



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 332 OF 2011

(IN THE MATTER OF THE ESTATE OF SOLOMON WANGAI KIMITA (DECEASED))

RUTH MUTHONI WANGAI.....PETITIONER

VERSUS

BONIFACE MWANGI WANGAI.....1ST PROTESTOR

TERESA WANGAI.....2ND PROTESTOR

JUDGMENT

The petitioner petitioned for letters of administration in respect of the estate of Solomon Wangai Kimita who died intestate domiciled in Kabarú in Nyeri County in March, 2004. In the petition filed in court on 6th July, 2011, the petitioner described herself as the deceased's wife and named eleven children as surviving the deceased. Of these children three are described as daughters while the remaining eight have been identified as his sons who include the first protestor.

The record shows that the grant of letters was made to the petitioner on 13th July, 2012 and on 15th July, 2013, the petitioner filed a summons for the confirmation of the grant.

The respondents protested against the confirmation and filed an affidavit of protest in that regard on 16th December, 2013. The first protestor who was listed by the petitioner as one of the deceased's sons protested that his mother, the second protestor and his sisters had been omitted from the list of beneficiaries eligible for a share of the deceased's estate. He proposed that the deceased's estate should be distributed equally between the petitioner's house and the second protestor's house.

In response to the protest, the petitioner swore an affidavit in which she disputed the contention that the second protestor was the deceased's wife; she contended that although the second protestor was once married to the deceased, she left him before his demise and even remarried. She however admitted that the second protestor left with the children she had had with the deceased and that these children had been adopted by her current husband as his own children. Of those children Joseph Muhindi and Peris Wanjiru Wangai are said to have remained with the deceased and the petitioner when the second protestor left.

Directions were taken that the protest be determined by way of oral evidence and so the protestors and the petitioner were heard on 16th December, 2014. The first protestor testified that his sisters Peris Wanjiru, Helen Nyiha, Veronica Wangu, Elizabeth Nyaruraya, Julieta Wanjugu and Ann Wambui had not been catered for in the distribution of the estate. His mother had also been omitted from the distribution proposed by the petitioner.

The second protestor testified that indeed she was one of the two wives of the deceased with whom she had eight children; she named these children as Peris Wanjiru, Helen Nyiha, Wangeci, Ann Wambui, Dororita Wanjugu, Joseph Muhindi and Wangu. She testified that all these children are alive and they are all of full age.

This protestor also testified that she left the matrimonial home and she was living with her father because her co-wife, the petitioner, became hostile to her after the deceased's demise; they were all previously living in the same homestead at Kimahuri. It was her evidence that the deceased left behind two properties one of which was at Kimahuri and the other one at Naromoru and that the protestor had disposed of the Naromoru property. She proposed the remaining property to be shared out equally between her house and that of the petitioner.

The petitioner's evidence was that she had nine children with the deceased; she named them as Peter Mwangi, John Kimani, Beth Wanjiru, John Gichuki, Esther Nyaruraya, David Mathenge, Miriam Mugo, John Kibara and Milcah Njoki.

The petitioner conceded that the second petitioner was her co-wife but that she left in 1984; she testified further that her co-wife had five children with the deceased before she left and that she left with all the children although two of them, Boniface Mwangi and John Muhindi came back.

As far as the estate is concerned, the petitioner testified that the deceased left behind several properties which she had listed in the petition as:-

1. Island farm 385 (measuring approximately 1.59 ha)
2. Island farm 386 (measuring approximately 1.61 ha)
3. Island farm 387 (measuring approximately 1.59 ha)
4. Island farm 388 (measuring approximately 1.59 ha)
5. Ewasonyiro/Naromoru West Block 1/143

The petitioner testified that she was ready to give the second protestor's sons part of the estate but not her daughters; she also does not wish to give her co-wife anything. She also admitted that she sold the Naromoru land which, so she testified, measured four and a half acres for Kshs. 320,000/=. That is as far as her case went.

When one considers the evidence of both the protestors on the one hand and petitioner on the other hand, several issues worth of consideration in this determination emerge; as far as I can gather, these issues are as follows:-

1. Whether the second protestor was the deceased's wife;
2. Whether the second protestor had any children with the deceased;
3. The identity or ascertainment of the entire estate of the deceased;
4. Whether the second protestor and her children are entitled to a share of the estate of the deceased;
5. How should the deceased's estate be distributed or shared out?

Was the second protestor was the deceased's wife?

The protestors' and the petitioner's evidence leaves no doubt that the second protestor was the deceased's wife. In her evidence, the petitioner acknowledged the second protestor was not only her co-wife but also that she had five children with the deceased; her problem with the second protestor was that she left the deceased before his demise and even remarried.

The protestor herself testified that she only left after the deceased's demise and when the petitioner

became hostile to her. According to her testimony, she did not remarry as alleged by the petitioner but she went back to her parents with whom she lives to date.

Apart from the petitioner's allegation that the second petitioner had remarried, there was no proof of such remarriage. My assessment of the petitioner's allegation that the second respondent had remarried is that the petitioner was simply laying ground to deny the second protestor a share of the deceased's estate. I have come to this conclusion because she testified that she is not ready to give the protestor anything out of the deceased's estate because, according to her, the protestor could not inherit from two husbands.

Her evidence regarding the second protestor's status was also contradictory; in her affidavit in answer to the protest, the petitioner swore that the protestor left in 1982 but when she testified in court she said that she left in 1984. Again while she testified that the protestor left with all her children and that two of them came back, she swore in the same affidavit that the protestor left behind two children.

The contradictions in the petitioner's evidence have led me to conclude that her testimony regarding the second protestor's marital status is not credible and cannot be relied upon. Apart from these contradictions, I have noted that there was no proof that the protestor had remarried either before or after the deceased's demise. I therefore hold that for purposes of succession to the deceased's estate, the second protestor was the deceased's wife; it does not matter that she may have left prior to the deceased's demise because under **section 3(1)** of the Law of Succession Act the term 'wife' includes a woman who may have separated from her husband. It is important for better understanding to quote this provision of the law verbatim; it says:-

“wife” includes a wife who is separated from her husband and the terms “husband” and “spouse”, “widow” and widower” shall have a corresponding meaning;

Did the second protestor have any children with the deceased?

Again the evidence of the petitioner and the protestors is clear that the second protestor and the deceased were blessed with children; the only point of departure in this regard was the number of children the second protestor had with the deceased. According to the petitioner, the protestor had five children with the deceased while the protestors' evidence was that the second protestor had eight children with the deceased.

Although the petitioner alleged that some of the protestor's children were not the deceased's, she did not point out any of the protestor's children claimed to be somebody else's children.

I have also noted that although she acknowledged that the deceased had five children with the deceased, the petitioner did not include any of them in the in the petition for letters administration; it is only in the affidavit in support of the summons for confirmation of grant that the petitioner included two of the second protestor's children.

The petitioner's conduct in respect of the second protestor's children with the deceased casts doubt on her evidence on the number of children that the deceased had with the second protestor. Looking at the petitioner's evidence from this perspective it is less probable that any of the second protestor's children were sired by a person other than the deceased; there is no evidence or proof that any of the protestor's children were not the deceased's.

What property constitutes the deceased's estate?

In form P& A 5 the petitioner listed five properties as constituting the deceased's estate; these assets are:-

1. Island farm 385 (measuring approximately 1.59 ha)
2. Island farm 386 (measuring approximately 1.61 ha)
3. Island farm 387(measuring approximately 1.59 ha)
4. Island farm 388(measuring approximately 1.59 ha)

5. Ewasonyiro/Naromoru West Block 1/143

The certificates of official search for the first four properties were filed in court together with the petition; none was filed in respect of the property referred to as **Ewasonyiro/Naromoru West Block 1/143**. However, since the petitioner listed it as one of the deceased's assets available for distribution it is presumed that it exists although its extent is uncertain. Without any evidence to the contrary I have no reason to doubt the petitioner's evidence that the deceased's estate comprised the listed properties and they are available for distribution amongst the beneficiaries to his estate.

Is the second protestor and her children entitled to a share of the deceased's estate?

From the evidence available, the second protestor was the deceased's wife in a polygamous family set-up and therefore under **section 40 (1)** of the **Law of Succession Act**, she together with her children are entitled to a share of the deceased's estate. **Section 40(1)** of the Act says:-

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.

This provision of the law is self-explanatory and it is unnecessary to belabour the point that the second protestor and her household are entitled to a share of the deceased's estate.

In what proportion should the estate be shared out?

Section 40 (1) of the **Law of Succession Act** which, as noted, answers the question whether the second protestor and her lot are eligible for a share of the deceased's estate also provides the answer to the question of how much of the deceased's estate each of the deceased's survivors is entitled to in circumstances where the deceased was polygamous and each of his widows has children.

Section 40(1) was considered extensively in the **Eldoret Civil Appeal No. 66 of 2002, Mary Rono versus Jane Rono & William Rono (2005) eKLR** and I propose to do nothing more than adopt what the learned judges held as the correct interpretation of that provision of the law as far as distribution of a net intestate estate in a polygamous family set up is concerned.

In that case, the learned counsel for the appellant argued that each of the two houses that survived the deceased should share the assets and the liabilities of the estate in equal measure. The respondents' learned counsel was of the contrary view; he was of the opinion that the first house should get a larger share of the estate considering, amongst other factors, that it contributed more to the acquisition of the estate.

In the leading judgment by Waki, J.A., the learned judge wrote:-

"I think, in the circumstances of this case there is a considerable force in the argument by Mr Gicheru (for the appellant) that the estate of the deceased ought to have been distributed more equitably taking into account all relevant factors and the available legal provisions. I now take all that into account and come to the conclusion that the distribution of the land, which is the issue falling for determination must be set aside and substituted with an order that the net estate of 192 acres of land be shared out as follows:-

- a. ***Two (2) acres for the farm house now commonly occupied by all members of the family be held in trust by the joint administrators of the estate;***
- b. ***Thirty (30) acres to the first widow, Jane Toroitich Rono***
- c. ***Thirty (30) acres to the second widow, Mary Toroitich Rono***
- d. ***Fourteen decimal four four (14.44) acres to each of the nine children of the deceased."***

Although the learned judge appeared to agree with the argument by the learned counsel for the appellant that the estate should be shared out **equally**, he nevertheless stated that the estate **“ought to have been distributed more equitably...”** and proceeded to do exactly that **“taking into account all relevant factors and the available legal provisions.”**

While agreeing with the leading judgment of Waki, J.A., Justice Omolo J.A. discounted any notion that the estate should have been distributed amongst the beneficiaries in equal shares because, in the learned judge’s view, there is no such requirement under the Act. The learned judge said:-

“I had the advantage of reading in draft form the judgment prepared by Waki, J.A., and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned Judge to be laying down any principle of law that the Law of Succession Act, cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr Gicheru. I can find no such provision in the Act.”

The learned judge proceeded to quote **section 40(1)**, which is also quoted hereinbefore, and said of it as follows:-

“My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has discretion to take into account the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.

Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in a case of young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.”

I had occasion to apply this decision in **Murang’a High Court Succession Cause No. 273 of 2013, Virginia Wanjiku Kinuthia versus Muthoni Kinuthia & Anor.** where I noted that equality as a decisive factor in the distribution of a net intestate estate in a polygamous family set-up was ruled out in the **Rono versus Rono** (ibid) decision. I took the view that in distributing an intestate estate, the court has the discretion to consider such other factors as may be necessary, for instance the number of children in each house and their station in life. The list of these factors is not exhaustive and the court will in exercise of its discretion consider such factors as are relevant in any particular case.

As far as this case is concerned, I would consider such factors as the petitioner having disposed of part of the estate; this of course was illegal and has its consequences but since the protestors do not appear to have taken any issue with it, I will only consider it as an issue only to the extent of distribution of the remainder of the deceased’s estate. I have also to consider that the petitioner has been benefitting from the estate to the exclusion of the second protestor and some of her children since the deceased’s demise; finally, I am minded that the protestors want nothing more than a half a share of the remainder of the deceased’s estate. Taking all these factors into account and taking cue from the decisions I have cited, I am inclined to distribute the deceased’s estate as follows:-

1. Land parcel known as **Nyeri/Island Farms/ 385** shall be shared equally between the petitioner and her children;
2. Land parcel known as **Nyeri/Island Farms/ 386** shall be shared equally between the petitioner and her children;

3. Land parcel known as **Nyeri/Island Farms/ 387** shall be shared equally between the second protestor and her children;
4. Land parcel known as **Nyeri/Island Farms/ 388** shall be shared equally between the second protestor and her children;
5. Land parcel known as **Euaso Nyiro/Naromoru West Block 1/143** shall be shared equally between the first house and the second house with each person in each house getting an equal share of the parcel of land allocated to the particular house.

For avoidance of doubt reference to the petitioner's children means the following persons:-

1. Peter Mwangi Wangai
2. John Kimani Wangai
3. Elizabeth Wanjiru Ngatia
4. Joseph Gichuki Wangai
5. David Mathenge Wangai
6. Esther Nyaruraya Kamau
7. William Mugo Wangai
8. Stephen Kibana Wangai
9. Milkah Njoki Maina

Reference to the second protestor's children means the following persons:-

1. Boniface Mwangi Wangai
2. Peris Wanjiru Wangai
3. Helen Nyiha Wangai
4. Ann Wambui Wangai
5. Julieta Wanjugu Wangai
6. Veronica Wangu Wangai
7. Elizabeth Nyaruraya Wangu Wangai
8. Joseph Muhindi Wangai

Accordingly, the grant of letters of administration in respect of the estate of **Solomon Wanagi Kimita(deceased)** made to **Ruth Muthoni Wangai** on 13th September, 2012 is confirmed in the foregoing terms. It is so ordered.

Dated, signed and delivered in open court this 6th day of March, 2015

Ngaah Jairus

JUDGE