



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 500 OF 2004
IN THE MATTER OF THE ESTATE OF STEPHEN KABIBIA NGAO (DECEASED)
AQWILLINA NDUNGE NGAO.....APPLICANT
VERSUS
ELIZABETH MUSILI NGAO.....RESPONDENT

JUDGMENT

1. The deceased Stephen Kabibia Ngao died intestate on 21st May 2000. On 26th February 2004 the applicant Aqwillina N. Ngao and the respondent Elizabeth Musili Ngao petitioned this court for the grant of letters of administration intestate. In their joint affidavit in support of the petition for the grant of letters of administration intestate, they indicated that they were the widows of the deceased; and that the deceased had left three children: Isaac Ngau Ngao, Emmanuel Mwai Ngao and Saul Nzioka Ngao. The estate left by the deceased had the following assets:-

- (a) Buru Buru House No. 572 at Phase III;
- (b) Kahawa West EE8, LR EE8;
- (c) Dandora Plot No. CO805;
- (d) Plot No. 3/181 Soweto Nairobi;
- (e) Plot No. 26 Makindu;
- (f) Parcel 940, 941 and 942 at Makindu;
- (g) Parcel No. 1710 at Makindu;
- (h) Parcel No. 1730 at Nguu Ranch;
- (i) Moto Vehicle Reg. No. KQN 780;
- (j) Shares in Nacico Sacco Society Coop Plaza LR No. 209/11834;

- (k) Certificate No. 0195 (membership No. A03-01586);
- (l) Shares Nahoco Chambers (membership No. A0301586);
- (m) Shares in Nacico Sacco Society Coop Plaza (Membership No. A01-01586);
- (n) Pension No. 1214; and
- (o) Bank A/c No. 5B-32874.

The grant was issued on 10th July 2004.

2. On 14th November 2007 the applicant filed the present application for the confirmation of the grant. In the affidavit sworn to support the application she indicated that the deceased had left the respondent as a dependant and Isaac Ngau Ngao, Emmanuel Mwai Ngao, and Saul Nzioka Ngao as the children. When it came to the distribution of the estate, she asked to be given land parcels Nos 940, 941 and 942 at Makindu; land parcel No. 1017 at Makindu; land parcel no. 1730 at Nguu Ranch; land parcels Nos 661 and 692 at Kisekini Adjudication; Plot No. 26 at Misongeni in Makindu; LR No. Block 76/572; house No. Kahawa West EE8; and Plot at Soweto No. 3/181. She asked that the Nacico and Nahoco shares be equally shared between her and the respondent; and that, the Local Government pension be shared equally between them after Kshs.219,700/= is deducted and given to her. The application was without reference to the respondent.

3. The respondent filed an affidavit of protest to complain that the applicant had sought confirmation without including her, and that she had allocated herself the entire estate of the deceased and left her and the children out; and she had not sought her consent and that of the children in the distribution. Later, she (the respondent) filed an affidavit of proposed mode of distribution in which she asked that the following property be distributed in accordance with **section 40** of the **Law of Succession Act (Cap. 160)**:-

- a) Buru Buru House No. 76/572 at Phase III;
- b) Kahawa West EE8;
- c) Soweto Plot No. 3/181;
- d) Land parcels No. 938, 940, 941, 942 and 1017;
- e) Nguu Ranch No. 1730; and
- f) Parcels Nos 661 and 691.

She asked that those properties be each registered in their joint names to be held in trust for the three children and for them to have life interest. As for the pension, she asked that it be shared as follows:

- (a) Applicant – 12.5%;
- (b) Respondent – 12.5%;
- (c) Saul Nzioka Ngao – 20%;
- (d) Isaac Ngau Ngao – 30%; and
- (e) Emmanuel Mwai Ngai – 25%.

Lastly, she asked that one of the properties be made available for the children to stay in instead of them staying in rented premises. Presently, she stated, the applicant stayed in the Buru Buru house and collects

rent from the Kahawa West house. She stays in a rented house with the children.

4. On 16th May 2008 the applicant swore an affidavit to say that she got married to the deceased in 1971. At the time deceased was living in a city council house, and that the only land he had was inherited. He was a civil servant. She was also a civil servant employed by the Ministry of Education. The deceased bought Dandora Plot No. CO805; Soweto Plot No. 3/181; Nacico shares; and Nahoco shares. He used his own resources. Added to this was his pension. However, the couple jointly brought parcels No. 940, 941 and 942 at Makindu (estimated to be 900 acres); parcel No. 1710 at Makindu (80 acres); parcel No. 1730 at Nguu Ranch (10 acres); pieces of land in Nunguni – Kyekalya and Kyandilo; plot No. 26 at Makindu (partly built); Buru Buru house which is the matrimonial property; vehicle KQN 780; then cattle, goats and sheep. The applicant stated that her contribution to the acquisition was more than half. The applicant stated that she personally bought the house at Umoja and the house at Kahawa. Regarding the house at Kahawa, she produced agreement dated 17th January 1979 to show that she was the buyer from the City Council of Nairobi for Kshs.30,000/=. Her case was that in 1984 the deceased forcefully got it transferred to him. When he retired in 1992, she continued, she noticed he was cohabiting with another woman (the respondent). In paragraph 18 of the affidavit she stated:-

“THAT I consented to the co-administration to be included in the grant not because I recognized that she was entitled to half of the property. I intended to bring up these issues during distribution.”

She asked that she gets the entire estate, except for the Dandora and Soweto plots and the Nacico and Nahoso shares and the pension which she sought that they be shared equally between her and the respondent and the children.

5. The respondent swore a further affidavit which was filed on 17th October 2008 to say that after the death of the deceased the parties jointly sold the vehicle and the Dandora plot and equally shared the livestock. She stated that the deceased had the two families openly and to the knowledge of the applicant, and that they interacted closely and celebrated Christmas together. She had settled on Plot No. 940 at Makindu. She worked and also contributed to the acquisition of the property in the estate. She considers all the property to belong to the estate of the deceased and therefore available for distribution to the beneficiaries.

6. The applicant was represented by Mr Musyoka and the respondent by M/s Muendo. The parties agreed that the distribution of the estate be decided on the basis of the filed affidavits and the written submissions by counsel. I have considered all these affidavits and the written submissions. I have considered the provisions of **Article 45(3)** of the Constitution of Kenya 2010 that:-

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

There is **section 40(1)** of the **Law of Succession Act** which provides that

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and residue of the net estate shall, in the first instance, be divided among the house 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.”

Further, I consider that it is just, fair and reasonable that the contribution of a spouse (whether such contribution is direct or indirect, financial or otherwise) be a consideration that the court should bear in mind when distributing the estate of the deceased. So that, where the deceased leaves two widows and one married in 1960 and the other in 1990, he dies in 2013, and he had acquired property throughout his married life, at every stage with the widows contributing, the later widow cannot, relying on **section 40(1)** above, claim that the estate left by the deceased should be shared equally between them. The court has to consider what each widow contributed, directly or indirectly, towards the acquisition and development of the property to the estate. Lastly, the court has to consider the children left by the deceased, bearing in

mind that each child has an equal claim to the estate left by the deceased.

7. The applicant appeared to be saying that the deceased did not take another wife (the respondent) and that she did not give him consent to marry again. However, her own pleadings and affidavits betrayed this position. She jointly with the respondent petitioned for the grant of letters of administration intestate and declared that the deceased had left two widows, herself and the respondent. She declared that the deceased had left three children who, according to the birth certificates availed, belonged to the house of the respondent. The birth certificates show that their father was the deceased. A party is bound by his own pleadings. I find that the deceased had two widows, the applicant and the respondent, and that he had three children with the respondent.

8. It is not clear at what stage the deceased married the respondent. The respondent did not say when she got married. The applicant stated that it was about 1992. According to the birth certificates filed by the respondent, her children were born in 1989, 1993 and 1996. The applicant was married to the deceased in 1971. It would appear that the respondent was married in late 1980's.

9. I have looked at some of the documents produced by the applicant. One shows that the deceased bought 400 acres in 1970 from one George Jonathan Kituu for Kshs.17,600/= to be paid in instalments. He paid a deposit of Kshs.2,000/= and the balance was to be paid by monthly instalments of Kshs.350/=-, beginning 5th September 1970. It would appear that the substantial part of the payments was made after the deceased had married the applicant. Both were civil servants, earning a salary each. There is another agreement in which the deceased bought land at Kyandilo in Kilungu from Mulandi Mwai for Kshs.8,300/= on 18th December 1976. A deposit of Kshs.1,000/= was paid and the balance was to be paid by monthly instalments of Kshs.200/=-. This, going by the earlier agreement that bought 400 acres, would appear to have been a substantial piece of land. On 12th January 1975 the deceased bought land from Mwalimu Nzyuko for Ksh.4,000/= at Katuluni. The land was paid for in full. Again, considering the amount and year, this was substantial parcel of land. On 24th December 1976 the deceased bought land at Katuluni for Kshs.8,500/= from Mwalimu Nzyuko. He paid Kshs.2,500/= deposit and the balance was to be paid as follows:- Kshs.1000/= at the end of January 1977, and the balance by monthly instalments of Kshs.500/=-. There is no dispute that the deceased bought the Buru Buru house, and it was acknowledged by the respondent that this is where the applicant has always stayed as her matrimonial house. Then there is the Kahawa West Tenant Purchase House. The applicant stated, and produced evidence to prove, that it was allocated to her by the City Council of Nairobi. She stated that she paid Ksh.30,000/=-. She showed she took a loan to raise the money. On 19th October 1984, there is evidence, she wrote a letter to the Council to have it transferred to the deceased. She said that she was forced to do this.

10. I have equally looked at the affidavits of the respondent. She stated that she was equally employed and contributed to the acquisition of the estate of the deceased. She did not say where she was employed, and there is no single property that she said was bought after she got married to the deceased. I find that she found all the property of the estate already bought.

11. The respondent stated, and it was not disputed, that after the death of the deceased the two sold the motor vehicle and the Dandora plot they equally shared the proceeds. They equally shared the livestock.

12. I consider that the respondent and her children would be entitled to benefit from the estate of the deceased. Specifically, they would be entitled to benefit from the estate less what the applicant would be claiming as her contribution. Equally, the applicant would be entitled to benefit from that portion of the deceased.

13. The Buru Buru house was the applicant's matrimonial house, and she is the one who bought the Kahawa West House. However, the deceased contributed to the acquisition of these properties in the same way the applicant contributed to the acquisition of the parcels of land mentioned in the foregoing.

14. Considering all the above, I order that Buru Buru Block 76/572 and Kahawa West EE8 shall each go

to the applicant absolutely. Land parcels 940, 941 and 942 measure about 900 acres according to the affidavit sworn by the applicant on 9th March 2005. The applicant shall get 500 acres, and the respondent and her three children shall get 400 acres to be shared equally among them. Land in Makindu 1710 measures 80 acres. The applicant shall get 40 acres, and the respondent and her three children shall equally share the balance of 40 acres. Land in Nguu Ranch No. 1730 measuring 10 acres. The applicant shall get 5 acres, and the respondent and her three children shall equally share the balance of 5 acres. The respondent and her three children shall equally inherit the Soweto (Kayole) Plot No. 3/181 and plot at Makindu town No. 26 (Misongeni). The three children of the respondent shall equally share the piece of land in Nunguni Kyelelya village. The applicant and the respondent shall equally share the shares in Nacico and Nahoco. Lastly, all the five beneficiaries shall equally share the Local Government pension. Any unshared property shall be equally shared by the applicant and the respondent.

15. In those terms, the grant issued jointly to the applicant and the respondent shall be confirmed. I ask each side to pay its own costs.

DATED and DELIVERED at NAIROBI this 17TH JANUARY 2017

A.O. MUCHELULE

JUDGE