REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 650 OF 2008

(IN THE MATTER OF THE ESTATE OF ROWLAND GAKUO KABIRO)

1. JOHN MAINA GAKUO

2. RACHAEL WAMBUI GAKUO.....APPLICANTS

-VERSUS-

VERONICA WANJIKU GAKUO.....PROTESTER

JUDGMENT

Rowland Gakuo Kabiro died intestate on 14 August 2004; he was domiciled in the Republic of Kenya and he hailed from Gikoe sub-location in Nyeri County which was also his last known place of residence.

Two of the deceased's three wives survived him and they, together with one of his children in the first house, petitioned for grant of letters of administration intestate on 24 November 2008. It would appear his first wife either predeceased him or died before the petition was filed.

The two surviving wives are the 2nd applicant and the protester respectively while the 1st applicant is the deceased's son from the first house. They listed twelve other children distributed among the three houses as having survived the deceased. The assets comprising the deceased's estate were listed as Title No. Gilgil/Karunga Block2/235 (Chokoreria) measuring approximately 4.07 hectares or 11.03 acres, Title No. Gilgil/Karunga Block2/236 (Chokoreria) measuring approximately 8.758 hectares or 23.74 acres and Title No. Gilgil/Karunga Block3/130(Chokoreria) measuring 0.7859 hectares or 2.13 acres.

The grant of letters of administration intestate was made in the joint names of the petitioners on 30 December 2009 but it was not until 27 September 2018, nine years later, that the summons for confirmation of grant was filed. And this was after the grant had even been revoked by the court for failure to take the necessary steps to have it confirmed within one year or such other reasonable period that the court could have granted after the grant was made.

The applicants took the initiative and filed the summons; in the affidavit in support of the summons, they proposed to share out the deceased's estate as follows:

1. **Title No. Gilgil/Karunga Block2/235**

Veronica Wanjiku Gakuo to get 2.29 acres

John Maina Gakuo to get 8.74 acres

2**. Title No. Gilgil/Karunga Block/236**

Veronica Wanjiku Gakuo to get 12.71 acres

Rachael Wambui Gakuo to get 11.03 acres

3**. Title No. Mahiga/Munyange/16**

John Maina Gakuo to get the entire two (2) acres

4. **Title No. Gilgil/Karunga Block 3/160** (measuring 0.7859 hectares or approximately 2.13 acres)

The entire parcel devolves upon Rachael Wambui Gakuo.

It is noted that the hectares were mistakenly converted at 2.74 acres for an hectare instead of 2.47 acres.

The protester was against this proposed scheme of distribution and therefore she filed an affidavit of protest on 15 March 2019. In it she contended that she had six children with the deceased whom she named as:

(i) Mary Wanjugu Gakuo

(ii) Joseph Kabiro Gakuo

(iii) Joseph Muchiri Gakuo

(iv) Tabitha Wanjiru Gakuo

(v) Rachael Wanja Gakuo

(vi) Esther Wangui Gakuo

She also deposed that the deceased had settled each of his three wives on their respective parcels of land which they should retain as their respective shares of the estate. In particular, the 1st house has all along been settled on Title No. Mahiga/Munyange/16 where he deceased was buried while the 2nd house is settled on Title No. Gilgil/Karunga Block 3/160. As for her, she is settled on Title No. Gilgil/Karunga Block 2/235

This is the narrative she carried forward when her protest came up for hearing. It was her evidence that Title No. Gilgil/Karunga Block2/235 (Chokoreria) and Title No. Gilgil/Karunga Block2/236 (Chokoreria) are together and that she resides on both of these parcels. She started living there in 1983.

She stated that she was married in 1976; by then she had one child, Esther Wangoi. Early in their marriage, she lived at Chokoreria with the deceased in a rental plot. She, however, acknowledged that the deceased purchased the two parcels of land in Gilgil in 1973, before she was married. She further testified that, Title No. Mahiga/Munyange/16, which is the land on which the deceased and his first wife were buried belonged to her father-in-law, that is the father to her husband.

The protester also admitted that a family meeting was held at her home in Gilgil after the deceased's death apparently over the distribution of his estate but denied that a similar meeting was held in Nyeri. She also admitted that there was a plot in Chokoreria which she identified as Plot No. 352 which the deceased transferred to her in his lifetime.

The protester's first-born child, Esther Wangui, testified that contrary to her mother's allegations, she was aware that the deceased wanted his properties shared out equally amongst his three wives. Further, it is not true that the deceased had allocated each of his wives any specific land. She conceded that part of the land in Gilgil is rocky and not fit for agricultural purposes but supported the applicant's summons for confirmation of grant.

The first applicant testified that his mother was the deceased's first wife. He stated that after the deceased's burial there was a family meeting at his home in Munyange where it was agreed that the protester keeps all the title documents to the deceased's estate. The same family also met at Chokoreria where the subject of distribution of the deceased's estate was discussed. In that meeting it was agreed that the estate be distributed equally. Like the protestor's daughter he admitted that part of the land at Gilgil was rocky.

Similarly, the second applicant testified that the deceased did not distribute his property in his lifetime. It was her evidence that she lives in Karunga on one of the parcels.

What emerges from the evidence of both the applicants and protester is that the basic facts are not in dispute; for instance, it is not in dispute that the deceased was polygamous, having been married to three wives; the number of children in each of these houses is also not in dispute and; finally, the extent of his estate is too not in dispute. The primary question and which is the main point of contention is this: which is the most suited scheme for distribution of the deceased's estate amongst his three houses or his survivors?

Considering that the deceased was polygamous, the answer to this question ought to be found in section 40 of the Law of Succession Act, cap. 160 that caters for such circumstances; it reads as follows:

> ***40. (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.***
>
> ***(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.***

I have always found the decision of the Court of Appeal in the **Eldoret Civil Appeal No. 66 of 2002, Mary Rono versus Jane Rono & William Rono (2005) eKLR** to be a good guide in interpretation of this particular provision of the law.

Like in the present case, the deceased in the *Rono case* was polygamous; to be precise, he had two houses and the primary issue before court was the distribution of the estate between them. The learned counsel for the appellant argued that each of the two houses should share the estate's assets and the liabilities in equal measure. The respondents' learned counsel, on the other hand, was of the opinion that the first house should get a larger share of the estate considering, amongst other factors, that it contributed more to the acquisition of the estate.

Waki, J.A. who read leading judgment said:

> ***"I think, in the circumstances of this case there is a considerable force in the argument by Mr Gicheru (for the appellant) that the estate of the deceased ought to have been distributed more equitably taking into account all relevant factors and the available legal provisions. I now take all that into account and come to the conclusion that the distribution of the land, which is the issue falling for determination must be set aside and substituted with an order that the net estate of 192 acres of land be shared out as follows: -***
>
> ***a. Two (2) acres for the farm house now commonly occupied by all members of the family be held in trust by the joint administrators of the estate;***
>
> ***b. Thirty (30) acres to the first widow, Jane Toroitich Rono***
>
> ***c. Thirty (30) acres to the second widow, Mary Toroitich Rono***
>
> ***d. Fourteen decimal four (14.44) acres to each of the nine children of the deceased."***

Although the learned judge appeared to agree with the argument by the learned counsel for the appellant that the estate should be shared out ***equally,*** he nevertheless stated that the estate ***"ought to have been distributed more equitably…"*** and proceeded to do exactly that ***"taking into account all relevant factors and the available legal provisions."***

Omolo, J.A. agreed with Waki, J.A. but still proceeded to discount any notion that the estate ought to have been distributed in equal shares for the simple reason that there is no such requirement under the Act. In his own words, the learned judge stated as follows:

> ***"I had the advantage of reading in draft form the judgment prepared by Waki, J.A., and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned Judge to be laying down any principle of law that the Law of Succession Act, cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr Gicheru. I can find no such provision in the Act."***

The learned judge invoked **section 40(1)** and said of it as follows: -

> ***"My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has discretion to take into account the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.***
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> ***Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in a case of young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality."***

Thus, the notion of equality of shares amongst the houses or the children, is not the decisive factor in the distribution of a net intestate estate in a polygamous family set-up; rather, it is equity, fairness and, ultimately the discretion of the court that count; exercise of that discretion in any particular way will, of course, take into account those factors that have been expressly specified in section 40(1) as necessary and, no doubt, the peculiar circumstances of each particular case. It does not, therefore, always follow that the house with the largest number of children will, as a matter of course, be entitled to the lion's share of the estate.

Turning back to the present case, the first wife is deceased but there are four children in that house; they have been named as:

(i) John Maina Gakuo

(ii) Lydia Wangui Wangara

(iii) Shelmith Wanjiru Gakuo

(iv) Lucy Wamucii Gakuo

In the second house we have the deceased's widow Rachael Wambui Gakuo and the following children:

(i) Joseph Karuri Gakuo

(ii) Mary Wanjiku Gakuo

The protestor, of course, is the widow in the third house and she named her children as follows:

(i) Mary Wanjugu Gakuo

(ii) John Kabiro Gakuo

(iii) Joseph Muchiri Gakuo

(iv) Tabitha Wanjiru Gakuo

(v) Rachael Wanja Gakuo

(vi) Esther Wangui Gakuo

It is obvious that the protester's house has the greatest number of children and therefore if the number of children in each house was the decisive factor, her house would obviously be entitled to the largest share of the estate. But for the reasons given, children in each house is only one of the factors to be taken into account; in exercise of its discretion the court has to consider such other factors as are relevant.

As far as the present case is concerned, such factors would include the time when the assets that now comprise the deceased's estate was acquired and the fact that the families are settled on particular estates. Going by the protestor's own evidence, she was also a beneficiary of an inter vivos transfer of what she described as plot No. 352, apparently in Gilgil and this should also count. Besides these factors, the court is enjoined to consider also those factors prescribed in section 41(1) of the Act.

The protester conceded that the properties now comprising the deceased's estate were acquired before she got married to him and therefore none of them could possibly have been acquired specifically for her exclusive benefit; to be precise, it was her evidence that the Gilgil properties were acquired three years before she was married. If they were acquired during the first and second widows' marriage to the deceased, and there was no evidence to the contrary, the contribution of the first and second houses in their acquisition cannot be ignored. I gather the Munyange property, where the deceased and his first wife were buried, was part of the ancestral land and the deceased acquired it by transmission.

When I consider all these factors, I am persuaded that the scheme proposed by the applicants is the most fair and equitable in the distribution of the deceased's estate. According to this scheme, the cumulative share of the protestor's house is approximately 13.90 acres; the first house's share is 9.68 acres and the second house's share is 12. 05 acres.

Going by acreage the protestor's share would still get more than what the rest of the houses are getting. As a matter of fact, the protestor has not alleged any bias or unfair advantage if the estate is distributed as suggested by the applicants. Her case is simply that the deceased had divided his properties prior to his death and that each house is not entitled to anything more than what they are settled on. In other words, each house should retain whatever they have. To the protester, it does not matter that the first and second houses will only get 2 acres and 1.39 acres respectively while the protester herself will have 31.68 acres if her proposal is adopted.

The problem with the protestor's scheme is first, based on unfounded allegation of fact; while she says that it was the deceased's wishes that the estate should be distributed as proposed, there is no evidence that the deceased had expressed his wishes of how he wanted his estate to be distributed. If there was such a wish, the protester was bound to petition for testate succession or for grant of probate or for grant of letters of administration with a will annexed, whether written or oral.

Her case is also self-defeatist because the grant in which she is a co-administratrix is for letters of administration intestate. It is worth noting that her own daughter does not agree with her proposed scheme of distribution but instead favours the scheme proposed by the applicants. In short, she has not provided any evidence why the estate should not be shared out either equally or equitably.

In the final analysis, I hold that there is no merit in the protestor's protest and the same is dismissed. I allow the applicants' summons for confirmation of grant and order the deceased's estate to be distributed as follows:

1. **Title No. Gilgil/Karunga Block2/235**

Veronica Wanjiku Gakuo to get 2.37 acres (subject to life interest)

John Maina Gakuo to get 7.68 acres

2**. Title No. Gilgil/Karunga Block/236**

Veronica Wanjiku Gakuo to get 11.52 acres (subject to life interest)

Rachael Wambui Gakuo to get 10.11 acres (subject to life interest)

3**. Title No. Mahiga/Munyange/16**

John Maina Gakuo to get the entire two (2) acres

4. **Title No. Gilgil/Karunga Block 3/160** (measuring 0.7859 hectares or approximately 1.94 acres) to devolve upon Rachael Wambui Gakuo subject to live interest.

The grant is confirmed in the forgoing terms. Being a family dispute, parties will bear their respective costs. It is so ordered.

Signed, dated and delivered this 4th day of May 2020

Ngaah Jairus

JUDGE