK	125 SHARES
SAMUEL MWANGI WAWERU	”	125 SHARES
RUTH WANJIRU WAWERU	”	125 SHARES
PAUL MUNIU WAWERU	”	125 SHARES
LUCY WAMBUI WAWERU	MONEY IN EQUITY BANK	SOLELY
LUCY WAMBUI WAWERU	MOTOR VEHICLE KAP 833 Y	SOLELY

2ND HOUSE

BETH NJERI WAWERU LOC 2/MAKOMBOK1/12, 1056, 635

BETH NJERI WAWERU	COMMERCIAL PLOTS LOC 2/MAKOMBOKI/10 AND 11A
BETH NJERI WAWERU	THIKA MUNICIPALITY/BLOCK 22/56
BETH NJERI WAWERU	THIKA MUNICIPALITY/BLOCK 22/235
BETH NJERI WAWERU	THIKA MUNICIPALITY/BLOCK 22/236
BETH NJERI WAWERU	THIKA MUNICIPALITY/BLOCK 20/2465 (Ngoingwa)
BETH NJERI WAWERU	THIKA 4953/14/93 (½ SHARE)
BETH NJERI WAWERU	MAKOMBOKI TEA FACTORY CO. LTDCERT NO. A 03709
BETH NJERI WAWERU	STANDARD CHARTERED BANK (K) LTD CERT.NO. 70315 OF HER
BETH NJERI WAWERU	BARCLAYS BANK OF KENYA LTD CHILDREN CERT.NO. 00372802
BETH NJERI WAWERU	KTDA SHARES CERT.NO.906128 & R 001655
BETH NJERI WAWERU	MONEY IN KTDA A/C MK 48 NO.5
BETH NJERI WAWERU	MONEY IN STANDARD CHARTERED BANK
BETH NJERI WAWERU	MOTOR VEHICLE KAB 206U PICK UP”.....TO BE REGISTERED UNDER HER NAMES

AND ON BEHALF OF

HER CHILDREN

This was more or less the mode of distribution proposed by the respondent in his affidavit of protest sworn on 15th May 2015. This did not go down well with the two widows of the deceased who are also the administrators of the estate and so they preferred this appeal. The appeal is premised on the following grounds: -

- “1. That the Trial Magistrate erred in law in misinterpreting the provisions of Sections 40 (1) of the Law of Succession Act Cap 160 Laws of Kenya.**
- 2. That the Trial Magistrate erred in law by failing to make a determination on whether or not the 2 lorries contested viz., KAK 254J and KAG 235Z were properties of the protestor or those of the estate.**
- 3. That the Trial Magistrate erred in law by failing to opine whether or not the protestor ought to have surrendered all monies collected by himself regarding THIKA MUNICIPALITY BLOCK 3/87 which the protestor had after the death of the deceased “thought” belonged to the protestor yet later on signed a consent acknowledging it belonged to the estate.**
- 4. That the Trial Magistrate erred in law and fact by finding that the 2nd appellant had no “qualms” with the respondent being given Loc. 2/Makomboki/330, Loc./Makomboki/1285, Commercial plots Makomboki 11B and Thika Municipality 20/2462 (Ngoingwa) whereas the 2nd Appellant did not so aver.**
- 5. That the Trial Magistrate erred in law by upholding the protest without dismissing the summons for confirmation of grant.**
- 6. That the Trial Magistrate erred in law by finding that the rest of the property will be sub-divided as per the affidavit of protest dated 19/05/2015 without giving reasons for so finding.**
- 7. That the Trial Magistrate erred in law by finding in favour of the respondent against the weight of evidence.”**

By this appeal they urged this court to set aside the judgement and orders of the lower court and: -

“(a) Confirm the grant pursuant to Paragraph 3 of the supplementary affidavit sworn by the themselves and filed on 17/02/2015.

(b) Dismiss the protest by the respondent.

(c) That the Lorries registration numbers KAK 254J AND KAG 235Z be included as part of the estate of the deceased and that the respondent be ordered to surrender the same to the estate or in the alternative surrender the proceeds of sale of the same to the estate at the current market rates.

(d) That the respondent be ordered to surrender to the estate all monies collected by himself with regard to Thika Municipality Block 3/87 from the date of the deceased's death to the time he ceased collecting the same.

(e) That the costs of this appeal to be to the appellants."

On 20th February 2020 Meoli J gave directions that this appeal would be heard by way of written submissions with the appellants getting 30 days to file and the respondents getting equal time. However, only those of the appellant were received despite a formal reminder being issued to Counsel for the respondent.

Counsel for the appellants submitted that the trial Magistrate misinterpreted the provisions of **Section 40 (1) of the Law of Succession Act** by not only sharing the residue of the net intestate amongst the two houses but by also including the respondent. Counsel submitted that the trial court should have in the first instance distributed the estate to the two houses having regard to the number of children in the respective houses and contended that distributing the estate according to the whims of the respondent was a travesty of justice. Counsel also submitted that the trial Magistrate ought to have called for copy of records in regard to motor vehicles KAK 254J and KAG 235Z which the respondent alleged belonged to him but which the appellants asserted belonged to the deceased. Counsel contended that if it was the case that the vehicles were transferred to the respondent after the death of the deceased then that was a criminal offence and he should have been ordered to surrender the vehicles to the estate or pay their value at market rates. Counsel also contended that the respondent ought to have been ordered to account for the rents he collected from Thika Municipality Block 3/87 since his father's demise on 18th February 2006. Counsel submitted that the respondent should be ordered to surrender all the proceeds collected by him as rent up to 27th January 2017 as a condition for him to claim any share of the estate more especially because the rent was more than Kshs. 100,000/-. Counsel contended that as it were the trial court allowed an intermeddler to benefit from his infraction and the appeal should be allowed with costs to the appellants.

As the first appellate court I have a duty to reconsider and evaluate the evidence in the lower court so as to arrive at my own independent conclusion while keeping in mind that I did not see or hear the witnesses who gave that evidence (*see Selle & another v Associated Motor Boat Company Limited & others [1968] EA 123*).

As correctly submitted by Counsel for the appellant the distribution of the estate of an intestate deceased who was polygamous is guided by **Section 40 (1) of the Law of Succession Act** which states: -

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children...."

The persons appointed as administrators of the estate are the two widows of the deceased. The protestor/respondent is a son of one of the administrators (Lucy Wambui Waweru). Having conceded that the property Thika Block 3/87 to which he was laying claim was in fact the property of the deceased his only objection was that his share of the estate which fell in his mother's house be transmitted to him directly rather than to his mother Lucy Wambui Waweru in the first instance. The trial court agreed with him and transmitted his share of the estate to him directly as set out in his affidavit of protest. The trial court did not give any reasons for giving the assets it did to the respondent. It is also not clear how the properties transmitted to him were identified because on their part the administrators had agreed on a mode of distribution which did not identify the share of each beneficiary. It would appear that the trial Magistrate simply transmitted to the respondent the assets which he himself chose. I am not wrong on this because in the words of the trial Magistrate the estate was distributed as per the affidavit of protest dated 19th May 2015. The trial Magistrate also found that the 2nd petitioner meaning the protestor/respondent's mother "*had no qualms with the protestor being given Loc 2/Makomboki/330, Loc/Makomboki/1285, commercial plots Makomboki 11B and Thika Municipality 20/2462 Ngoingwa.*" I have perused the evidence on record and I am unable to find anywhere that Lucy Wambui Waweru the 2nd appellant expressed herself thus.

In this case the deceased had two houses each with three children and a widow and if we were to apply **Section 40 (1) of the Law of Succession Act** the assets would be shared equally between the two houses. Indeed, that is what was proposed by the two administrators/appellants in their supplementary affidavit sworn on 17th February 2015. There were also assets which they were to continue holding jointly in trust for their children. It is my finding that whereas **Section 71 (2)** has a proviso to the effect that "*.....in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares*" the trial Magistrate having failed to specify the shares of all the other beneficiaries and having instead decided to confirm the grant as provided in the proviso to **Section 84 of the Act** she ought to have confirmed the grant as proposed by the administrators/appellants in the supplementary affidavit. **Section 84 of the Law of Succession Act** states: -

.....Provided that, where valid polygamous marriages of the deceased person have resulted in the creation of more than one house, the court may at the time of confirmation of the grant, appoint separate trustees of the property passing to each or any of those houses as provided by section 40."

Each appellant would then be a separate trustee of the assets passing to their house as provided by **Section 40 of the Act**. Each widow would then distribute the properties passing to their houses as agreed between her and her children and if there be no agreement equally. It is my finding in this case that ought to have been the mode of distribution and I do so order.

On the issue of rent which the respondent collected from Block 3/87 he shall be required to give an account of the same to the administrators and the trial court within six months of this order and the administrators and the beneficiaries shall then agree on the mode of distribution of that income and if there be no agreement the court shall make a determination on the distribution of the income amongst the beneficiaries.

As the protestor/respondent did not prove that the two vehicles Registration Nos. KAK 254J and KAG 235Z were gifts to him *inter vivos* he

shall either return them to the estate or pay to the estate their equivalent value at market rates which sums shall then be shared/distributed as agreed by the beneficiaries or if there be no agreement as shall be directed by the trial court.

Accordingly, the appeal is allowed and the estate shall now be distributed as follows: -

1ST HOUSE REPRESENTED BY LUCY WAMBUI WAWERU

1. LOC. 2/MAKOMBOK1/326.
2. LOC. 2/MOKOMBOK1/330.
3. LOC. 2/MAKOMBOK1/1 IA.
4. LOC. 2/MAKOMBOK1/19A.
5. THIKA MUNICIPALITY BLOCK 20/2462 NGOINGWA.
6. THIKA MUNICIPALITY BLOCK 20/2463 NGOINGWA.
7. THIKA MUNICIPALITY BLOCK 22/235 NGOINGWA.
8. THIKA MUNICIPALITY BLOCK 22/236 NGOINGWA.
9. LOC. 2/MAKOMBOK1/642.

2ND HOUSE REPRESENTED BY BETH NJERI WAWERU

1. LOC. 2/MAKOMBOK1/1243.
2. LOC. 2/MAKOMBOK1/1056.
3. LOC. 2/MAKOMBOK1/10.
4. LOC. 2/MAKOMBOK1/2A.
5. THIKA MUNICIPALITY BLOCK 20/2464 NGOINGWA.
6. THIKA MUNICIPALITY BLOCK 20/2465 NGOINGWA.
7. THIKA MUNICIPALITY BLOCK 20/2466 NGOINGWA.
8. THIKA MUNICIPALITY BLOCK 22/56 NGOINGWA.
9. LOC. 2/MAKOMBOK1/635.

JOINTLY SHARED BY LUCY WAMBUI WAWERU & BETH NJERI WAWERU

1. LOC. 2/MAKOMBOKI/1126.
2. THIKA MUNICIPALITY 4953/14/93.
3. THIKA SSS/13/87 MK/KAN/LD/U1/41/2/1.
4. EWASO NYIRO/II/PAJETA/BLOCK 1/420.
5. Shares in Ikumbi Tea Factory.
6. Shares in KTDA farmers Co., Ltd.
7. Shares in Makomboki Tea Factory Co., Ltd.
8. Shares in ICDC Investment Co., Ltd.
9. Shares in Equity Bank.

10. Shares in Standard Chartered Bank.

11. Shares in National Industrial Bank.

12. Shares in Barclays Bank (K) Ltd.

13. Monies in Equity Bank A/C 0010101202431 corporate Branch Jeevanjie Nairobi and 0070101263558 Kangari Branch.

14. Monies in Standard Chartered Bank Thika Branch A/C 0102098373700.

In the upshot this appeal succeeds and orders are granted as set out above. As for the costs of the appeal this being a family matter each party shall bear their own costs. It is so ordered.

SIGNED AND DATED AT NYAMIRA THIS 25TH DAY OF FEBRUARY 2021.

E. N. MAINA

JUDGE DATED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 9TH DAY OF MARCH 2021.

MARY KASANGO

JUDGE