



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**SUCCESSION CAUSE NO. 36 OF 2013**

**IN THE MATTER OF THE ESTATE OF WILFRED MUNENE NGUMI.. DCD**

**LOISE WAIRIMU MUNENE..... PETITIONER**

**V E R S U S**

**PASQUELINA WANJIRU MUNENE.....1<sup>ST</sup> CITEE**

**JUDITH WAMBUI MUNENE.....2<sup>ND</sup> CITEE**

**JUDGMENT**

1. This matter relates to the estate of Wilfred Munene Ngumi (deceased) who died on 27/12/2006.
2. The petitioners Loise Wairimu Munene and David Mwaniki Munene applied for Grant of Letters of Administration intestate in the estate of Wilfred Munene Ngumi (deceased) which they were granted on 25/07/2014. The petitioners applied for confirmation of grant on 08/05/2015 stating that the deceased left behind 3 widows (Pasquelina Wanjiru Munene, Loise Wairimu Munene and Judith Wangui Munene), nine sons (one of whom is deceased) and 12 daughters. They proposed that the deceased's estate be shared as hereunder;

**A). Land Parcel No. Kirinyaga/Gathigiriri/277**

- a. 5.544 Ha be registered under Pasquelina Wanjiru Munene to hold in trust for herself and the children of the 1<sup>st</sup> house.
- b. 3.536 Ha be registered under Loise Wairimu Munene to hold in trust for herself and the children of the 2<sup>nd</sup> house.
- c. 2.52 Ha be registered under Judith Wangui Munene to hold in trust for herself and the children of the 3<sup>rd</sup> house.

**B) Plot No. 14 Wang'uru market**

3. Be jointly registered in the names of Pasquelina Wanjiru Munene, Loise Wairimu Munene and Judith Wangui Munene in equal shares.

**1. Plot No. B391 Wang'uru market**

4. Be jointly registered in the names of Pasquelina Wanjiru Munene, Loise Wairimu Munene and Judith Wangui Munene in equal shares.

**Protestors' case**

The protestors Pasquelina Wanjiru Munene and Judith Wangui Munene proceeded to file an affidavit in protest on 19/10/2015. They stated that the petitioners did not consult them during filing of the application for confirmation of grant. That before the demise of the deceased, he had sub-divided the land to all his children and wives as follows;

**1. Land Parcel No. Kirinyaga/Gathigiriri/277**

He had left a Will that each of his sons to get 2 acres and the widows to get 2 acres each.

**2. Plot No. 14 and B391 Wang'uru market**

They were left to all members of the family who are entitled to benefit from the same.

5. During the hearing, the protestor Judith Wangui Munene testified that Pasquelina Wanjiru Munene had 10 children, Loise Wairimu Munene had 6 children and Judith Wangui Munene had 5 children. She did not know about **Plot No. 14 and B391 Wang'uru** only **Plot No. 67 Wang'uru** which the deceased had sold ½ portion. She indicated that there was also **Plot No. 25** but she did not have the documents. That the land in dispute is for the widows and the deceased since the sons were shown their portions.

6. The petitioner Loise Wairimu testified that the deceased had not distributed the land but had only shown the children where to cultivate and build. She proposed that the land be shared equally between the wives and the children. **Plot No. 67** she confirmed the deceased sold ½ share and the remaining share the three widows are using it. **Plot No. 14** is where the deceased used to stay and is used by the 3<sup>rd</sup> wife and proposed it be shared equally between the 3 widows.

#### Annexures;

1. Deceased's Will dated 09/01/2005.
2. Affidavit sworn by the 3 widows on 06/01/2011.
3. Property rates payment request for Plot No. 14 belonging to the deceased.
4. Property rates payment request for Plot No. B391 belonging to the deceased.

#### Issues for determination

##### 1. Whether the Will is valid

**Section 11 of the Law of Succession act** states;

*No written will shall be valid unless—*

*a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;*

*b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;*

*c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.*

7. In this case, though the deceased had signed the Will, the same was not attested by any witnesses therefore the same cannot be considered as a valid Will. The alleged will state how he wished the estate to be distributed. However since the will is not valid the matter will proceed as intestate succession.

##### 2. Distribution

8. The petitioner sought to have the estate be distributed equally among the dependants while the protestor sought to only distribute the 4 acres left for the deceased and sub-division of the widows' portion claiming that the sons had already been given their share. However, she did not adduce any proof that the deceased had distributed the land to his sons during his lifetime and without proof then the deceased's estate should be divided equally among all the units. **Section 40 of the Law of Succession Act** provides:-

***“(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.”***

9. Proof has been adduced that **Plot No. B391 and 14 Wang'uru** belonged to the estate of the deceased. This mode of distribution has been upheld by the Court of Appeal.

#### 10. In **Francis Mwangi Thiong'o & 4 others v Joseph Mwangi Thiong'o [2015] eKLR**

The Court of Appeal in allowing the appeal stated;

Section 40(1) aforesaid states that it is any wife surviving the deceased that would be considered as an additional unit in the number of children.....

**That ground of appeal therefore succeeds as the Judge should have found that the first house had four units and the second, comprising the respondents, had five units. The land should therefore have been subdivided in the first instance along the ratio of 4:5.**

In Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat [2015] eKLR.

The Court of Appeal stated;

**From the consideration of sections 35, 40 and 42 of the Act, the broad principle of law which emerges is that where an intestate was polygamous, the estate, in the first instance, should be divided among the houses according to the number of children in each house adding a surviving wife as an additional unit taking into account any previous benefit to any house.**

11. The estate of the deceased should therefore be distributed as provided under **Section 40 of the Law of Succession Act** that is each house according to the number of children in each house and the wife as an additional unit.

12. The estate of the deceased comprises of the following properties:-

- a). Plot No. 14
- b). Plot No. B391.
- c). Kirinyaga/Gathigiriri/277 measuring approximately 11.6 Ha.

13. The estate shall be distributed as follows:-

Plot No. 14 since it would not be practical to have it distributed to all the beneficiaries, it will be registered in the names of the 3 windows that is Pasquelina Wanjiru Munene, Loise Wairimu Munene and Judith Wambui Munene in equal shares.

14. The same goes for Plot. No. B391 Wang'uru to be registered in the names of the three windows in equal shares.

Plot No. Kirinyaga/Gathigiriri/277 will be distributed equally among the children in each house and the windows(wives) as an additional unit.

15. The grant be confirmed in those terms.

Since this is a dispute involving family members, I make no orders as to costs, each party to bear its own costs.

**Dated at Kerugoya this 8<sup>th</sup> day of March 2019**

**L. W. GITARI**

**JUDGE**

**8/3/19**

Read out in open court.

**L. W. GITARI**

**JUDGE**

**8/3/19**