



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT SUCCESSION CAUSE NO. 1013 OF 2011

**IN THE MATTER OF THE ESTATE OF KIAGO MWANIKI ALIAS KIAGO S/O MWANIKI
(DECEASED)**

WATURI KIAGO

JOHN GACHUCHIA KIAGO..... PETITIONERS

VS.

ANDERSON MUCHUCHE KIAGO

ESTHER WATHIEGENI MUCHEMI..... OBJECTORS

JUDGMENT

Kiago Mwaniki alias Kiago S/O Mwaniki is said to have died on 19th April 1948.

According to the letter from the Chief Gaaki location, dated 15th November 2007 ref no. LAND/89/VOL.II/310 the deceased had three wives, two of whom had died by then leaving only the 1st Petitioner, Waturi Kiago.

The chief indicated as follows;

1st WIFE (HOUSE)

1. WANGECI KIAGO- WIFE- DECEASED

2. MWIHAKI KIAGO- DECEASED

3. ALEXANDER MUCHEMI KIAGO- 72 YEARS

4. NYAGUTHII KIAGO-NOT MARRIED- 60 YEARS

5. WILLIAM KIMURI KIAGO-DECEASED

6. NJERI KIAGO-MARRIED

7. NDIANGUI KIAGO-DECEASED

8. JOYCE KARUNGARI- MARRIED

2ND HOUSE

1. WATURI KIAGO- 2ND WIFE
2. BETHA KARUNGARI KIAGO
3. WINFRED KAHORO KIAGO-DECEASED
4. JOHN GACHUCHA KIAGO-60 YEARS
5. MICHAEL KARIUKI KIAGO-55YEARS
6. WANGUI KIAGO- MARRIED
7. NJERI KIAGO- MARRIED

3RD HOUSE

1. WARIMA KIAGO-3RD WIFE
2. RAHAB KARUNGARI KIAGO-DECEASED
3. MWANIKI KIAGO-DECEASED
4. WANJIKU KIAGO-MARRIED DECEASED
5. ANDERSON MUCHUCHE KIAGO-64 YEARS
6. KIMURI KIAGO-DECEASED

The deceased left two parcels of land;

1. AGUTHI/GAKI/303 APPROXIMATELY 20.9 ACRES
2. PLOT NUMBER 15 MUTHINGA REGISTERED IN THE NAMES OF KIAGO MWANIKI AND WILFRED KAHORO

Waturi Kiago and her son John Gachucha Kiago petitioned for letters of administration intestate on 12th October 2011.

There was also another letter in the file from the Chief Gaaki Location dated 11th March 2011 ref no LMD/33/VOL.II/213 indicating that the deceased had more than one wife, the second page is missing listing the other houses.

I noted from the record also that when the form P&A 5 was filed it did not indicate that the deceased had three wives. It simply listed the survivors as Waturi Kiago as the widow and 4 married daughters, one daughter (assumedly unmarried), two daughters in law, two sons and one grandson.

It is common ground that the deceased had purchased various parcels of land which, during the demarcation and consolidation period between 1956 to 1959 were put together into AGUTHI/GAKI/303 measuring about 20.9 acres registered in his name despite the fact that he had passed away in 1948.

Grant of letters of administration intestate was issued on the 27th April 2012 to Waturi Kiago and the protester Anderson Muchuche Kiago after he had raised objection to the same being issued to her and her son.

By a summons dated 22nd February 2013, the 1st petitioner sought the confirmation of the grant in the following terms;

Those who survived the deceased were identified as follows;

- 1.BETHA KARUNGARI-MARRIED DAUGHTER
- 2.JOHN GACHUCHA KIAGO- SON
- 3.MICHAEL KARIUKI KIAGO –SON
- 4.MARGARET WANGUI NJUGUNA – MARRIED DAUGHTER
- 5.JECINTA NJERI GACHANJA-MARRIED DAUGHTER
- 6.ANDERSON MUCHUCHE KIAGO-SON
- 7.ELIZABETH NYAGUTHII KIAGO-DAUGHTER
8. PRISCA NJERI KAGIRI-MARRIED DAUGHTER

She also indicated the dependants of the deceased as follows;

- 1.WATURI KIAGO- WIDOW
- 2.JANE WAGUTHI KAHORO- DAUGHTER IN LAW
- 3.ESTER WATHIEGENI MUCHEMI- DAUGHTER IN LAW
- 4.JOSHUA KIAGO KIMURI-GRANDSON

She proposed the following mode of distribution of the estate; LAND PARCEL AGUTHI/GAKI/303 And HALF PLOT NO 15 MUTHINGA to be shared in equal shares by

- 1.JOHN GACHUCHA KIAGO- SON
- 2.MICHAEL KARIUKI KIAGO -SON
- 3.ANDERSON MUCHUCHE KIAGO-SON
- 4.ELIZABETH NYAGUTHII KIAGO-DAUGHTER
- 5.JANE WAGUTHII KAHORO-DAUGTHER IN LAW
- 6.ESTER WATHIEGENI MUCHEMI-DAUGHTER IN LAW
- 7.JOSHUA KIAGO KIMURI-GRANDSON

It is interesting that following the filing of this Summons for Confirmation of Grant, she filed an affidavit of protest in which she complained bitterly that her son, JOHN GACHUCHA KIAGO and the advocate had misled her into signing documents disinheriting herself of her own husband's estate. She deposed that the land ought to be divided equally among the three houses at 6.9acres, plus an equal share of the plot no 15 Muthinga. She also filed a statement in which she stated that her husband had three wives and his estate should be shared among them.

The record shows that it is after this that she apparently appointed another firm of advocates who filed an

amended application for the confirmation of grant in which she would get her 2 acres separately, and each house would have an equal share of the rest of the Estate. She later disowned the said advocate and requested that the documents he had filed be expunged from the record. Consequently, the documents were expunged from the record by Justice Mativo.

The second protester withdrew her protest in the course of things.

The co administrator Anderson Muchuche filed an affidavit of protest to the summons for confirmation of grant on the 13th March 2013. He stated that the clan elders had in 1959 shared the property of the deceased equally among the three houses with each getting 6.9 acres.

He also filed a witness statement by one Gathondu Wandura who stated that he was born in 1902 and was in the demarcation committee of the Gaki sub location. He stated that he knew the deceased and saw his land being consolidated and demarcated. And that the deceased 's 3rd wife died in 1952, but each of deceased's wife's families occupied their portion of land in 1959.

The parties agreed to rely on all the documents and affidavits they had filed up to the time of the hearing of the protest.

When the matter came for hearing on the 7th February 2017, the protester was cross examined on his affidavit by Ms. Mwai for the Petitioner.

He told the court that he was born in 1946 and had five siblings who had all passed away. He denied that by the time of his father's death his mother had gone back to her parents' home. His mother died in 1952, his siblings died between 1951 and 1998. That the two properties belonged to his father and his brother Wilfred Kihoro must have added his own name on the Muthinga Plot after the death of their father. That his father's estate could not be shared among the children because his father had already shared the land among his wives. That the 1st administrator/petitioner could not decide how the land would be shared as each house already had its own portion.

In her testimony the Petitioner, a very elderly lady, told the court that she had bought land about 21 acres with her husband. That her husband also had a plot in Muthinga where her son Wilfred Kihoro, now deceased had constructed a building. That the plot was registered in both her son and her husband's names.

She also said that her son said that the land be divided among 7 persons and each to get three acres.

Cross examined by the protester, she said she was subdividing the land among the children of the deceased although they were not all her children because the land belonged to her husband.

Her witness Peter Kabogo Njaramba otherwise known as Githongo told the court that he was 70 years old and the deceased was his uncle. He said that the 1st petitioner had raised all of them including the protester. That the deceased had 6 sons and one unmarried daughter who should inherit his estate.

In his submissions the Protester reiterated the fact that his father had three wives, that each of the wife's family had occupied their portion since 1959 and there was no reason to disturb that occupation.

He referred the court to the 1st petitioner's affidavit of protest and statement of 5th March 2013 which she filed when she found that she had been disinherited by her son.

The petitioner filed submissions through her advocate Ms. Mwai.

It was submitted that the documents filed on 5th March 2013 by the 1st petitioner were not known to her and were filed by an advocate who had not been appointed by the petitioner. However, a perusal of the record will show that the statement and the affidavit of protest were filed by the petitioner before the said

advocate came on record. The only documents filed by the advocate were the amended summons for the confirmation of the grant and these were expunged from the record

It was also submitted that there was no certainty that the land AGUTHI /GAKI/303 and the plot no 15 MUTHINGA actually belonged to the deceased because it was registered in his name after his death. With respect that argument is not tenable, as it is clear from the evidence that what came to be registered as AGUTHI/GAKI/303 was the consolidation of the fragments of land that had belonged to the deceased.

It was also submitted that the protester would get an undue advantage if the estate was shared among the three houses as all his siblings are deceased. There is however the provision of the law applicable to the circumstances of this case, where the deceased was polygamous, and died before the commencement of the Law of Succession Act Cap 160 Laws of Kenya. However, the contrary is also possible. From what has been placed before me, it is not clear to me, which house(s) each of the listed beneficiaries belongs to. The possibility that some belong to the same house leading in an unfair share is not far-fetched.

According to the 1st petitioner's statement filed on the 5th of March 2015, soon as the land was registered in 1959, she and her family occupied the western part of the land, Wangeci the 1st wife occupied the eastern part of the land while the children of the 3rd wife were given occupation of the central portion of the land. In that statement she also stated that the deceased was allocated a property in 1932 plot 15 Muthinga where he put up a shop in 1946. In that statement she proposed that the estate be shared equally among the three houses. These seems to agree with the protester's position.

According to the protester, after the demarcation and consolidation of land, each of the deceased's wives occupied a specific area on the land together with her children. That this has been the case since 1959.

From the submissions and the evidence before me certain issues arise;

1.The legal regime applicable to the deceased estate because he died in 1948 taking into consideration the provisions of section 2 of the LOSA on the application of the Act to estates of persons who died before the commencement of the act.

Section 2 provides

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

2. Considering the issue above, the next question is which of the three houses does each of the listed beneficiaries belong to? This is important and relevant to the distribution of the Estate in the event that the court does find that section 2 above is applicable.

This is in view of the definition of "house" in the Law of succession Act to mean a **family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife;** (emphasis added)

Further, we have the provisions of section 40 with regard to an intestate who was polygamous which provides as follows;

s.40 (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.** (emphasis added)

(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.

3. When was the Muthinga Plot registered in the names of the deceased and his son Kahoro? That information is not available from the certificate of search and it is relevant to the distribution of this estate.

Before I can give the final orders, and acting under the provisions of Rule 73 of the P & A Rules of the Law of Succession Act Cap 160 Laws of Kenya, I order that the parties to address these issues in particular issue number 2 and 3 by way of a supplementary affidavit. Both parties have 30 days to do so.

DATED, SIGNED AND DELIVERED THIS 5TH MAY 2017 AT NYERI

TERESIA MATHEKA

JUDGE

IN THE PRESENCE OF

Ms. Mwangi holding brief for Ms. Mwai for the Petitioners

N/A for the Protester

Court AssistantTeresia