



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CASE NO. 67 OF 2017

IN THE MATTER OF THE ESTATE OF KAMAU KUNGU (DECEASED)

JUDGMENT

1. Before me is Summons filed on 9th September, 2015, for the confirmation of the Grant of letters of administration intestate to the Estate of Kamau Kungu (Deceased). The Grant to be confirmed was issued to **BETH WANJIRU NJUGUNA** and **JOSEPH MAGANJO KAMAU**.

2. The Summons is supported by the affidavit of **Joseph Maganjo Kamau (the Applicant)**. He identified twenty one dependants namely;- Margaret Nyambura Kamau, Mary Wangui Karanja, George Ndichu Kamau, Agnes Mugure Kungu, Nancy Waithira Gacece, Lucy Wanjiru Njoroge, Beth Wanjiru Njuguna, Simon Njeru Kamau, Joyce Wanja Kamau, Joyce Njoki Kamau, Margaret Waithira Chege, John Kungu Chege, David Mbugua Chege, Mary Wangui Mwangi, Jane Waithira Kamau, Joseph Maganjo Kamau, Peter Gathungu Kamau, Pauline Wambui Kamau, Samuel Thiongo Kamau, Daniel Kabui Kamau and Beth Wanjiru Kamau. He also identified the shares of all persons beneficially entitled to the estate in his proposed mode of distribution.

3. **BETH WANJIRU NJUGUNA (the Protestor)** filed her affidavit of protest on 17th December, 2015. She opposed the Summons for Confirmation of Grant by Joseph Maganjo Kamau. She deposed that the deceased was survived by two widows: her mother **Margaret Nyambura Kamau** (1st house) and the Applicant's mother **Joyce Wanja Kamau** (2nd house). She contended that the deceased had given indication of the manner in which he wished his property to devolve as per the amended decree attached to the affidavit of the protestor. She urged the court to rely on the said amended.

4. Prior to the hearing of the Summons, the parties recorded a consent on the distribution mode in respect of the following land parcels:-

a) **JUJA/JUJA EAST BLOCK 1/1030**

To be shared equally by JOHN KUNGU CHEGE, DAVID MBUGUA CHEGE, PETER GATUNGU KAMAU, JOSEPH MAGANJO KAMAU, SAMUEL THIONGO KAMAU and DANIEL KABUE KAMAU.

b) **JUJA/JUJA EAST BLOCK 1/1175** to devolve upon LUCY WANJIKU KAMAU.

c) **KIGANJO/NEMBU/1240**

To be shared equally by the widows MARGARET NYAMBURA KAMAU and JOYCE WANJA KAMAU holding a life interest.

5. It was agreed that the distribution of the disputed plots; **KIGANJO/NEMBU/1509** and **Plot NO. 1160 KIGANJO RANCHING COMPANY** be determined by this court. Parties filed their witness statements. The parties adduced viva voce evidence.

6. The Applicant **JOSEPH MAGANJO** is the son of Joyce Wanja. He testified as **PW1**. He adopted his two supporting affidavits. He testified that his two mothers currently collect rent from two rows of units developed on **Nembu Plot 1509** and that the same should be shared between the two widows as intended by the deceased. He disputed that Plot 1509 is included in the alleged amended decree relied on by the Protestor. He claimed that Plot 1160 KIGANJO belonged to **Joyce Wanja** and does not form part of the deceased's estate and that she had given the same to her sons **David Mbugua** and **Daniel Kabue**. In cross-examination, he asserted that the two widows share the Nembu rental income. He confirmed the reference to lot No. 1509 in the disputed amended decree indicating that it belonged to with Margaret Nyambura Kamau. He also confirmed that in the amended decree, Plot 1160 was to be registered in the name of Margaret Nyambura Kamau. He however, stated that Plot 1160 belonged to **Joyce Wanja**.

7. **JOYCE WANJA KAMAU**, the Applicant's mother testified as **PW2**. She contended that the deceased divided the rental houses in Plot 1509 NEMBU between the two widows and they each collect rent accordingly. She testified that she is the one who bought **Plot 1160 Kiganjo** and then later transferred the same to her two sons, and as such does not form part of the deceased's property. And is not available for distribution.

8. **NJENGA WA MBIRU (PW3)** adopted his witness statement and further stated that he is a neighbor to the parties herein and that when the deceased became sick, the two widows took over control of **Nembu Plot 1509**. He contended that the land tribunal had ordered both of the widows to pay rates. He denied that the plot should exclusively devolve upon the first widow, Margaret.

9. **BETH WANJIRU NJUGUNA (DW1)** is the daughter of Margaret Nyambura Kamau. She testified that Nembu Plot 1509 was assigned to her mother Margaret and that there was an exchange between the widows regarding **Plot 1160** and **1150** as a result of which Plot 1160 belonged to her mother while plot 1150 went to Joyce Wanja because her sons had already built their homes thereon. In cross-examination, she stated that the plot at Nembu is used by both widows and that they collect rent therefrom. She admitted that Plot 1160 was not included in the Petition and that the land buying company declined to effect the amended decree until determination of this dispute.

10. The court has considered the evidence by the parties. The twin issues for determination relate to two properties, namely, plot **LR. Kiganjo/Nembu/1509** and plot **No.1160 Kiganjo Location ranching Company Ltd (Thika Municipality Block 30/1160)**. Whether the former ought to devolve exclusively to the first widow (house of Margaret Nyambura Kamau) and regarding the latter, whether it forms part of the estate of the deceased, and how it ought to be distributed. **Plot No 1160** was not among the listed assets of the deceased contained in the Petition. According to the protestor/administrator **Beth Wanjiru Njuguna**, this plot was the property of the deceased and was to devolve upon her mother while the 2nd house of **Joyce Wanja** took the plot **No. 1150 (Juja/Juja East Block 1/1030)** where her sons had already built their homes.

11. Although **Joyce Wanja** who testified as **PW2** asserted that she bought **plot 1160** from her own funds, she did not tender any evidence in proof of the fact, and was hard pressed to explain why she was contented with the amended decree in Land Tribunal (DO's Case No.60 of 2017) by which she was required to hand over **plot 1160** to the first wife while taking for herself **plot 1150** which her sons have admittedly developed. Whereas, the legal validity of the amended decree is questionable given the proper jurisdiction of the Land Dispute Tribunals when they existed, what can be gathered from the evidence of the parties is that there were two plots, i.e. **No.1160** and **1150** in respect of which the deceased had filed a suit against the land buying company called Kiganjo Location Ranching Company.

12. In her evidence, **PW2** came close to admitting that both plots were owned by the deceased and that she got involved in the case because she was apprehensive that the first family wanted to take both plots exclusively. Her son, the first administrator, Joseph Maganjo Kamau (**PW1**) in his Further affidavit filed on 30.11.17 annexed a letter purportedly from Kiganjo Location Ranching Company (annexure JMK) to the effect that the **plot 1160** belonged to his brothers **David Mbugua** and **Daniel Kabue**. The letter had no supporting document, not even share certificate or receipt copies. It has a barely legible letter head and does not attach a copy of the alleged company records referred to therein.

13. In her evidence **PW2**, though unable to tender any evidence of purchase or ownership in her name stated that she had transferred the **plot 1160** to her said two sons. Looking at the entire evidence of **PW1** and his mother **PW2**, the annexure JMK, the court was not persuaded that **PW2** was the owner of this plot as she asserted. On a balance of probabilities, it appeared more likely that both the plots **1160** and **1150** were the property of the deceased and admittedly the 2nd house took possession of and developed **plot 1150**. That there was a dispute over the said plots between the two houses and the deceased and land company, which the Land Tribunal purported to resolve, giving rise to the amended decree The protestor's evidence confirms this.

14. The 2nd house having benefitted from the **plot No. 1150** cannot, in absence of any evidence of separate ownership also benefit from the second **plot No.1160**. The court finds therefore that **plot No.1160** indeed formed part of the estate of the deceased and that **PW2's** family somehow managed to maintain a hold over it, even after being assigned plot **No.1150** by the deceased. The deceased was a polygamous man and his free estate must be distributed in accordance with the provisions of Section 40 of the Laws of succession Act. As **plot No. 1150** has already devolved, through a consent, upon the 2nd family, the 1st family is entitled to benefit from **plot 1160**.

15. According to the chief's letter in the Petition and the Petition, the first house had the following beneficiaries:

1. Margret Nyambura Kamau - widow
2. Mary Wangui Karanja - child
3. George Ndichu Kamau - child
4. Agnes Mugure Kangi - child
5. Nancy Waithira Kageche - child
6. Lucy Wanjiku Njoroge - child
7. Beth Wanjiru Njuguna - child
8. Simon Ngeru Kamau - child
9. Joyce Njoki Kamau - child

With the exception of beneficiary No.6 who had already received a gift

inter vivos (Juja/Juja East/Block 1/1175, the remaining 8 will share equal units/shares in the plot No.1160.

16. The sole question to be determined in respect of plot **Kiganjo/Nembu/1509** is distribution. There was strong evidence on both sides that the two widows had, even prior to the death of the deceased been collecting rents from different units developed on the said plot. **PW2** claimed to have developed the plot but tendered no evidence to that effect. She appeared content to share the said plot with the 2nd house. As for the protestor, her position that the amended decree attached to her affidavit contained the wishes of the deceased was difficult to sustain. The legal validity of the amended decree is doubtful and it is not a will. Nor can it override the provisions of Section 40 of the Law of Succession Act.

The second house has the following beneficiaries;

1. Joyce Wanja Kamau - widow
2. Margaret Waithera Chege - child
3. John Kungu Chege - child
4. David Mbugua Chege - child
5. Mary Wangui Mwangi - child
6. Jane Waithira Kamau - child
7. Joseph Maganjo Kamau - child
8. Peter Gatungu Kamau - child
9. Pauline Wambui Kamau - child
10. Samuel Thong'o Kaamau - child
11. Daniel Kabui Kamau - child
12. Beth Wanjiru Kamau - child

17. Nembu Plot No. 1509 is just over half an acre (0.625 acres) I direct that the said parcel be divided into two halves between the 1st and 2nd houses. The evidence adduced suggests that the two widows have been collecting rent from the units develop thereon. The court directs that the two widows Margaret Nyambura Kamau (1st house) and Joyce Wanja Kamau (2ND house) will hold a life interest of the respective share of their houses, and upon their demise, such share will devolve upon their respective children or if dead, the children's children who survive them.

18. The following beneficiaries who have already benefited from other bequests and/or consent assignment will be excluded from sharing in the Nembu plot upon the demise of their respective mothers:

Excluded in 1st house

1. Lucy Wanjiku Njoroge.

Excluded in 2nd House

1. John Kungu Chege
2. David Mbugua Chege
3. Peter Gatungu Kamau
4. Joseph Maganjo Kamau
5. Samuel Thiong'o Kamau
6. Daniel Kabue kamau

19. With regard to the 2nd house therefore, only the five daughters of the deceased or if deceased, their surviving children, will inherit shares of their house portion of **Nembu plot 1509** upon the demise of their mother **Joyce Wanja Kamau**. In the first house their share of **Nembu plot 1509** will upon the demise of their mother **Margaret Nyambura Kamau** devolve upon the beneficiaries below or if they are deceased, their children who survive them:

1. Mary Wangui Karanja
2. George Ndicho Kamau
3. Agnes Mugure Kungu
4. Nancy Waithera Kageche
5. Beth Wanjiru Njuguna
6. Simon Njeru Kamau
7. Joyce Njoki Kamau

20. For the avoidance of doubt, with regard to the consent recorded in respect of **KIGANJO/NEMBU/1240 (1.40 Ha)**, upon the determination of the life interest of the two widows in the half share assigned to each respective house, all the children surviving the widows or if deceased, their surviving children will share equally the agreed half share that devolves upon each house by virtue of the consent recorded on 25th September 2018. The grant is confirmed in these terms.

Parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 6TH DAY OF FEBRUARY 2020

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C. MEOLI

JUDGE

In the presence of:

Mr. Khisa holding brief for Mr. Mboha for Protestor

Applicant – No Appearance

Court Assistant - Kevin