



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 458 OF 2015**

**IN THE MATTER OF THE ESTATE OF SABETH KAMWENJU**

**WANJAU alias ZABED KAMENJU WANJAU (DECEASED)**

**MARY THUGURI KAMENJU.....APPLICANT**

**VERSUS**

**VERONICAH WAIRIMU KAMENJU.....PROTESTOR**

**RULING**

1. The estate relates to the late Sabeth Kamwenju Wanjau alias Zabed Kamenju Wanjau (deceased) who died on the 7<sup>th</sup> March, 2015; the identifiable properties comprising the estate of the deceased are the land parcel numbers listed hereunder;

- (i) **Nyeri/ Endarasha/2530**
- (ii) **Nyeri/Watuka/2079**
- (iii) **Plot No.18 Watuka Trading Centre**

2. The deceased died testate and as set out in the Letter from the Office of the Chief dated 25/05/2015 at the time of his demise he left two widows and eight children surviving him namely;

- (i) Mary Thuguri Kamenju - 1<sup>st</sup> wife
- (ii) Veronicah Wairimu Kamenju – 2<sup>nd</sup> wife
- (iii) James Wanjau Kamenju – son – 1<sup>st</sup> house
- (iv) Jonah Kariuki Kamenju – son – 1<sup>st</sup> house
- (v) Jane Wanjiku Kamenju – daughter – 1<sup>st</sup> house
- (vi) Catherine Wangechi Kamenju - daughter – 1<sup>st</sup> house
- (vii) Irene Wanjiku Kamenju - daughter – 2<sup>nd</sup> house
- (viii) Catherine Wanjiru Kamenju – daughter – 2<sup>nd</sup> house
- (ix) Purity Mumbi Kamenju – daughter – 2<sup>nd</sup> house
- (x) James Wanjau Kamenju – son – 2<sup>nd</sup> house

3. On the 30/06/2008 the petitioner (herein referred to as “**Mary**”) under the belief that the deceased had died intestate initiated this cause by way of Citation whereby she cited the Objector (herein referred to as “**Veronica**”) and her adult children namely Catherine Wanjiru

Kamenju and Irene Wanjiku Kamenju for refusing to give their Consent to facilitate the taking out of Letters of Administration;

4. The court record reflects that all the three Citees entered appearances; Mary it appears was thereafter granted leave to proceed to file a Petition for the Letters of administration and a Grant was issued on the 22/12/2015; she then proceeded to file the application for the Confirmation of the Grant on the 29<sup>th</sup> July, 2016 and therein proposed her mode of distribution of the deceased' estate;

5. It was at this stage that it was brought to her knowledge that the deceased had died Testate and that there was a written **WILL** made by the deceased; upon discovering that the 1<sup>st</sup> house had been excluded and disinherited in the **WILL** Mary proceeded to file an application dated 9/12/2016; the application was made under no specific provision of the law and it challenged the validity of the **WILL**; Veronica filed her response to the application on the 6/06/2017 by way of an undated Affidavit;

6. Directions were taken on the 18<sup>th</sup> April, 2016 that the matter proceed for hearing and that '**viva voce**' evidence be tendered and that witness statements be filed and exchanged; the matter proceeded for full hearing and all the concerned parties gave evidence and were subjected to cross-examination; hereunder is a summary of the evidence tendered by the respective parties.

#### **APPLICANT's CASE**

7. The applicant's (**Mary**) evidence was that she was one of the wives of the deceased; that she was also the petitioner herein and had obtained a Grant to administer the estate of the deceased and had proceeded to request the court to confirm the Grant; her proposed mode of distribution of the estate of the deceased was that it be distributed equally between the two houses;

8. Mary stated that when the application for confirmation of the Grant came up for hearing the respondent produced a Will in court made by the deceased; she disputed the mode of distribution as set out in this Will and contends that it was bad and against the law of natural justice as it did not take into consideration that she and her children were a part of the deceased's family and did not bestow any of the properties upon her or her children;

9. That the Will as drawn was unfair and unconstitutional; that it was also invalid and unacceptable to her as the properties were given to one house, that is, the second wife and her family; that if adhered to this would leave her and her children destitute; she reiterated that her family was entitled to an equal share in the deceased's property;

10. Under cross-examination, Mary stated that after she got married to the deceased they cohabited on Plot No.18; that she had left the deceased due to domestic problems but later returned to reside on Plot No.18 upon the demise of the deceased; the deceased later bought the parcel known as Nyeri/Endarasha/2550; and in 2012 he bought another piece of land known as Nyeri/Watuka/2079 measuring  $\frac{1}{4}$  of an acre which he gave to their son, Jonah Karuka Kamenju; the deceased had told Jonah to reside thereon who then proceeded to build a small store on the property that was used for storage during planting and harvesting time and it was for use by everybody;

11. She stated that she had assisted the deceased to purchase the properties but didn't know how the properties were bought nor did she know the purchase price;

12. The evidence of Jonah Karuka Kamenju (**DW2**) was that the deceased was his father and that the applicant was his mother; he confirmed that the deceased passed on the 6/03/2015

13. Jonah's evidence was that the respondent got married during the time when the applicant was still around and found them residing on Plot 18; the deceased moved the respondent to another shamba and built her a house thereon; that when the respondent came into their lives they were very young and still in school; when their biological mother left them they were solely dependant on the respondent and they had all lived on Plot 18 upto the time the deceased moved the respondent;

14. He told the court that his father had been employed as a mason at a school and that he utilized his salary not a loan to purchase the properties; the parcel of land Endarasha/2530 was bought in 1994 and it was paid for in cash and in instalments; that he later bought parcel 2079 from the proceeds of sale of another property; and he had been given a portion of this parcel of land to hold in trust and had been told by the deceased how he was to utilize this property and also shown where to build;

15. **DW2** reiterated that he too had issues with the Will as it did not cater for the applicant and her family;

16. Jane Wanjiku Maina (**DW3**) testified that the deceased was her father and confirmed that he had two (2) wives and eight (8) children; she stated that when the respondent got married to the deceased her mother was not resident on Plot 18; that she recalled that she was still in school and that the respondent came to live with them on Plot 18 and that she was under the respondent's care; even when she got married her mother was not involved and that the respondent was very involved and hosted her guests at Plot 18;

17. She had visited the deceased at home and in hospital and that he had never mentioned the existence of any Will; all her father had told her was that they should live in harmony; she confirmed that she got to know of the Will after the demise of her father and that it was read out by Muhoho Advocate; that she found the contents of the Will to be wrong;

18. In closing her case, Mary reiterated that her prayer was that the Will be disregarded as it did not distribute the deceased's property in a fair manner and she prayed that the estate be distributed equally among the two wives of the deceased;

#### **RESPONDENTS CASE**

19. In response the respondent confirmed that she was also a widow of the deceased; that she had been summoned in the month of April, 2015 by the Chief Endarasha and that she had informed the Chief and the family of the petitioner that the deceased had written a Will which had been made in Nyeri town by his lawyer namely, Advocate Muhoho Gichimu;

20. That on the 23<sup>rd</sup> April she was again summoned to the Chief's office and this time the deceased's Advocate having been summoned by the Chief, was present; and that he then proceeded to read out the Will in the presence of all the interested parties and left copies of the same;

21. Her evidence was that she was surprised to later find out that the petitioner had proceeded to petition for a grant of letters of administration as if there was no Will;

22. The respondent called the deceased's advocate Muhoho Gichimu (**DW2**) as her witness; and his evidence was that he was an advocate of the High Court practicing in Nyeri Town under the name and style of Muhoho Gichimu Advocates; that the deceased was known to him and had attended his office accompanied by Daniel Kagume Wambugu (**DW3**) who was also known to him and that there was a lady in their company known as Jane Nkene Nganatha who was not known to him; the deceased informed him that he wanted to make a will; and was candid and informed him that he had two wives;

23. He took instructions and prepared the WILL upon which the deceased affixed his left hand thumb print; the deceased was literate and could write but opted to placing his thumb-print on the document; the two persons accompanying him witnessed his thumbprint;

24. Thereafter he recalled receiving a call from the area Chief of Endarasha inviting him to a meeting with the family of the deceased; and the Will was read at the earliest opportunity and that was at the Chief's office; only one daughter was known to him otherwise the rest of the family members were introduced to him and he read out the Will and left copies with them; he confirmed that he did not Probate the Will.

25. The evidence of Daniel Kagume Wambugu (**DW3**) was that the deceased was his cousin; that he knew that the deceased had two wives and he knew that the applicant had four family members;

26. He would accompany the deceased and the respondent to Nyeri Town and would escort him to Mathari Hospital and also to the Hospice; that he had also accompanied the deceased to the advocate's office on that day he had made a decision to go write his Will;

27. They left the respondent in town and proceeded to Advocate Muhoho's office; he confirmed that the Will was prepared and was executed by the deceased by affixing of his thumbprint; that he read the Will and was privy to its contents and had witnessed the deceased's thumbprint placed thereon; he confirmed that it was the desire of the deceased that the families live in harmony;

28. The evidence of Jane Nkene Nganatha (**DW4**) was similar to that of **DW3** that she escorted the deceased to the advocates office on the day he had attended the Hospice; and that she was present when the document was drawn and knew its contents and that she was also a witness; she confirmed that the respondent did not accompany them to the advocates offices on that material date;

29. She stated that she attended the funeral of the deceased; and confirmed that she did not know any of the family members nor did she have any relationship with them; and that she did not disclose to the family the existence of the Will.

30. After this witness testified the respondent closed her case and reiterated her prayer that the property be distributed as provided in the Will.

#### **ISSUES FOR DETERMINATION**

31. After hearing the rival presentations of the respective parties this court has framed the following issues for determination;

(i) Whether the applicant is acting in good faith when obtaining the Grant and believed the **WILL** dated 4<sup>th</sup> February, 2015 was non-existent; whether to disregard it due to the respondent's indolence;

(ii) Distribution of the estate of the deceased.

#### **ANALYSIS**

**Whether the applicant is acting in good faith when obtaining the Grant and believed the WILL dated 4<sup>th</sup> February, 2015 was non-existent; whether to disregard it due to the respondents indolence;**

32. The issues were framed and when embarking on the writing of the ruling this court noted that the cause of action was centered on the Will dated 4/02/2015 made by the deceased; the respondent adduced no evidence on whether the **WILL** had ever been admitted to Probate and thereafter confirmed; these facts are very central to this cause as its admissibility is being challenged; the ruling was deferred to accord the respondent an opportunity to produce the Probated Will or to proceed to petition for a Grant of Probate in terms of the Will so as to enable this court to make a just determination on the Intestate Grant of Letters of Administration and the merits of the petitioner's application; but the respondent failed to produce the same and or update this court on any intended action taken;

33. What is apparent is that the respondent took no steps to produce or share information of the existence of the Will when she was served with the Citation dated 29/04/2015 that had been filed by the applicant; from her conduct it is also apparent that the respondent did not make any attempt to seek any specialist professional advice on the Will not even from the very counsel she called to testify on her behalf;

34. The record reflects that the only action taken by the respondent and her children is the Entering of Appearance to the Citation; there is no other evidence adduced or produced or any other action taken; in the absence of any explanation from the respondent on the action taken to share or produce or probate the Will;

35. The evidence of **DW2** was that he read the Will in the presence of the family; he never gave details of whether both houses were represented nor which members of the family were present; there was no evidence adduced on the presence of the applicant when the Will was read and or that she received a copy of the same;

36. In the light of the above this court is satisfied that the applicant acted in good faith and believed that there was no Will in existence at the time she cited the respondent and thereafter was granted leave by this court to petition for Letters of Administration and was then issued with the Grant dated the 22/12/2015;

37. Further, despite the respondent having been granted indulgence by this court to provide evidence of any action taken none was provided; she appears and continues to be indolent; therefore, in those premises the end result is that this court is satisfied that the Grant dated the 22/12/2015 and issued to the applicant was not made through lack of care or erroneously.

**Distribution of the estate of the deceased.**

38. The facts that are not in dispute are that the deceased was a polygamist and had two wives and that there were two households.

39. This court finds that Section 40 of the Law of Succession to be the applicable law and distribution shall be subjected to the said provisions; the Section reads as follows;

**“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.”**

40. 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.

41. The first house is found to comprise of three family members and the applicant being the extra unit which translates to four units; the second house comprises of three members and the respondent being the extra unit bringing the total to four units; the ratio of distribution is therefore determined to be 4/8 for the first house and 4/8 for the second house; this translates to a ratio of half to the first house and half to the second house;

42. This court is satisfied and finds that these are the ratios to be applied in distributing the three properties that comprise the estate of the deceased;

**FINDINGS and DETERMINATION**

43. This court finds that the applicant acted in good faith and believed that there was no Will in existence;

44. The applicant’s application to disregard the Will is found to have merit and is hereby allowed;

45. The Grant is hereby confirmed on the terms set out in paragraph number 41 and 42 hereinabove;

46. This being a family matter and to bring closure each party shall bear their own costs.

It is so ordered.

**Dated, Signed and Delivered at Nyeri this 3<sup>rd</sup> day of October, 2019.**

**HON. A. MSHILA**

**JUDGE.**