



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 406 OF 2006**

**IN THE MATTER OF THE ESTATE OF MUGO GATHU alias MUGO GATHIU (DECEASED)**

**CHARLES WACHIRA MUGO.....1<sup>ST</sup> PROTESTOR**

**JANE WAKINI WACHIRA.....2<sup>ND</sup> PROTESTOR**

**VERSUS**

**JAMES MWANGI MUGO..... RESPONDENT**

**RULING**

**FACTS**

1. The estate relates to the late Mugo Gathu (deceased) who died intestate on the 28<sup>th</sup> April, 2001; the identifiable properties comprising the estate of the deceased are the following land parcel numbers;

- (i) Konyu/Ichauga/584
- (ii) Gakawa/Kahurura Block 1/190
- (iii) Ruguru/Kiamariga/245

2. The respondent '**James**' filed a Citation against the beneficiaries and thereafter petitioned for Letters of Administration to the deceased's estate; a Grant was subsequently issued on the 12<sup>th</sup> April, 2007 to the respondent as the administrator;

3. The deceased was polygamous and had three wives and was survived by a widow and children from the three households;

4. On the 19<sup>th</sup> October, 2007 James applied for the Confirmation of the Grant and therein proposed his mode of distribution; the protestors on their part filed their Affidavit of Protest against the respondent's mode of distribution; Directions were given on the 2<sup>nd</sup> November, 2007 that the summons for confirmation and the protest dated 1<sup>st</sup> November, 2007 to proceed for hearing simultaneously by way of oral evidence; at the close of the proceedings both counsel were directed to file and exchange written submissions.

**APPLICANTS CASE**

5. The protestor ('**Charles**') stated that the deceased was polygamous and had three wives; the second wife, Mary Ngima Mugo of the 2<sup>nd</sup> house is the only surviving widow and that the other two widows of the 1<sup>st</sup> and 3<sup>rd</sup> house were both deceased; the houses comprise of the persons as listed hereunder;

(i) **1<sup>st</sup> house**

Mumbi Mugo – widow – (deceased)

Wahome Mugo – son

Zelipha Wanja Gachuru – daughter

Wanjiru Mugo – daughter (deceased)

**(ii) 2<sup>nd</sup> House**

Mary Ngima Mugo – widow

Philis Wamuyu Muriuki – daughter

Rachel Wanjeri Macharia – daughter

Margaret Wangui Muriuki – daughter

Alice Wanjira Mugo – daughter (deceased)

James Mwangi Mugo –son

**(iii) 3<sup>rd</sup> House**

Tabitha Gathigia Mugo – widow (deceased)

Elizabeth Nyarwai Muhoro – daughter

Julia Wamuyu Wambugu – daughter

James Mwangi Mugo – son

Agnes Gathoni Karoki – daughter

Margaret Wangui Magenda – daughter

Jane Wakini Wachira – daughter

Regina Thogori Mugo – daughter

James Maina Mugo – son

Anastacia Mumbi Mwangi –daughter

Peter Kamacu Mugo -son

6. Charles is the son of Wanjiru Mugo an unmarried daughter of the deceased from the 1<sup>st</sup> house; his mother who is deceased left four surviving children; and he is related to the deceased by virtue of being his grand-child; his claim is that the respondents' mode of distribution of the estate of the deceased had not been agreed upon by the beneficiaries; and his proposal was that the assets be distributed as follows;

(a) **Konyu/Ichagua/584** - be divided into three equal shares and each house to receive 1/3 share; he had no problem with the distribution of this parcel provided the 1<sup>st</sup> house's 1/3<sup>rd</sup> share be divided equally between Wahome Mugo and himself; and provided that the 3<sup>rd</sup> house's 1/3<sup>rd</sup> share be divided equally amongst the children and the 2<sup>nd</sup> protestor be included;

(b) **Ruguru/Kiamariga/245** – (the suit property) to be divided into three equal shares; provided the 1<sup>st</sup> house's 1/3<sup>rd</sup> share be divided equally between Wahome Mugo and himself;

(c) **Gakawa/Kahurura Block 1/Ichuga/190** – be divided into three equal shares and each house to receive 1/3 share;

7. The basis of Charles' protest was that his siblings and himself were not included in the distribution of **Ruguru/Kiamariga/245**; that they were brought up on one of the suit properties where their mother had a home; when his mother passed on his grand-father had called a family gathering and indicated that his mother was to be buried at the extreme end of the parcel of land known as Konyu/Ichuga/584;

8. Anytime there was an issue his grand-father would call all his children inclusive of his mother; Charles would attend the family meetings whenever called upon to attend; his evidence was that he had heard his grandfather state that his property was to be shared amongst all his children; that he never heard his grand-father expressing the wish that the suit property should go only to the sons;

9. The 2<sup>nd</sup> protestor stated that she was the daughter of the deceased and a step- aunt to Charles; her claim was also limited to the suit property **Ruguru/Kiamariga/245**; that the respondent was proposing that pursuant to the deceased's wishes only the sons should inherit this parcel of land; but it was her evidence that the deceased had indicated that when the land was to be shared it would be regardless of gender; her proposed mode of distribution was that the property be divided equally into three and that the 3<sup>rd</sup> house's 1/3<sup>rd</sup> share be divided equally

amongst the siblings in this house irrespective of gender and marital status;

10. The protestors urged the court to hold that they were beneficiaries and entitled to benefit from the deceased's estate; and to find that Lawrence was not a beneficiary nor entitled to a share of the deceased's estate;

#### **RESPONDENTS CASE**

11. In response the respondent called two witnesses to testify; Paul Wahome Mugo (**DW1**) stated that the deceased was his father; that his late father had three wives; and that the deceased's estate comprised of three parcels of land; his evidence was that in 1988 he was present when his late father had expressed his wish on how his estate was to be divided; that it was the old man's wish that the parcel known as Konyu/Ichuga/584 be divided amongst the sons and daughters; whereas the parcel known as Ruguru/Kiamariga/245 was for the sons only; and Gakawa/Kahururu Block 1/ Ichuga/190 was for one of the sons; he couldn't recall the exact date the deceased had made known his desire to subdivide the property; but he recalled that the year and month was July, 1998 when the deceased had called for a meeting which was held at his house and that it was only the children who were summoned; but Charles was also present at this meeting when the deceased expressed his wish on the sub-divisions; that the protestor Jane was also present at the meeting held in July, 1998;

12. The evidence of James (**DW2**) was that he was not the administrator of the deceased's estate; the deceased was his father and that the deceased had three wives; that his estate comprised of three parcels of land and that each house had been given its respective shares; the parcel known as Konyu/Ichuga was sub-divided by the deceased into three and each house got a share; as for Ruguru/Kiamariga the deceased had said that it was to be shared by only the sons; the Gakawa/Kiamariga parcel was reserved for a son; that Charles was present at this meeting which was held at **DW1s** house; Jane was also present at the meeting; he could not recall the exact date of the meeting but that it was held about six to 10 years before the demise of the deceased;

13. According to him the administrators proposed mode of distribution was in accordance with the deceased's wishes and is as set out hereunder;

#### **(a) KONYU/ICHUGA/584**

- (i) James Mwangi Mugo - 0.42 acres
- (ii) James Mwangi Mugo - 1.67 acres
- (iii) Jane Wakini Wachira - 0.42 acres
- (iv) James Maina - 0.42 acres
- (v) Lawrence Ngetha Muthiga - 0.42 acres
- (vi) Wahome Mugo - 0.42 acres
- (vii) Charles Wachira Mugo - 0.42 acres

#### **(b) GAKAWA/KAHURURA BLOCK 1/ICHUGA/190**

- (i) James Mwangi Mugo - 2 acres
- (ii) James Mwangi Mugo - 0.9 acres
- (iii) Lawrence Ngetha Muthiga - 2.5 acres
- (iv) Wahome Mugo - 2.9 acres

#### **(c) RUGURU/KIAMARIAGA/245**

- (i) James Mwangi Mugo - 2.26 acres
- (ii) James Mwangi Mugo - 0.75 acres
- (iii) James Maina Mugo - 0.75 acres
- (iv) Lawrence Ngetha Muthiga - 0.75 acres
- (v) Wahome Mugo - 2.26 acres

#### **ISSUES FOR DETERMINATION**

14. This court did not have the benefit of hearing the witnesses in this protracted matter; the Hon. Wakiaga J heard the whole cause and had directed the parties to file and exchange written submissions but before writing the ruling the Honorable Judge was transferred to another station; this court was left with the onus of writing the ruling based on the evidence already on record; after reading the proceedings and the rival written submissions this court has framed the following issues for determination;

- (i) Whether Charles and Jane and Lawrence are beneficiaries of the estate of the deceased;
- (ii) Whether there was a valid oral will made by the deceased;
- (iii) Distribution of the estate

## **ANALYSIS**

### **Whether Charles , Jane and Lawrence are beneficiaries to the estate of the deceased;**

15. The evidence of Charles is that he is the son of Wanjiru Mugo (deceased); that his mother had a home on the property known as Konyu/Ichuga/584 and together with his siblings they had been brought up on it; when his mother died she was buried thereon at the extreme end;

16. The basis of his protest was that the respondent had excluded him together with his siblings in the distribution of the contentious suit property known as Ruguru/Kiamariga/245; that being the children of the deceased's daughter they were beneficiaries and entitled to their deceased mother's share of her father's estate; that he was not aware of his grandfather's wishes that the suit property was to be given to his uncles only and contends that their late grandfather had intended that his properties be shared equally between the houses and also shared between his sons and daughters irrespective of the daughters marital status;

17. Section 29(a) of the Law of Succession Act defines a dependant as the children of the deceased whether or not maintained by the deceased immediately prior to his death; from the evidence of both sides there is no dispute that Jane the 2<sup>nd</sup> protestor is a daughter of the deceased from the 3<sup>rd</sup> house;

18. This court has considered the evidence put before it and is satisfied the administrator recognized Jane as the daughter of the deceased from the 3<sup>rd</sup> house; this court is therefore satisfied that she qualifies as an undisputed dependant;

19. As for Charles and his siblings in line with the provisions of Section 29(b) of the Law of Succession Act a grand-children of the deceased can only be entitled to a share of their grand-fathers if evidence is adduced to show that they were taken in by the deceased and maintained by him during his lifetime; this court notes that there is nothing to show that they were maintained by the deceased during his lifetime; nor is there any evidence adduced that upon the demise of their mother that the deceased had taken them into his family as his own and that he had generally maintained them as his own; nor was any documentary produced by either Charles to show that the deceased assisted them financially by paying their school fees, rent or any other bills;

20. On that basis this court finds that Charles and his siblings as the grand-children do not qualify as direct dependants of the deceased as per the provisions of Section 29(b) of the Act; but Charles contention is that they are entitled to their late mother's share of the deceased's estate; that he had attended meetings called by the deceased and had heard his grand father state that his property be shared amongst all his children; his evidence on his attendance and presence at the meetings is corroborated by the 2<sup>nd</sup> protestor and was not controverted by either **DW1** or **DW2**;

21. It is not in dispute that his mother was a daughter of the deceased and that she had predeceased the intestate; the applicable law is found in the provisions of Section 41 of the Act which entitles Charles and his siblings to the share their mother would have taken had she not pre-deceased the intestate; the section allows the issue of any child of the intestate to take through degrees, in equal shares, the share which their parent would have taken had she not pre-deceased the intestate; therefore by virtue of the above provision Charles and his siblings are entitled to a share in the deceased's property;

22. The respondent has proposed to share out part of the deceased's estate to one Lawrence Ngetha Muthiga (**'Lawrence'**); the protestors state that Lawrence is a third party and that if any of the beneficiaries are desirous of selling to third parties such as Lawrence they should do so after the estate is distributed;

23. Upon perusal of the letter from the chief dated 25/02/2007 this court notes that the name of Lawrence is not mentioned therein as a beneficiary; indeed even the administrator when he petitioned for letters of administration did not include the name of Lawrence either as a beneficiary nor as a liability to the estate; from the submissions Lawrence can best be described as a purchaser with dealings with beneficiaries as opposed to dealings with the deceased; in the absence of any evidence on the status of Lawrence and his interest in the estate this court is satisfied that he has no vested interest in the estate of the deceased and is not entitled to an initial benefit from the deceased's estate;

24. From the evidence adduced this court is satisfied that both the protestors Charles and Jane qualify as beneficiaries and are entitled to benefit from the deceased's estate; as for Lawrence, this court is satisfied that he is not a beneficiary and is therefore not entitled to a direct share of the deceased's estate

### **Whether there was a valid oral will made by the deceased;**

25. The evidence of all the parties was that the deceased had called his children to a meeting sometime in July, 1998 when he orally made known his wishes on how his property should be shared, amongst his children, upon his death; **DW2** stated that the meeting was held at **DW1s** house; he confirmed that Jane and Charles were both present at this meeting; he could not recall the exact date of the meeting but that it was held about six to 10 years before the demise of the deceased;

26. The applicable law on the validity of an oral will is found at Section 9 of the Act which provides that the oral will can only be valid if the testator made it before two or more competent witnesses and that the testator died within three (3) months after it was made;

27. The evidence on record is that the deceased passed on the 28/04/2001 and that the oral will is said to have been made in July, 1998; the time lapse translates to a period of over two years and nine months from the date of making of the oral will to the date of the deceased's demise; the onus was on the party seeking to rely on the contents of the oral will to avail the competent and independent witnesses to the will; the court record reflects that this was not done and no one was availed to testify; this court is therefore satisfied that the oral will does not comply with the specific provisions of Section 9 of the Act and is therefore found to be invalid

### **Distribution of the estate**

28. This court having considered the evidence put before it is satisfied that the that Jane as a daughter qualifies to be a dependant and together with Charles both qualify to be a beneficiaries of the deceased's estate; the task left for this court is to determine the dispute on the distribution of the deceased's estate;

29. There is no dispute as to the properties that comprise the estate of the deceased; it is also not disputed that the deceased was a polygamous man and had married three wives and that only one widow from the 2<sup>nd</sup> house survived him; in the circumstances the applicable law is Section 40 of the Act and distribution shall be subjected to the said provisions; the section provides as follows;

### **Section 40**

**“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.”**

30. This court is also 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.

31. The 1<sup>st</sup> house is found to comprise of three family members' which translates to three units made up of;

- (i) Wahome Mugo
- (ii) Zelipha Wanja Gachuru
- (iii) Wanjiru Mugo (deceased) but survived by her children who have laid a claim to her share.

32. The 2<sup>nd</sup> house comprises of five members and Mary the widow being the extra unit bringing the total to six units; the house is made up of the following persons;

- (i) Mary Ngima Mugo –widow
- (ii) Phylis Wamuyu Muriuki
- (iii) Racel Wanjeri Macharia
- (iv) Margaret Wangui Muriuki
- (v) Alice Wanjira Mugo
- (vi) James Mwangi Mugo

33. The 3<sup>rd</sup> house is found to comprise of ten children of the deceased but translates to nine (9) units as Lydia Wangui Mugo's children have not made any claim to their deceased's mother's share; this household is therefore made up of;

- (i) Julia Wamuyu Wambugu
- (ii) James Mwangi Mugo
- (iii) Agnes Gathoni Karoki
- (iv) Margaret Wangui Magenda

- (v) Jane Wakini Wachira
- (vi) Lydia Wangu Mugo (deceased)
- (vii) Regina Thogori Mugo
- (viii) James Maina Mugo
- (ix) Anastasia Mumbi Mwangi
- (x) Peter Kamacu Mugo

34. The protestors propose that all the children irrespective of their gender and or marital status be given a share in their deceased father's estate; the respondent has a set mind in that the properties should only be inherited by the sons of the deceased; when it comes to inheritance at Section 29 of the Act there is no classification of the children of the deceased into categories of male, female, married or unmarried; the Act does not discriminate against the male or female children of the deceased; nor does it discriminate between the married daughters and unmarried daughters of a deceased; also Article 27 of the Constitution 2010 provides that every person is equal before the law; and the Article goes further to state that there should be no discrimination on any ground including gender and marital status;

35. Therefore, this court is satisfied that the failure by the respondent to include his married female siblings in his proposed mode of distribution is discriminatory and unfair;

36. The ratio of distribution is determined to be 3/18 for the first house and 6/18 for the second house; and 9/18 for the third house; this court will therefore apply these ratios in distributing all the three properties comprise the estate of the deceased which are Konyu/Ichauga/584, Ruguru/Kiamariga/245 and Gakawa/Kahurura Block 1/190;

#### **FINDINGS AND DETERMINATION**

37. For the afore-going reasons this court finds that Charles and Jane are beneficiaries and are entitled to benefit from the deceased's estate;

38. The respondents proposed mode of distribution is found to be unfair and discriminatory; the estate of the deceased shall be distributed as follows;

- (i) Konyu/Ichauga/584, Ruguru/Kiamariga/245 and Gakawa/Kahurura Block 1/190 shall be divided on a ratio of 3/18 for the first house; the ratio for the second house is 6/18 and the extra unit for Mary the widow shall be held as a life interest; the life interest to terminate upon her demise and it shall then be shared equally between her surviving children; the ratio for the third house is 9/18;

39. The Grant is hereby confirmed on the terms as ordered.

40. Each party shall bear their own costs.

It is so ordered.

**Dated, Signed and Delivered at Nyeri this 9<sup>th</sup> day of May, 2019.**

**HON. A. MSHILA**

**JUDGE**