REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 1016 OF 2010

(IN THE MATTER OF THE ESTATE OF KIAMA WAMBUGU (DECEASED)

WILLIAM WAMBUGU KIAMA.....APPLICANT/PETITIONER

VERSUS

WINROSE WAMBUI KIAMA.....PROTESTOR

JUDGMENT

The grant of the letters of administration in respect of the estate of the late Kiama Wambugu (hereinafter the deceased) was made in the joint names of the applicant and the protestor on 23 November, 2012. The deceased himself died on 21 August, 2006 and as at that time he was domiciled in the Republic of Kenya his last known place of residence being Kirichu in Nyeri County.

On 14 May 2015 the applicant filed a summons for confirmation of grant and listed in the affidavit in support of the summons the following as the surviving children of the deceased:

1. Grace Wanjiku Maina
2. Winrose Wambui Maina
3. Jane Warigia Kiama
4. Gladwin Watetu Kiama
5. William Wambugu Kiama
6. Bilha Gathoni Kiama
7. Rosemary Warigia Kiama
8. James Muigua Kiama
9. Gladys Nyokabi Kiama

He was categorical that apart from these people, the deceased was not survived by any other dependants. Despite this deposition, he proceeded to swear that land title No. RUGURU/GACHIKA/981, measuring approximately 1.7 hectares and which is the only asset comprising the deceased's intestate estate be shared out amongst the following beneficiaries:

1. William Wambugu Kiama
2. Bilha Muthoni Kiama
3. Rosemary Warigia Kiama
4. James Muigua Kiama

5. Gladys Nyokabi Kiama

6. Watson Kiama Wanjiku

7. Watson Wachira Nyokabi

8. Charles Kimita Munga

9. Nancy Muthoni Kariuki

A quick observation from this list is that, first, the applicant omitted the first four persons whom he acknowledged in his previous list as being some of the children surviving the deceased and; secondly, he included in the subsequent list four new names that are not in the list of the deceased's surviving children; these are the last four people in the subsequent list. Having sworn that the deceased was not survived by any other dependants, these fresh names can only be of people who can be best described as strangers to the deceased's estate.

Inevitably, a protest was filed against the summons; the protestor initially filed her own version of summons for confirmation of the grant; in the affidavit in support of the summons, she swore that the deceased was survived by two houses and listed the following as having survived the deceased:

1. Florence Wacheke Kiama (widow)

2. Grace Wanjiku Maina (daughter)

3. Winrose Wambui Mbuthia (daughter)

4. Jane Warigia Kiama(daughter)

5. Gladwin Watetu Kiama(daughter)

6. Grace Thanji Kiama(widow)

7. William Wambugu Kiama(son)

8. Joyce Wanjiku Kiama(daughter)

9. Bilha Gathoni Kiama(daughter)

10. Alfred Mahinda Kiama (son)

11. Rosemary Warigia Kiama(daughter)

12. James Muigwa Kiama(son)

13. Gladys Nyokabi Kiama(daughter)

Of these survivors, Florence Wacheke Kiama was named as the first widow of the deceased while Grace Thanji Kiama was identified as his second widow. The protestor proposed that the estate be shared equally between two houses with the first house's share devolving upon Peter Kiama Mbuthia, Peter Maina Watetu, Peter Kiama Maina and Peter Kiama Warigia who would each get 1.85 acres of the land while Isaac Wandere Maina would get 0.25 acres. It is not apparent from her affidavit how these people were related to the deceased. However, at the hearing of the protest, she testified that Peter Kiama Mbuthia was her son while the rest were sisters' sons. As for the second house, she proposed that it should have 2.1 acres which is to be shared equally amongst the children of that house.

Besides her summons for confirmation of grant, the protestor also filed an affidavit of protest in which she more or less reiterated her depositions in the affidavit in support of the summons for confirmation of grant. Perhaps because of this affidavit of protest, she withdrew her version of the summons for confirmation of grant in the course of the hearing of the protest.

Although the applicant had all along disowned Florence Waceke Kiama as the deceased's wife, he admitted at the hearing that Waceke's children were the deceased's children and they were entitled to inheritance as much as the second house' children. With this admission there is no basis for denying not only that the deceased and Waceke were husband and wife but were also blessed with children who ordinarily would be rightful heirs of the deceased's estate.

It would therefore follow that the only question of concern to this honourable court is that of the most suitable scheme the court can adopt in the distribution of the deceased's estate between the two houses. The law that quickly comes to mind in these circumstances is section 40 (1) of the Law of Succession Act, cap. 160 which caters for distribution of an intestate's estate where the intestate was polygamous; that section 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.

The application of this provision of the law was considered extensively by the Court of Appeal in the **Eldoret Civil Appeal No. 66 of 2002, Mary Rono versus Jane Rono & William Rono (2005) eKLR;** whenever I have been faced with situations where I have had to apply section 40(1), I have done nothing more than adopt the reasoning of the learned judges of Appeal as the correct interpretation of that section in distribution of the net intestate estate in a polygamous family set up. At any rate, I am bound by the thinking of the Court of Appeal in its interpretation of this particular provision of the law.

Anyone who has read my previous decisions on this issue may find this repetitive but, in every case I have applied the decision in **Rono versus Rono,** I always find it necessary to relate, albeit in summary, the gist of the arguments in that case and court's decision on them.

Like in the present case, the primary issue in the Rono case was the distribution of the estate between the intestate's two houses. The learned counsel for the appellant argued that each of the two houses that survived the deceased should share the assets and the liabilities of the estate in equal measure. The respondents' learned counsel was of the contrary view; he 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.

In the leading judgment by Waki, J.A., the learned judge wrote: -

"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 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."**

While agreeing with the leading judgment of Waki, J.A., Justice Omolo J.A. discounted any notion that the estate should have been distributed amongst the beneficiaries in equal shares because, in the learned judge's view, there is no such requirement under the Act. The learned judge said: -

"***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.

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."

As far as I understand them, the essence of the learned judges' pronouncements is that 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.

The protestor's uncontroverted evidence is that she together with all her siblings were born on the deceased's land. However, at some stage in their life, they moved from there and went to live with their paternal grandfather before their uncle gave them land on which they settled. Apparently, that is where they have lived and it is where the protestor's unmarried sisters are settled with their respective families.

That notwithstanding, the protestor's late mother was buried on the deceased's land when she died in 2014. It is instructive that the applicant unsuccessfully attempted to stop her internment on the estate on the ground that she was not the deceased's wife. It has turned out there was no substance whatsoever in this ground as the applicant himself acknowledged that she was the mother to the protestor and the rest of the protestor's siblings all of whom he has recognised as the deceased's children.

Up to that point, a case has been made for distribution of the deceased's estate between his two houses. However, there is one rather puzzling aspect of the protestor's case and which I have to consider as a pertinent factor in the distribution of the deceased's estate; this is that in her proposed scheme of distribution of the estate, the protestor has not allocated any share to any of the children of the first house, including the protestor herself. It was her evidence that the people she has listed as the beneficiaries of the share due to the first house are her son and her sisters' children. It is not clear, and no reason whatsoever was given, why the protestor would chose to pursue the interests of her son and those of her sisters' children when it would have been easier for them to make a claim to the share of the estate in their own right as the children of the deceased and beneficiaries of his estate. In my humble view, the protestor and his sisters' conduct, can only be interpreted to mean that they are not interested in the deceased's estate and, considering that none of the proposed beneficiaries testified to lay any claim on the estate, it cannot be assumed that they too are interested in the estate. As a matter of law, even if the protestor's and her sisters' children were to lay any such claim it would not go that far as long as their mothers are alive and capable of pursuing their rights of inheritance to their late father's estate in their own names. The point is, under section 40(1) of the Act, the protestor's son and her sisters' children have no better right to the deceased's estate than their respective mother's. I would suppose that they would only come into the picture if, for instance, their mothers are deceased, in which event they would lay a claim on the estate, not in their own right, but as representatives of their respective mothers' estates.

Considering the stance the protestor and her sisters have adopted, my first instinct was to have the entire estate devolve upon the second house since, on the face of it and, based on evidence before court, none of the children in the first house is interested in the estate. However, it would be too drastic a step if I was to deny these children any part of the deceased's estate and thereby effectively disinherit them. As a matter of fact, I was prepared to give them half of the estate were it not for the fact that none of them has asked for any share. The best I can do in the circumstances is to give them a quarter an acre of the estate as owners in common. In the ultimate I have come to the conclusion that the land known as Title No. RUGURU/GACHIKA/981 shall be subdivided, transferred and registered as follows:

1. 0.5 acres of the land shall be registered in the following names as owners in common in equal shares:

   i. Grace Wanjiku Maina

   ii. Winrose Wambui Mbuthia

   iii. Jane Warigia Kiama

   iv. Gladwin Watetu Kiama

2. 3.7 acres shall be shared among the following people in equal shares:

   i. William Wambugu Kiama

   ii. Bilha Muthoni Kiama

   iii. Rosemary Warigia Kiama

   iv. James Muigua Kiama

   v. Gladys Nyokabi Kiama

Parties will bear their respective costs. It is so ordered.

Signed, dated and delivered in open court this 16th day of May, 2019

Ngaah Jairus

JUDGE