



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**SUCCESSION CAUSE NO.46 OF 2017**

**(FORMERLY OF NAKURU SUCC.599 OF 2015)**

**IN THE MATTER OF THE ESTATE OF GERALD WAIGWA NDEGWA (DECEASED)**

**A N D –**

**LUCY WANGARI NDEGWA.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**DAVID MWANGI NDEGWA.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**V E R S U S**

**BETH WANGUI WAIGWA.....OBJECTOR/APPLICANT**

**R U L I N G**

The subject matter relates to the estate of Gerald Waigwa Ndegwa (the deceased) who died on 10/8/2001. Lucy Wangari and David Mwangi Ndegwa (the 1<sup>st</sup> and 2<sup>nd</sup> petitioners/respondents) filed this petition for grant of letters of administration. Grant of representation was issued to the respondents on 28/8/2002. Before grant was confirmed, the objector by the notice of objection dated 16/11/2004 opposed the application for confirmation and sought to be recognized as a widow of the deceased. The objector's application was granted on 15/6/2005.

For consideration before me is the summons filed by Beth Wangui Waigwa, the objector, dated 7/7/2014, in which she seeks the following orders:

***(1) That the objector be issued with a grant of letters of administration and a certificate of confirmation thereof in terms of paragraph 10 of her supporting affidavit;***

***(2) That costs of the application be costs in the cause.***

The application is brought pursuant to Section 48 and 71 of the Laws of Succession Act and Rules 40, 49 and 73 of the Probate and Administration Rules.

The application is based on grounds found on the face of the application and the affidavit of the applicant sworn on 7/7/2014.

When the respondents filed this cause on 24/12/2001, they did not include the applicant and her children as beneficiaries of the deceased's estate. As a result, the objector filed objection proceedings on 16/11/2004, the same were heard by way of *viva voce* evidence and on 15/6/2005, the court rendered its ruling upholding the objection in which the objector was recognized as the deceased's wife, and her children beneficiaries to the deceased estate. The respondents appealed the said decision in Nakuru HCA.125/2005 but the same was dismissed vide the court's ruling of 31/3/2010 on grounds that the court's leave had not been sought (Ruling BWW1). No proper appeal was ever filed.

By a summons dated 29/7/2010, the objector moved the court to have LR No.Nyandarua/Olkalou Central/823, which is the only asset comprising the deceased's estate and which had been registered in the name of the 1<sup>st</sup> respondent as absolute owner and later had been subdivided into portions, to be cancelled. The court in its ruling of 17/3/2011 allowed the application (BWW3) and the registration of the 1<sup>st</sup> respondent as proprietor of the deceased's estate was also cancelled. The land reverted to the original owner, that is the deceased.

Following the above history of what has taken place, the objector seeks to be appointed as the administrator of the deceased's estate under

Section 48 and 71 of the Law of Succession Act because the respondents have failed to administer the deceased's estate faithfully. On distribution, she prays that the estate which comprises Nyandarua/Ol Kalou Central/825 be shared equally between her and the 1<sup>st</sup> respondent, who should then hold in trust for their respective houses. The applicants' fear is that if the respondents remain as the administrators, they are unlikely to co-operate in the administration of the estate.

Mr. Gakui Chege, the objector's counsel also filed submissions which he highlighted.

The objection was opposed and the 2<sup>nd</sup> respondent, David Waigwa filed an affidavit of protest dated 27/8/2014 in which he deponed that the grant issued to the respondents on 28/8/2002 is still valid and the court has no jurisdiction to issue two sets of grant of letters of administration; that the grant can only be issued to the objector if the first one is revoked or annulled; that the heirs and beneficiaries of the estate have not consented or renounced their rights to petition for the grant to allow the objector to represent them nor have they consented to the mode of distribution of the estate; that by the time the deceased died on 10/8/2001, the land was already registered in the 1<sup>st</sup> respondent's name which was done on 20/4/1999 as a gift *inter vivos* and the land cannot be subject to succession when the 1<sup>st</sup> respondent is still alive. The 2<sup>nd</sup> respondent also deponed that this court has no jurisdiction to hear this matter and attached a valuation report to his supplementary affidavit to the effect that the land is now valued at 12 million. He urged the court to dismiss the summons.

On 19/11/2019, the 2<sup>nd</sup> respondent filed a notice to act in person as his counsel had applied to cease acting. He therefore appeared in person. In his submissions, he introduced another ground, that in fact the deceased left a will dated 12/6/1981 in which he left the land to five people. He also submitted that his parents wedded on 26/3/1995 and that there is a marriage certificate to that effect.

In reply to the allegation that there exists a will, Mr. Chege urged that the petition indicates that the deceased died intestate and the issue of a will has never arisen nor has any will ever been exhibited.

I have given due consideration to the application, submissions for the objector and the reply by the respondents.

Mr. Chege, counsel for the objector identified the issues for determination and I will add others:

They are:

- (1) Whether the deceased left a will or died intestate;***
- (2) Whether the land had been given to the 1<sup>st</sup> respondent as a gift *intervivos* in 1998;***
- (3) Whether the court has pecuniary jurisdiction to entertain this matter;***
- (4) Whether the land in question formed part of the deceased's estate as of 10/8/2001;***
- (5) Whether the cancellation of the title by the trial court can be reversed through protest proceedings;***
- (6) Whether the objector can be issued with a fresh grant and certificate of confirmation without a revocation of the grant issued to the petitioners;***
- (7) Whether the objector can be issued with a grant without the consent of other heirs or beneficiaries of the deceased's estate;***
- (8) How should the deceased's estate be distributed;***
- (9) Who is liable to pay the costs.***

***Whether the deceased left a will or died intestate:***

The petition for letters of administration and the affidavit filed in court on 24/12/2001, when the respondents petitioned the court for letters of administration for the deceased's estate clearly indicate that the deceased died intestate. Probate and Administration Forms 80 and 5 are evidence of that.

Besides, the allegation that the deceased left a will had never arisen till the submissions by the 2<sup>nd</sup> respondent. If the deceased had left a will, the petition would have indicated so and the will would have been exhibited. Even as the 2<sup>nd</sup> respondent alleges that the deceased left a will, he did not exhibit any. There is totally no evidence to support the 2<sup>nd</sup> respondent's contention and the same is untenable. The deceased died intestate.

The 2<sup>nd</sup> respondent also alleged in his submissions that the land, the subject of these proceedings Nyandarua/Ol Kalou Central/825 had been transferred to the 1<sup>st</sup> respondent well before the deceased died on 10/8/2001; that it was transferred to the 1<sup>st</sup> respondent on 20/4/1999 and that it had been registered in the 1<sup>st</sup> respondent's name.

Firstly, it is the respondents who filed this petition and listed the suit land as the only property of the deceased in form P & A.5. I do agree with the objector's submission that the respondents are bound by their pleadings as indeed that is the law.

In addition to the above, the objector annexed to their affidavit in support of this application the green card (BWW3) which shows that the deceased, Gerald Waigwa was registered as the owner of the land on 28/5/1990 and this is the title that the respondents submitted when they filed this petition. I have seen an entry dated 20/4/1999, that the land was transferred to Lucy Wangari Waigwa and the title was not issued till 8/8/2007. The letter that the respondent filed in court with the petition dated 1/11/2001 indicated that the deceased was the registered owner of the land. The Chief's letter introducing the respondents to court also indicated the said land was the only property forming the deceased's estate. In fact, throughout the proceedings, in this court, the respondent never raised the issue that the said land had been given to the 1<sup>st</sup> respondent as a gift.

This contention comes late in the day and sharply contradicts the respondent's own pleadings and evidence on record. Earlier, by the application dated 29/7/2010, the objector applied to have the registration of the 1<sup>st</sup> respondent as absolute proprietor of the suit land be cancelled and cancellation of the resultant sub divisions which comprise Nyandarua/Ol Kalou Central 4504 – 4513 and the rectification of the said title to revert back to the deceased's name. That application was granted on 18/3/2011 (BWW3). There has been no appeal against the court's ruling. The contention that the land had passed to the 1<sup>st</sup> respondent as a gift *inter vivos* is an afterthought and contradicts the respondent's own pleadings by which they are bound.

As to whether this court has got jurisdiction to hear this matter. I think that the respondent alleged that this court had no jurisdiction when this matter was before the Magistrate's Court. The respondent attached a valuation report prepared by Mbugua Associates to demonstrate that the land is worth over Kshs.12 million. If that is the case, even the magistrates court, has jurisdiction as its jurisdiction was enhanced to handle matters of land worth Kshs.20,000,000/=.

The matter is before the High Court which has unlimited jurisdiction in all matters save of those reserved for the Supreme Court.

Whether the objector can be issued with grant of letters of administration without the consent of the other beneficiaries, dependants or heirs of the deceased's estate, the objector filed the objection dated 16/11/2004 which was heard by way of *viva voce* evidence and the court declared the objector as the first wife of the deceased. The said order has not been appealed against or set aside. Under Section 66 of the Laws of Succession Act, both the 1<sup>st</sup> respondent and objector being widows of the deceased, rank in equal priority in petitioning the court for grant of representation. Section 66 provides as follows:

***“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:-***

***(a) Surviving spouses, with or without association of other beneficiaries;***

***(b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;***

***(c) Creditors:***

***Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executors who prove the will.”***

So far, none of the beneficiaries or heirs who are the 1<sup>st</sup> respondent's children of the deceased has come up to object to the grant being issued to the objector. In my view, being the wife of the deceased, unless there are good grounds given and none have been shown so far, the objector can be issued with the grant of letters of administration, either alone or with the 1<sup>st</sup> respondent.

The history of this cause speaks for itself. The cause was filed way back in 2001. On 15/6/2005 the objector was recognized as the deceased's widow. The court dismissed the respondent's appeal against the ruling of the court on recognizing the objector as wife of the deceased on 31/3/2010. Until the objector filed this instant application, on 7/7/2014, 4 years after the dismissal of the appeal, the respondents had not taken any steps towards finalizing this matter. It is the objector who has been keen on having this matter determined.

In this case, both the respondents were found to have withheld facts material to this cause, that the objector was the wife of the deceased. The application under consideration was brought under Section 48 and 71 of the Laws of Succession Act.

Section 71 Laws of Succession Act provides as follows:

***“(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.***

***(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may:-***

***(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or***

***(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66***

*inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be un-administered; or*

*(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or*

*(d) Postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:*

*Provide 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 the grant shall specify all such persons and their respective shares.*

*(2A) Where a continuing trust arises and there is only one surviving administrator, if the court confirms the grant, it shall, subject to Section 66, appoint as administrators jointly with the surviving administrator not less than one or more than three persons as proposed by the surviving administrator which failing as chosen by the court of its own motion.*

**(3) Subject to this Section and Sections 72 and 73, where an applicant files, at the same time as the petition, summons for the immediate issue of a confirmed grant of representation the court may, if it is satisfied that:-**

*(a) There is no dependant, as defined by Section 29, of the deceased or that the only dependants are of full age and consent to the application;*

*(b) No estate duty is payable in respect of the estate; and*

*(c) It is just and equitable in all circumstances of the case, immediately issue a confirmed grant of representation.*

**(4) Notwithstanding the provisions of this Section and Sections 72 and 73, where an applicant files, at the same time as the petition, summons for the immediate issue of a confirmed grant of representation the court may, if it is satisfied that:-**

*(a) There is no dependant, as defined by Section 29, of the deceased other than the petitioner;*

*(b) No estate duty is payable in respect of the estate; and*

*(c) It is just and equitable in all circumstances of the case, immediately issue a confirmed grant of representation.”*

In this case, the respondents have not diligently administered the deceased's estate and have taken too long to do so, to the prejudice of the objector. The court can issue a grant to another person under Section 71(2)(b). For that reason, this court is satisfied that the objector should be enjoined in the administration of the deceased's estate. The court hereby revokes the grant as respects the 2<sup>nd</sup> respondent and replaces him with the objector.

The administrators of the deceased's estate will therefore be, the deceased's widows – the 1<sup>st</sup> respondent and the objector.

How should the estate be distributed?

The deceased was married to two wives and each has their respective children. The objector suggested that the distribution be by way of the estate being divided equally between the two houses. The deceased's estate comprises only one asset – Nyandarua/Ol Kalou Central/825. It measures 3.99 Ha. Section 40 of the Laws of Succession Act provides for distribution of an intestate property where the deceased was polygamous.

Section 40 reads:

***“(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 within each house shall then be in accordance with the rules set out in Section 35 to 38.”***

If the court were to distribute the estate as suggested by the objector, it would be grossly prejudicial to the 1<sup>st</sup> respondent who has 11 children; 6 sons and 5 married daughters. On the other hand, the objector has only 2 children. Under Section 40, the 3.99 Ha. has to be divided into 15 units. (3.99Ha x 2.471 = 9.85929 acres).

9.85929 acres have to be divided into 15 portions which brings it to 0.657 acres as entitlement for each beneficiary. In total, the objector's house would be entitled to 1.971858 acres. However, I take into account the fact that the 1<sup>st</sup> respondent must have taken all the personal effects and household effects of the deceased and so in exercise of my discretion, I will add the objector a bit more acreage. The objector's house will be entitled to 2.5 acres of the deceased's estate while the 1<sup>st</sup> respondent's house will be entitled to 7.35929 acres.

In the end, I make the following orders:

- 1. The objector together with the 1<sup>st</sup> respondent be and are hereby issued with grant letters of administration;**
- 2. The 2<sup>nd</sup> respondent is removed as an administrator;**
- 3. The grant be and is hereby confirmed in the following terms:**
  - (a) Objector's house to get – 2.5 acres out of the deceased's estate;**
  - (b) 1<sup>st</sup> respondent's house are entitled to 7.35929 acres.**
- 4. Each party to bear their own costs.**

**Dated, Signed and Delivered** at **NYAHURURU** this **20<sup>th</sup>** day of **May**, 2019.

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Mr. G. Chege for objector

Lucy Wangari - Petitioner

David Mwangi – Petitioner

Soi – Court clerk