



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

SUCCESSION CAUSE NO. 23 OF 2013

IN THE MATTER OF THE ESTATE OF THE LATE

WANDIMU MUNYI DCD

MILIKA WANJIKU MWANGIAPPLICANT

V E R S U S

ROSE WANGECHI WANDIMU.....RESPONDENT

JUDGMENT

1. This matter relates to the estate of Wandimu Munyi, deceased. Letters of administration were issued to Rose Wangechi and Milka Wanjiku. On 14/10/05 Milka Wanjiku Mwangi filed an application dated 5/6/2015 seeking an order that the Grant of Letters of Administration be rectified to correct an error in the name of the administratrix Milka Wanjiku Mwangi. She further prays that upon rectification, the grant be confirmed.

The application is based on four grounds:-

- a. Six months have lapsed since the original grant herein was issued.**
- b. That some of the beneficiaries of the estate of the deceased have agreed on the mode of distribution thereof.**
- c. No application for dependency is pending.**
- d. No estate duty is payable in respect of the estate of the deceased.**

2. The application is supported by the affidavit of Milka Wanjiku Mwangi. She depones that her name was wrongly indicated on the grant as Milka Wanjiku Wandimu instead of Milika Wanjiku Wanjiku Mwangi.

3. That the parties have agreed on the mode of distribution and signed a consent.

4. An affidavit of protest was filed by Rose Wangechi Wandimu. She contends that she is one of the wives of the deceased. The 1st wife who was Agnes Muthoni Wandimu had three children who are:-

- Milika Wanjiku Mwangi
- Elizabeth Wangechi Muhoro
- Martha Wambui Wanjohi.

That she had five children who are:-

- Samson Mwai Wandimu
- Lucy Muthoni Wandimu
- Leah Wambui Wandimu
- Boniface Kinyua Wandimu

- Winfred Njoki Wandimu

5. That the estate of the deceased is comprised in land parcel No. Mwerua/Kibiriri/341 measuring 22 acres. Part of the land 3 Acres will be acquired by the N.I.B due to the construction of Thiba Dam. She proposes that each child gets two acres. That the money to be given by the N.I.B shall be shared equally among all the family members but the money from the compensation of rice, the house, the trees and any other property that will be destroyed along the passage of the canal shall go to her as she is the one who has developed the areas. That she will occupy the permanent house on Mwerua/Kibiriri/341 together with three acres.

6. The applicant adopted the affidavit of Martha Wambui who has deponed that Rose Wangechi Wandimu had only one child with the deceased, that is Samson Mwai Wandimu. The others Lucy Muthoni, Leah Wambui, Boniface Kinyua and Winfred Njoki are not children of the deceased. She depones that the estate should be shared equally between the children and the wife as an additional unit.

7. The parties adduced evidence and filed submissions. The protestor chose to rely on the affidavit.

8. I have considered the application. The issues which arise for determination are:-

1. Rectification of grant

Section 74 of the Law of Succession Act provides:

Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court.

Rule 43(1) of the Probate and Administration Rules provides:

“Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of the death of the deceased, or in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons”.

9. The provisions allow the rectification of grant to correct errors. The errors which maybe corrected are in names, descriptions of any person or thing, time or place of death of deceased. The rectification is on minor errors and mistakes which will not affect the substance of the grant. The rectification which the applicant seeking is correction of name which will not affect the substance of the grant. It is the rectification envisaged under **Section 74 of the Act and Rule 43(1) Probate and Administration rules**.

10. The respondent does not oppose the application. The application to rectify the grant has merits.

2. Confirmation of Grant.

The issue which arises is who are the rightful beneficiaries.

11. According to the applicant Milika Wanjiru Mwangi, the deceased had two wives, comprised as follows;

First house:

Agnes Muthoni (deceased wife)

Milika Wanjiru Mwangi

Elizabeth Wangechi Muhoro

Martha Wambui Wanjohi

Second house:

Rose Wangechi Ndimu

Samson Mwai Wandimu

12. That she had initially indicated the deceased was survived by Lucy Muthoni, Leah Wambui and Boniface Kinyua but that they were born after his demise therefore cannot be his children.

13. She proposed that the deceased's estate be shared as follows;

- **Mwerua/Kabiriri/341** – equally among all the dependants
- **Permanent house on Mwerua/Kabiriri/341** - Rose Wangechi Ndimu to have life interest and after her death to Samson

Mwai Wandimu.

14. According to the protestor there are other beneficiaries who are Lucy Muthoni, Leah Wambui Mwandimu, Boniface Kinyua Mwandimu and Winfred Njoki.

15. The applicant's case is that the four were born after the deceased had passed away and are therefore not children of deceased.

16. When the protestor testified, during cross-examination, she confirmed that Lucy Muthoni Kandimu was born in 1988, Leah Wambui Mwandimu in 1991, Boniface Kinyua was born in 1994 and Winfred Njoki Wandimi in 2008.

a. The question is whether these are children of the deceased.

17. The applicant had issued notice to the protestor to produce the identity cards of the four disputed children but she did not.

18. She however confirmed during cross-examination that the four children were not sired by the deceased. She said she wants to give them land equally with the rest since they were born and lived on the land. This however does not entitle them to inherit from the deceased.

a. Whether children born posthumously are entitled to inherit.

Section 29 of the Law of Succession Act, Cap 160 states:

For the purposes of this Part, "**dependant**" means—

a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

b. such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;

19. The deceased had not taken the children as his own and was not maintaining them before he passed away since they were not even born and are therefore they are not dependants of the estate.

20. The estate should therefore be distributed equally among the five beneficiaries as proposed by Milika Wanjiru Mwangi giving consideration on the proposed water canal.

21. The protestor having confirmed that the children were not sired by the deceased they are excluded as beneficiaries of the deceased. In **Re Estate of M'mboroki s/o Maraja (deceased) (2009) eKLR** it was stated:-

“That exclusion is in my opinion in order for a child born posthumously to a widow not less than nine months upon the death of the husband cannot be regarded as having survived the deceased and is therefore not entitled to inherit the net intestate estate.”

22. The four children are excluded as beneficiaries. The beneficiaries entitled to the net estate of the deceased are:-

- **Rose Wangechi Wandimu,**
- **Samson Mwai Wandimu**
- **Mulika Wanjiku Wandimu**
- **Elizabeth Wangechi Muhoro**
- **Martha Wambui Wanjohi.**

23. Distribution of the Estate.

There is no dispute that the deceased was a polygamous man. He is survived by four children and one widow. The distribution should be in accordance with the number of children. The widow is an additional unit. **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.”

24. The provision is applicable to the estate of the deceased as he was polygamous and is survived by children and one widow. The distribution should therefore be to the houses according to the number of children equally and the widow as an additional unit to the number of children. This is in line with the holding in **Mary Rono –v- Jane Rono & Another (2005) eKLR** where it was stated that “more

importantly Section 40 of the Act which applies to the estate makes it provision for distribution of the net estate to the “houses according to the number of children on each house but also adding any wife surviving the deceased as an additional unit to the number of children. A ‘house’ in a polygamous setting is defined in Section -3- of the Act as a “family unit, comprising a wife ----- and the children of that wife.” There is no discrimination of such children on account of their sex.”

25. In Conclusion.

The prayer for rectification of grant is allowed.

a. The name of the applicant shall be rectified to read Mulika Wanjiku Mwangi.

b. The beneficiaries are:-

- Mulika Wanjiku Mwangi
- Elizabeth Wangechi Muhoro
- Martha Wambui Wanjohi
- Rose Wangechi Wandimu.
- Samson Mwai Wandimu.

c. The estate of the deceased land parcel No. Mwerua Kabiriri/341 shall be distributed to the fine beneficiaries in (b) above in equal shares.

Rose Wangechi Wandimu’s share to be where the permanent house is situated.

d. The land be surveyed to ensure that each beneficiary’s portion has access to the water carnal.

e. Money for compensation from N.I.B shall be shared equally by the beneficiaries.

f. Each party bears its own costs.

Dated at Kerugoya this 14th day of June 2019.

L. W. GITARI

JUDGE