



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 561 OF 2008

IN THE MATTER OF THE ESTATE OF THE LATE PETERSON NJOGU WARUI (DECEASED)

TERESA GATHONI NJOGU.....PETITIONER/ PROTESTOR

VERSUS

MARGARET MWIHAKI NJOGU.....PETITIONER/RESPONDENT

RULING

FACTS

1. The estate relates to the late Peterson Njogu Warui (deceased) who died on the 5th April, 2003; the identifiable properties and assets comprising the estate of the deceased are as follows;

- (i) Othaya/ Ihuririo/412
- (ii) Ihuririo Market Plot No.28
- (iii) Naromoru/Block II Muriru/1030
- (iv) EuasoNyiro/ Suguroi Block I/1054
- (v) Magutu/Gatei/769
- (vi) Muriru Centre No.1030

2. The petitioner known as Teresa Gathoni Njogu (**'Teresa'**) had originally singularly petitioned for Letters of Administration in the lower court at Karatina; on the 14/10/2008 upon it being established that the value of the property exceeded the sum of Kshs.100,000 the cause was transferred to the High Court Nyeri due to want of jurisdiction; thereafter a **Grant of Letters of Administration Intestate** was issued to Teresa and the respondent on the 27/01/2009 as joint administrators to the deceased's estate;

3. On the 28/07/2009 the respondent (**'Margaret'**) filed an application for the Confirmation of the Grant; her proposed mode of distribution was in accordance with her Supporting Affidavit that is annexed to the application; Teresa on her part filed an Affidavit of Protest on the 29/09/2009 and therein set out her proposed mode of distribution;

4. Directions were given on the 27/09/2013 that the hearing of the matter was to proceed by way of oral evidence; as the matter was part heard by Wakiaga J further directions were given on the 11/06/2018 that the proceedings be typed and that the matter proceeds from where it had reached; at the close of the hearing the parties were directed to file and exchange written submissions; hereunder is a summary of their rival claims;

PROTESTOR'S CASE

5. Teresa who is one of the administrators of deceased's estate is the Protestor herein; she testified that she got married to the deceased in the year 1974 under Agikuyu Customary Law and it was later solemnized at the Kigumo Catholic Church in the year 1997; she stated that she was the only recognized wife of the deceased and their union was blessed with seven (7) children; her matrimonial home was constructed in 1976 on the property known as Othaya/Ihuririo/412 which measured approximately six (6) acres and she has resided thereon ever since;

6. Before his demise the deceased had given her the properties listed in a book which was produced as **'PEXh.1'**; one of such properties

being the one known as Narumoru/Mureru Block 2/1030 measuring ten acres which was currently occupied and utilized by her son named David Warui Njogu; the other being Plot Ihuririo No.28 which had a shop constructed thereon; she testified as to being the one who had constructed the shop;

7. Under cross-examination she stated that she had gotten married to the deceased in 1974 and dowry had been paid and later the marriage was solemnized in church; she did not know whether the deceased had married Margaret who was a stranger to her; the deceased had never mentioned to her that he had another wife and being the legally wedded wife of the deceased she was unwilling to share the properties with Margaret;

8. The protestor seeks to distribute the estate of the deceased to herself and to her children and is opposed to her co-petitioner's mode of distribution and stated that as the only spouse she was only one together with her children who were entitled to share the estate of the deceased;

9. To support her the protest she called two witnesses; Felix Thuku Wachira (**PW2**) who was a retired Assistant Area Chief stated in his evidence that he was a native of the area and had been the assistant area chief from 1990 a position he held for 14 years; he had known the deceased for a period exceeding twenty (20) years and that they were friends; the deceased was a retired civil servant and had been resident in the sub-location; had owned land there which had 2000 to 3000 tea bushes; he also carried on business;

10. He confirmed that the deceased had only one wife known as Teresa who hailed from the neighbouring sub-location; he got to meet her in 1980 whilst working as a clerk in the chief's office; he had never heard the deceased mention the name of the respondent nor had the deceased ever mentioned that he had another wife; he knew that the deceased had seven (7) children with the protestor and was not aware of any other children;

11. He recalled that the deceased and the protestor were married under customary law and later formalized their marriage through a church wedding 23/08/1997; he attended the wedding and had also attended the deceased's funeral where he was even called upon to make a speech; and produced the Funeral Program ('**PExh.2**') which contained the Eulogy.

12. When cross-examined he stated that he was not aware of the Karatina Succession Cause nor of the appointment of the respondent as a joint administrator; despite having read the affidavit of protest and the attached mode of distribution he still maintained that the respondent was a stranger and the deceased's property should not be gifted to a stranger and that the protestors mode of distribution should be followed;

13. David Mwangi Ndirangu (**PW3**) stated that he was a clan elder and hailed from Ihuririo Sub location; he had known the deceased for more than 20 years; that the deceased had only one wife known as Teresa whom he had married under customary law and later converted it to a Christian marriage at CCM Kigumo Catholic Church;

14. That he was the deceased's confidante and was not aware that the deceased had any other wife apart from Teresa; under cross-examination he stated that he did know the respondent; he did not know where the succession cause had started; he did not know the contents of the chief's letter nor did he have anything to say that contradicted the mode of distribution set out in the affidavit of protest; and reiterated that Teresa was the only known wife of the deceased;

15. At the close of her case the protestor urged the court to allow her proposed mode of distribution.

RESPONDENT'S CASE

16. In response the respondent opposed the protest and stated that she got married to the deceased in 1964 under customary law and that she and the deceased had both resided and both were teachers at the Othaya Approved School; and they were blessed with five (5) children;

17. In 1968 they purchased the land known as Othaya/ Ihuririo/412 measuring 2.43 hectares which translates to approximately six (6) acres; the title was registered in the deceased's name; she produced a copy of the Certificate of Title and it was marked as '**DExh.2**' and the Certificate of Official Search was marked as '**DExh.1**'; with the help of her brother and a labourer she planted 16,000 tea bushes on this parcel of land and the tea had good income particularly the bonus; she had supervised the construction of a permanent house with seven bedrooms on the contentious property; the plot in the market was a commercial property and it had five rooms and the business operating thereon was a Bar; they had also purchased the properties known as Narumoru/Mureru/Block.2/1030 and Sugoroi/Block 1054 copies of the titles were produced and marked as '**DExh.3**' and '**DExh.4**' respectively; the Magutu property '**DExh.5**' was ancestral land;

18. The respondent claimed that the protestor came into her life in 1976; she came as a labourer and later become a wife and the deceased had also informed her about her co-wife but had never briefed her on either the customary law marriage nor of the church wedding;

19. The deceased collapsed and died in April, 2003 and though she had been duly informed she was unable to attend the funeral due to the hostility that existed between her and the deceased's family; later she filed a succession cause at the Eldoret High Court whereas the protestor filed another one in the Karatina Court; the parties agreed to have both causes transferred to Nyeri High Court and on the 17/01/2009 both the protestor and the respondent were appointed as joint administrators;

20. On 27/07/2009 she proceeded to file an application for the confirmation of the grant and the co-administrator being opposed to the proposed mode of distribution filed the instant protest; her contention was that the respondent's proposed mode of distribution was unfair and her prayer was that the protest be dismissed and that the deceased's estate be distributed as set out in her summons general;

ISSUES FOR DETERMINATION

21. After hearing and reading the rival written submissions this court has framed the following issues for determination;

- (i) Whether the respondent and her children are entitled to benefit from the estate of the deceased;
- (ii) Distribution of the Deceased's estate

ANALYSIS

Whether the respondent and her children are entitled to benefit from the estate of the deceased;

22. The protestor and her witnesses all stated in their testimonies under oath that the deceased had only one spouse who was Teresa; the evidence of Teresa is that of denial yet in her Affidavit of Protest dated 29/09/2009 which is also made under oath she acknowledges and describes Margaret therein as a widow of the deceased; therefore, this court has difficulty in believing the evidence of the protestor, Teresa, that she did not know of the respondent's association with the deceased;

23. Further, the court record reflects that the two litigants entered into a Consent on the 27/01/2009 where by the two consented to being appointed as joint administrators of the deceased's estate; in the light of the averment in the Affidavit of Protest and in the absence of an order setting aside the consent order and/or an application for the Revocation of the consequential Grant the protestor is stopped from denying that the respondent was a co-wife and a surviving spouse of the deceased;

24. For the foregoing reasons this court finds that the respondent is indeed a spouse and entitled to benefit together with her children from the estate of the deceased.

Distribution of the Deceased's estate

25. The court record reflects that prior to entering into the consent dated 27/01/2009 the parties had indicated to the court that the only issue that was left for determination was the manner of the sharing of the deceased's estate; when adopting the consent the court directed that either of the administrators was at liberty to file an application for the confirmation of the Grant; and gave them a deadline of six (6) months for the application to be filed;

26. The respondent initiated the process by filing an application for confirmation and in her Supporting Affidavit proposed her mode of distribution; Teresa being dissatisfied with her co-administrator's proposed mode of distribution filed the instant protest and when testifying stated that being the only legitimate spouse she was the only one entitled together with her children to benefit from the whole of the deceased's estate;

27. Starting with the issue of beneficiaries to the deceased's estate; the protestor and the respondent in their respective affidavits have listed all themselves and all the twelve (12) surviving children of the deceased; this court reiterates that the protestor is bound by her pleadings and again cannot be heard to disown the respondent's children whom she has listed and described as surviving the deceased in her Affidavit of Protest; therefore this issue is settled;

28. As for the list of the assets comprising the deceased's estate the respondent it is noted had listed all the properties in her Supporting Affidavit; when testifying she came out as a more superior and knowledgeable witness; she knew when and how the properties were purchased and was apparently also the custodian of all of the title documents pertaining to the deceased's estate which she produced as exhibits; whereas the protestor it is noted from the court record that when petitioning for the Letters of Administration had only listed one property namely Othaya/Ihururio/412 in the assets section on the P&A5 Form; her testimony and that of her witnesses was also devoid of knowledge and facts pertaining to how the properties were obtained by the deceased;

29. Therefore, from the respondent's evidence this court has been able to glean and compile a list of the properties that comprise the estate of the deceased; which properties are as set out hereunder;

- (i) Narumoru/Mureru Block 2/1030 – 8 HA-
- (ii) Plot at Ngomongo Nairobi –
- (iii) Nairigia Ngare – 4 acres –
- (iv) Euaso Nyiro Suguroi Block 1/1054 -1.5 HA
- (v) Othaya/Ihururio/412 – 2.4 HA
- (vi) Plot No.28 Ihuririo Market
- (vii) Magutu/Gatei/769
- (viii) Pension Scheme

30. This court has had occasion to compare the parties' proposed mode of distribution and finds that there is a partial consensus in the mode

of distribution of some of the properties which are as listed hereunder;

- (i) Narumoru/Mureru Block 2/1030 – 8 hectares- Teresa Gathoni Njogu - Absolutely
- (ii) Plot at Ngomongo Nairobi – Teresa Gathoni Njogu - Absolutely
- (iii) Nairigia Ngare – 4 acres –Teresa Gathoni Njogu - Absolutely
- (iv) Euaso Nyiro Suguroi Block 1/1054 -1.5 hectares –Margaret MwihakiNjogu – Absolutely.

31. The parties agreed mode of distribution for the above-mentioned properties shall therefore be adopted by the court;

32. Having satisfied itself that the deceased died intestate and was polygamous; and also having satisfied itself from the facts adduced that at the time of his demise the deceased was survived by two (2) widows and twelve (12) children; this translates into two (2) house holds; the court shall thus apply the provisions of Section 40 of the Law of Succession Act towards the distribution of the remainder of the properties;

33. Section 40 reads as follows;

“Where an interstate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate 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.”

34. This court is guided by the Court of Appeal decision of **Rono vs Rono and Anor (2005) 1 EA 363**; where it was held that the estate of a polygamous deceased should be distributed according to the number of children and not the number of houses.

35. The first house is found to comprise of five (5) family members and the respondent being the extra unit which translates to six (6) units; the second house comprises of seven (7) members and the protestor being the extra unit bringing the total to eight (8) units; the ratio of distribution is therefore determined to be 6/14 for the first house and 8/14 for the second house;

36. These are the ratios that are found to be applicable in distributing the remaining properties that comprise the estate of the deceased; the properties are as listed hereunder;

- (i) Othaya/Ihururio/412 – 2.4 HA
- (ii) Plot No.28 Ihururio Market
- (iii) Magutu/Gatei/769

37. As for the Pension Scheme any monies that are still due and payable shall be divided between the two (2) spouses in equal shares.

FINDINGS AND DETERMINATION

38. For the afore-going reasons this court makes the following findings and determinations;

- (i) This court finds that the respondent was a spouse to the deceased; and finds that the respondent and her children are entitled to benefit from the estate of the deceased;
- (i) The mode of distribution in the Protest is found to be unfair and lacking in merit and it is hereby disallowed;
- (ii) The estate of the deceased shall be distributed in the terms as set out in paragraphs30, 31,35, 36 and 37hereinabove; and the Grant is hereby confirmed accordingly;
- (iii) Parties at liberty to apply;
- (iv) Each party shall bear their own costs.

It is so ordered.

Dated, Signed and Delivered Electronically due to the Pandemic (Covid19) at Nyeri this 15th day of October, 2020.

HON. A. MSHILA

JUDGE