



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 190 OF 2013

IN THE MATTER OF THE ESTATE OF IBRAHIM WATHUTA MBACI

SAMUEL WACHIRA KAMUHIA

JOSPAT MAINA KAMUHIA.....PROTESTORS

VERSUS

MARY WANGUI WATHUTA..... PETITIONER

RULING

1. The estate relates to the late **Ibrahim Wathuta Mbaci alias Wathuta s/o Mbache** (deceased) who died on the 16th August, 1994 aged 84 years; the estate of the deceased consists of three (3) properties namely:

- (i) **Thegenge/Kihoro/69**
- (ii) **Eusonyiro/Suguroi Block VII/377**
- (iii) **North Tetu Farmers Co. Ltd Plot No. 0063**

2. As set out in the Chiefs letter dated the 11/03/2013 the deceased was survived by a widow and the following children;

- (i) Mary Wangui Wathuta - widow
- (ii) Samwel Wachira Kamuhia - son
- (iii) Josphat Maina Kamuhia - son
- (iv) Margaret Wagaki Njagi - daughter
- (v) Jane Wairimu Maina - daughter
- (vi) Peter Bere Wathuta - son
- (vii) Charles Gatundu Wathuta – son
- (viii) John Gichuki Wathuta - son
- (ix) Lucy Wambui Muya - daughter
- (x) Paul Kabuchi Wathuta -son
- (xi) Anne Wanjiru Mureithi – Daughter
- (xii) Leah Wangechi Wathuta – daughter

(xiii) Stephen Murage Wathuta - son

3. The Petitioner hereinafter referred to as “**Mary**” was the widow of the deceased and she petitioned for Letters of Administration and a Grant was issued to her on the 15th April, 2014; and on the 24th February, 2015 she applied for the Confirmation of the Grant and proposed a mode of distribution that all the properties constituting the estate of the deceased be registered in her name;

4. Subsequent thereto the Protestors who are the deceased’s sons from the 2nd house filed an Affidavit of Protest against the summons for confirmation and gave their reasons for protesting and also included their proposed mode of distribution of the deceased’s estate; two daughters from the 1st house also jointly filed their Affidavit of Protest on the 5th June, 2015 and therein proposed their mode of distribution;

5. Directions were taken on the 14/03/2016 that the matter proceed for hearing and that Samuel Wachira was to give ‘**viva voce**’ evidence on behalf of the first set of protestors and that Elizabeth Wagaki Wachira was to give oral evidence on behalf of the second set of Protestors; the matter proceeded for full hearing and the parties gave evidence and were subjected to cross-examination; hereunder is a summary of the respective parties.

THE 1ST PROTESTORS’ CASE

6. The 1st protestor who shall be referred to as “**Samuel**” stated in his evidence that he was from the 2nd house and that Mary is their mother; and that the 2nd house consisted of twelve (12) children; one had passed on leaving eleven siblings; out of the eleven there were only two who were opposed to the mode of distribution put forward by the petitioner; the two being himself and his brother both from the same house;

7. That the 1st wife died in 1987 and that his father passed on ten (10) years later; that the deceased never locked out his step-sisters from tilling their late father’s land; and his proposed mode of distribution was that the three (x3) properties be divided equally between the 1st house and the 2nd house and that the petitioner be given a life interest;

8. That when their father passed on he left the family in harmony; and that each wife had been given their portion; that the 1st wife was buried on the portion granted to the 2nd house; he proposed that a swap of the portions be done and their portion where the 1st wife was buried be given to the 1st house and vice versa;

THE 2ND PROTESTOR’S CASE

9. This protestor who shall hereinafter be referred to as ‘**Elizabeth**’ was also opposed to the Petitioner’s proposed mode of distribution; her evidence was that the deceased had two (2) wives and her late mother Ruth Nyawira Wathuta was the 1st wife of the deceased; that she was her daughter and was from the 1st house; that the 1st house had four (x4) daughters and one of these daughter’s had since passed on; she confirmed that the children of the 2nd house were more and consisted of Mary and ten (10) children;

10. Her complaint was that Mary had only involved her own children and that she had not obtained Consent from the 2nd protestor and her sibling’s consent when she filed for the Letters of Administration of the deceased’s estate; and that Mary’s intention was to disinherit them; as the children and the daughters of the 1st wife they were entitled to benefit from the estate of the deceased;

11. When her father came back from detention he gave her the parcel known as Thengenge/Kihoro/69 to till despite the fact that she was married and hadn’t left her husband’s homestead; when Mary got married to the deceased Elizabeth left this parcel of land she was tilling to Mary who still continues to till the land to date; that she knew how the deceased had acquired the parcel known situate in Mahatia; and that her late mother’s father was a sub-chief and he had helped the deceased to purchase this parcel; the other parcel in North Tetu Farmers had been bought by the deceased; the two latter properties lie fallow and no one has ever tilled this land;

12. Family meetings between both houses were held in the presence of clan elders; she confirmed that one such meeting was held on the 23/02/2013; that an agreement was arrived at, that Mary tills the land and when it comes to distribution it be divided equally between the two houses; that she and her siblings did not know what they were signing and she had been misled into signing the document; and that they had never renounced their interest in their late father’s estate; and they wanted and were entitled to a share in all the three properties;

13. Her proposed mode of distribution was follows;

(i) Thegenge/Kihoro/69

The petitioner - to get half share

Elizabeth Wangui Wathuta)

Mary Gachambi Kiiru) - half share jointly

Lucyia Wambui Mathenge)

(ii) Eusonyiro/Suguroi Block VII/377

The petitioner - to get half share

Elizabeth Wangui Wathuta)

Mary Gachambi Kiiru) - half share jointly

Lucyia Wambui Mathenge)

(iii) North Tetu Farmers Co. Ltd Plot No. 0063

The petitioner – - to get half share

Elizabeth Wangui Wathuta)

Mary Gachambi Kiiru) - half share jointly

Lucyia Wambui Mathenge)

14. The 2nd protestor called three (3) neighbors by the names Joseph Wambugu Nderitu (**PW3**), Kanyiri Ndehu (**PW4**) and Samuel Wathera to testify and to support her case; the evidence of **PW3** was that he was aged 81 years; he knew the deceased and that the deceased had two (2) wives; and the deceased lived on the parcel of land known as **Thegenge/Kihoro/69** and that the deceased had lived on that land with both of his wives who both tilled and utilized the land; the first wife had four (4) daughters and that one had passed away; currently it was only the 2nd wife that was Mary who was resident thereon and utilizing the land;

15. **PW4's** evidence was that he was aged 92 years and had known the deceased and that the deceased had two (2) wives and that the first wife was deceased; that the first wife had four (4) daughters with one having passed away; that the daughters were all adults and two of them were married; that in Kikuyu culture married daughters get no inheritance from their father; that this was in the past and that he would gladly divide his land to his daughters; his evidence was that the 2nd wife was the one currently tilling the parcel of land which had coffee and exotic trees planted thereon; **PW5's** adopted the evidence as stated in his witness statement; which evidence was not challenged;

THE RESPONDENTS CASE

16. The Respondent herein who shall be referred to as "**Mary**"; confirmed that the deceased was her husband and that she was the petitioner herein; that he 1st protestor was her son whom she had with the deceased; as for his co-protestor he was also her son but that she had gotten him before she got married to the deceased; and confirmed that all the beneficiaries had consented to the Grant being issued to her;

17. That her proposed mode of distribution of the deceased' estate was as outlined in paragraph 5 of her supporting affidavit in support of the application for confirmation; all she wanted was to be a trustee of the estate that is why she proposed that all the properties be registered in her name; none of the beneficiaries would be oppressed and that she had no intention of selling any of the properties;

18. Under cross-examination she restated that she was a widow of the deceased and that she was blessed with twelve children with one named Lucy Wambui Muya having passed away some twenty years ago; Mary confirmed that her deceased daughter's signature was appended on the Consent Form 38 and also on the Consent for Confirmation of Grant; but did not know how because Lucy was deceased and therefore could not have consented; She confirmed having petitioned for Letters of Administration but had no idea that the beneficiaries were aggrieved with her mode of distribution and had filed protests; that she was hearing of this for the first time; but she still reiterated that all the beneficiaries had granted consent to the confirmation of the grant and had duly signed;

19. She acknowledged that the deceased had a 1st wife who had four daughters; she insisted that the names of her step-daughters had been included in the Area Chief's Letter dated the 11th March, 2013; but that the daughters were married and were therefore not entitled to benefit;

20. That her late husbands' wishes were that she becomes the administrator and that only the sons were allowed to inherit the properties; but the deceased had never written this down;

21. Samuel had built a house on the land which was still standing; and that any grievance she had with him arose due to the neighbors blocking her access to the land; so she had to create a road that cut near his house;

22. That she was 70 years of age and was not opposed to registering the properties as trustee for all of her children; but was still opposed to the daughters of Ruth getting a share of the property because they were married;

ISSUES FOR DETERMINATION

23. After hearing the presentations of the respective counsel and reading the written submissions this court has framed the following issues;

(i) Whether all the children of the 1st house were beneficiaries and whether they are entitled to benefit from the deceaseds estate;

(ii) Distribution of the estate of the deceased.

ANALYSIS

Whether all the children of the 1st house are dependants and whether they are entitled to benefit from the deceaseds estate;

24. The dispute is as between **Mary** and her sons and step-daughters; but from the evidence adduced there is no dispute as to the property that comprises the estate of the deceased;

25. The only dispute is as to whether the married daughters are entitled to a share of the deceased's estate; the applicable provision of the law is Section 29 of the Law of Succession which defines a dependant; and it reads as follows;

“Section 29: 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;

26. From the reading of the above section it is clear that the succession laws disregard customary law and that it allows all the deceased's children inclusive of those daughters who had gotten married whether or not maintained by the deceased prior to his death to benefit from his estate; therefore when Mary failed to include the married daughters of the 1st house in the distribution of the deceased's estate she acted unfairly;

27. This move of exclusion of the 1st house was also opposed by her very own sons who also protested her proposed mode of distribution; their evidence was that when their father passed on he left the family in harmony; and that each wife had been given their portion; that the deceased never locked out their step-sisters from tilling their late father's land; and their proposed mode of distribution was that the three (x3) properties be divided equally between the 1st house and the 2nd house and that the petitioner be given a life interest;

28. In considering the evidence of both sides in totality this court finds that the married daughters were children of the deceased and qualify to inherit any interest in the deceased's estate in their own right.

Distribution of the estate of the deceased

29. This court reiterates that there is no dispute as to what comprises the estate; the dispute hinges on distribution of the deceased's estate and the parties are not agreeable upon its mode of distribution; this court is therefore tasked with resolving this issue.

30. From an overall review of the evidence adduced by the parties it is clear that the Thegenge/Kihora/69 property was where the deceased had resided with his two wives during his lifetime; and that both wives tilled and utilized the land; there also seems to be a consensus by both sets of protestors on the mode of distribution of this property; in that it be divided into two half portions; the 1st protestor proposed that the parties switch the sub-divisions and the portion that housed the grave of the 1st wife be given to the 2nd set of protestors;

31. Mary claimed in her evidence that all the beneficiaries were supportive of her mode of distribution; and that they had all appended their signatures to the Consent; from the evidence adduced by the parties it is apparent that Mary's actions are the genesis of all the acrimony between her and the beneficiaries;

32. This court is inclined to disregard the Consent filed by Mary because the evidence demonstrates that one of the signatories therein was deceased; Mary acknowledged in her testimony that her daughter named Lucy had been deceased for many years and therefore it would not have been possible for her signature to be on the consents; due to the questionable signatory and activity it is apparent that the Consent filed is not a true and valid consent and can safely be disregarded by this court;

33. Due to the consensus by the protestors on the mode of distribution of the deceased's properties this court is disinclined to increase the acrimony created by Mary and will therefore adhere to the mode proposed by the protestors; for the Thegenge property Mary's sons had proposed that the 2nd house' portion be held by Mary and that she holds a life interest in the said portion;

34. In addressing the distribution of the remaining properties; the facts that are also not in dispute are that the deceased was a polygamist and had two wives and that there were two households.

35. Section 40 of the Law of Succession is found 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.”

36. 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.

37. The first house is found to comprise of four daughters; one is deceased but the surviving sisters invited their deceased sister's children to claim their late mothers portion; which then translates to four units; the second house comprises of eleven members and Mary is the extra

unit bringing the total to twelve units; the ratio of distribution is therefore determined to be 4/16 for the first house and 12/16 for the second house; this court will therefore apply these ratios in distributing **Eusonyiro/Suguroi Block VII/377** and **North Tetu Farmers Co. Ltd Plot No. 0063**;

FINDINGS AND DETERMINATION

38. For the forgoing reasons this court finds that the married daughters are dependants and beneficiaries of the deceased and qualify to inherit and are also entitled to benefit from the deceased's estate.

39. The mode of distribution by Mary as set out in her application is found to be unfair and discriminatory; the Protests are found to have merit and are hereby allowed;

40. The Grant is hereby confirmed and the deceased's estate shall be distributed as follows;

(i) The property known as land parcel number **Thegenge/Kihora/69** shall be apportioned equally between the 1st house and the 2nd house; the 1st house shall take the portion that hosts their deceased mother's grave; Mary shall hold a life interest in the 2nd house's half portion share; and upon her death this portion shall be divided equally between her surviving children;

(ii) **Eusonyiro/Suguroi Block VII/377**- shall be divided on a ratio of 4/16 for the first house; and 12/16 for the second house; Mary shall hold a life interest of the second houses share the life interest to terminate upon her death and shall then be shared equally between all her surviving children.

(iii) **North Tetu Farmers Co. Ltd Plot No.0063** –the property to be divided according to the determined ratios; Mary shall hold a life interest of the second houses share and upon her demise it shall be shared equally amongst all her surviving children.

Each party shall bear their own costs.

It is so ordered.

Dated, Signed and Delivered at Nyeri this 13th day of December, 2018.

HON. A. MSHILA

JUDGE.