



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 163 OF 2008

In the matter of the Estate of WILSON NJOGU KAMUGANE (Deceased)

AND

AGRIPINA IGANDU WILSON.....1ST PETITIONER

LAWRENCE PETER MACHARIA.....2ND PETITIONER

VERSUS

HILLUM KARIUKI NJOGU.....1ST PROTESTER

ELIAS MURIITHI NJOGU.....2ND PROTESTER

J U D G M E N T

This cause was filed on 22/4/2008 by Agripina Igandu Wilson and Lawrence Peter Macharia who were appointed joint administrators of the deceased's estate on 17/9/2008 in the estate of Wilson Njogu Kamugane following gazettelement of the cause on 24/6/2008. Form P&A 5 show that the deceased left one widow surviving who is the first administrator. There are eight (8) sons and one daughter surviving the deceased aged between 60 and 27 years.

In their application dated 20/10/2009, the administrators petition this court to confirm the grant distributing the assets of the deceased consisting of the following:-

1. **Kyeni/Mufu/2202** measuring 1.63 ha. where the 1st administrator **Agripina Igandu Wilson takes 0.40 ha.** Each of the following children gets **0.05 acres each;**

- a. *Lawrence Peter Macharia*
- b. *Anthony Kamugane Kamwigu*
- c. *Celeste Njeru Njogu*
- d. *John Ileri Njogu*
- e. *Martin Mugo Njogu*
- f. *Johnston Mwaniki Njogu*
- g. *Hilum Kariuki Njogu*
- h. *Elias Muriithi Njogu*

2. **Kyeni/Kigumo/3643** measuring 1.01 ha. with each of the following children and grand children getting **0.13 ha.**

- (a) *Lawrence Peter Macharia*
- (b) *Anthony Kamugane Kamwigu*
- (c) *Celeste Njeru Njogu*
- (d) *John Ireri Njogu*
- (e) *Martin Mugo Njogu*
- (f) *Johnston Mwaniki Njogu*
- (g) *Hillum Kariuki Njogu*
- (h) *Elias Muriithi Njogu*

3. **LR. Kagaari/Weru/549** where the following children and grand children inherit the following shares:-

- a. *Elias Njagi Njeru* - 3 acres
- b. *Susan Muthanje Njogu* - 1 acre
- c. *Lucy Thaara Njogu* - 1 acre
- d. *Ambrose Gitonga Macharia* - 0.20 ha.
- e. *Martin Mugo Njogu* - 0.20 ha.
- f. *Lena Wawira Njogu &* - 1 acre jointly
- g. *Caroline Wanja Njogu*
- h. *Christentia Wangai Njogu &* - 1 acre jointly
- i. *Faustin Mugo Njogu*
- j. *Hillum Kariuki Njogu &* - 1 acre jointly
- k. *Elias Muriithi Njogu*

4. **Agripina Igandu Njogu** to take the following shares (stock) whose value or quantity has not been specified:-

- a. *Mathundiri Competitive Co.*
- b. *Rukuriri Tea Growers Sacco Ltd*
- c. *Rukuririi Tea Factory Commercial Ltd*
- d. *Kathangariri Tea Factory Ltd*
- e. *Rahimtula Trust Tower Building*

5. **One Bicycle** to go to *Johnston Mwaniki Njogu*.

The protesters Hillum Kariuki Njogu and Elias Muriithi Njogu filed a joint affidavit of protest against confirmation sworn on 5/11/2012 and filed in court on the same date. The affidavit raised several issues in opposition to the mode of distribution proposed by the administrators.

Firstly, that the deceased had three wives and is survived by only one namely Agripina Igandu Wilson the first administrator. She was the second wife of the deceased. The first wife was Jerusha Kanyi Njogu and the 3rd wife was Gladys Igandu Njogu. Gladys was the mother of the protesters. Both the first and the third wives are now deceased. The children of each wife are listed and named in this affidavit. It is stated that the 3rd house is not represented in the administration of the estate and it is the protesters' prayer that it be represented.

It is the evidence of the protesters that during the lifetime of the deceased he distributed his land LR. No.Kyeni/Mufu/348 comprising of measuring 8.09 ha. (18 acres) to the sons of the 1st and 2nd wives. A total of 16 acres was distributed leaving only a two acres portion in the name of the deceased. During the lifetime of the deceased he called the protesters who were the youngest sons in his family and showed them half acre portions where each of them was to build a home. Thereafter, the protesters put up their homes on those respective portions. It is their proposal that having already constructed their homes on the said portions, they be given the portions as part of their inheritance. It is proposed that the remaining one acre be shared equally between the three houses. One Johnstone Mwaniki Njogu had been given land measuring two acres bought by the deceased and the protesters are of the view that Johnstone should keep the two acres as part of his inheritance.

The protesters testified that the deceased had distributed LR. Kagaari/Weru/3643 equally to his three wives. The protesters have no issues with that property and the shares held by each house.

LR. Kagaari/Weru/549 comprised 10 acres. The deceased distributed it to his children leaving only two acres. It is the protesters' case that the two acres be shared as follows:-

- a. *Lucy Thaara Njogu (an unmarried daughter of the deceased) to get One (1) Acre;*
- b. *The remaining one acre be shared equally between the three houses of the deceased.*

The deceased had shares in five companies/co-operative societies and/or Saccos which the administrators have proposed goes to the surviving widow who is the 1st administrator. The protesters are of the opinion that the three houses should share the stocks (shares) equitably.

Lastly, the protesters say that one of the deceased's sons Celeste Njeru Njogu is now deceased and as such his share should be registered in the name of Lydia Muthoni Njeru. The protesters also demand that the original title of LR. Kagaari/Weru/549 be produced by the administrators for purpose of executing the grant.

The petitioners' case is that the first administrator being the second and the only surviving widow of the deceased together with the son of the first wife should remain the administrators of the estate. Their case is that they called all the members of the three houses before filing the case in court and agreed on how the succession cause was to be conducted and how the estate was to be distributed. The protesters were present and also participated in the decision of the family. The protesters consented to the two petitioners being appointed administrators.

The petitioners defended their mode of distribution arguing that surviving widow has taken care of the interests of all the children of the deceased. Further that she has given the destitute grand children shares in the estate which would have gone to their parents if they were alive. It was also argued that the one acre will also provide for the married daughters of the 1st administrator in case they separate from their husbands.

The issues for determination are twofold:-

- (a) *Whether the 3rd house (that of the protesters) should be represented in the administration of the estate.*
- (b) *The identification of shares for the beneficiaries.*

It is not in dispute that the deceased had three wives and that DW1 is the only surviving widow. The deceased in his lifetime had shared his land among his sons in the first and second for the reason that they had attained the age of majority. The younger sons who are the protesters claim to have been shown half acre portions on which they put up their homes. The 2nd petitioner confirms that even the youngest son (2nd protester) has already constructed his house and that the 1st administrator pointed out to him the portion on which the house stands.

From the affidavit of the petitioners, the first house which has 5 children are supposed to get a total of 11.13 acres. The house has one married daughter who is not claiming a share in the estate. The acreage includes the 9 acres made up of 3 acres each for the 3 sons given by the deceased during his lifetime.

The second house which has 9 children with only 4 claiming beneficial interest is supposed to get 8.85 acres. This acreage includes the six acres made up of two each given to the 3 children during the lifetime of the deceased. The 3rd house with 5 children claiming beneficial interest is slated for 5.3 acres from the petitioners mode of distribution. This acreage includes two acres given to one of the children Johnstone Mwaniki during deceased's lifetime.

In regard to the stock (shares), the petitioner proposes that all of the shares in six companies/co-operatives societies devolve to the surviving widow. In my considered opinion, the proposed distribution is not fair to the rest of the beneficiaries especially those of the first and third houses. It is also in contravention with Section 40 of the Law of Succession Act which treats the surviving widow as an additional unit to the children of the deceased.

The protesters affidavit represent some sort of equitable distribution by setting out the shares to be inherited by each house. This is notwithstanding that the estate should be distributed in accordance with the law.

The first and second house are represented in the administration of the estate. It will be fair and just to have one of the protesters be appointed a co-administrator to take care of the interests of the third house.

The deceased died in the year 2004 and the law of Succession Act is therefore applicable in the distribution of the estate. The deceased was polygamous and as such Section 40 of the Succession Act Cap 160 is applicable.

It provides:-

(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.

(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.

The estate of the deceased herein ought to be distributed between the three houses according to the number of children in each house, and also adding the surviving widow as an additional unit to the number of children. This position was affirmed by the Court of Appeal in the case of **CATHERINE NYAGUTHII BAUNI VS GREGORY MAINA BAUNI [2009] eKLR** where the High Court was faulted for not making reference to the provisions of Section 40 of the act in the case where the deceased had a polygamous union. The court was also faulted by the trial judge for treating grand children of the deceased as part of the second house. The court then held that the estate of the deceased should be share out in ratio reflecting the number of units in the two houses.

In this case, the protesters are asking the court to give them half an acre each on Kyeni/Mufu/2202 and then distribute the remaining acre to the 3 houses. It is not disputed that this parcel resulted from subdivision of deceased's land Kyeni/Mufu/348 whereas all the children of the first and second house were given land during their father's lifetime.

The land was allocated as follows:-

Name-----Parcel No.-----Acreage-----

- (a) Antony Kamugane Kamuigu 2196 1.21 ha. (3 acres)
- (b) Lawrence Peter Macharia 2197 1.21 ha. (3 acres)
- (c) Celeste Njeru Njogu 2199 1.21 ha. (3 acres)
- (d) John Ireri Njogu 2200 1.21 ha. (3 acres)
- (e) Martin Mugo Njogu 2201 0.81 ha. (2 acres)

Parcel No. 2198 was given to one Lemmy Oscar Nyaga. His name does not feature in the list of survivors of the deceased and it is likely that he was not a family member. Parcel No. 2202 comprising of 1.86 ha. remained in the name of the deceased Wilson Njogu Kamugane and it is an asset for distribution in this cause.

The children of the 3rd wife may have been minors at that time and could not be allocated any land. However, Johnstone Mwaniki Njogu was later given LR. Kyeni/Mufu/2161 measuring 0.81 ha. by the deceased.

In a situation where the deceased has given properties to the beneficiaries during his lifetime, Section 42 of the Law of Succession Act is applicable.

It provides:-

“Where

- a. An intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- b. Property has been appointed or awarded to any child or grandchild under the provisions of Section 26 and 35

That property shall be taken into account in determining the share of the net estate final accruing to the child, grandchild or house”.

In the case of **SAMUEL MAINA MWANGI & 2 OTHERS VS MUTHONI KAGIRI [2013] eKLR** the Court of Appeal in dealing with an appeal with similar facts held:-

“Therefore, the trial court was correct in holding that the parcels of land that were given to the appellants (by the deceased during his lifetime) would be taken into account in distribution of the estate of the deceased”.

In view of the provisions of Section 42 of the Act and relying on the Court of Appeal decision, I am of the considered opinion that the land given to the children of the first and the second house and Johnstone Mwaniki Njogu of the third house, ought to be taken into account in the distribution of the estate. It is also important to note that only a 2 acre portion was left in the name of the deceased while 16 acres were distributed to the first and second houses.

The petitioners are also claiming shares in the two acres arguing that most of the family members live there. The protesters have impressed me as for they are selfless people claiming only portions of ½ an acre each out of LR. Kyeni/Mufu/2202. They propose that the remaining one acre be divided into three portions for each house to get a portion. In my considered opinion, this is very considerate of the protesters who seem to be ready to forfeit their entitlement for the benefit of the whole family.

The petitioners propose that a grandson of the deceased and a son to the 1st petitioner Lawrence Peter Macharia be given a share in the estate of the deceased. He has been offered 0.20 acres in LR. Kagaari/Weru/549. His father is one of the children who was given three acres out of Kyeni/Mufu/348 by

the deceased. He has also slated for himself a share in the 2 acre parcel which remained in the name of the deceased after sub-division of the original parcel. This is land reference No. Kyeni/Mufu/2202. The Law of succession Act gives priority to the children of the deceased as opposed to grandchildren in matters of inheritance. In cases where the child of deceased is inheriting his rightful share, the grand children will not inherit.

I rely in the Court of Appeal case of **CHRISTINE WANGARI GACHIGI VS ELIZABETH WANJIRA EVANS & 11 OTHERS [2014] eKLR** which dealt with the issue of grandchildren claiming in the estate of the deceased and where the court applied the provisions of Section 38 of the Act. The court affirmed that:-

- *the learned trial Judges decision that the beneficiaries of the estate of the deceased herein comprised all the deceaseds' children surviving as at the time of distribution and the grandchildren of the deceased children of the deceased who had either predeceased her or died shortly after presentation of the succession proceedings to court.*
- *The principal of equality as enshrined in Section 38 of the Act is the key principle which ought to have guided the learned judge in the distribution exercise. We affirm that it is the same principle that will guide our redistribution exercise. In doing so, we find it fit not to treat the eligible grandchildren of the deceased as single units, but to reroute them back to benefit as such through their deceased parents house hold units.*

It is therefore clear that the grandson of the deceased namely Ambrose Gitonga Macharia is not entitled to inherit a share in the estate of the deceased. His father Lawrence Peter Macharia has already been factored in as the rightful heir. His children will inherit from their father when their time comes.

As for the other five grandchildren, it was explained that they are coming on board to take the shares of their deceased parents in the estate. Lena Wawira Njogu, Caroline Wanja Njogu and Pius Menja are children of the daughter of the deceased (with his first wife) namely Catherine Muthoni Njogu . Christientia Wangai Njogu and Faustine Mugo Njogu are children of Viorenza Rwamba Njogu a deceased daughter of the deceased by his 2nd wife.

The law treats grandchildren whose parents are deceased as rightful heirs of the estate and are entitled to inherit the share of their deceased parents. It is imperative that the grandchildren must be given their shares in the estate.

In regard to the shares of the deceased in various companies, I find the proposal of the protesters reasonable that the shares be distributed among the three houses of the deceased. This manner of distribution will be fair and just to all the beneficiaries.

It is my finding that the protest is merited and that the distribution proposed therein will be considered in distribution of the estate only as far as it complies with the law. However, it must be appreciated that equality may not be achieved in distribution of the deceased's estate and that what the law strives to achieve is equitable distribution.

I therefore proceed to distribute the estate in the following manner:-

1. **LR. Kagaari/Weru/549**

- (a) Elias Njagi Njeru - 3 acres
- (b) Lucy Thaara Njogu - 1.16 acres
- (c) Susan Muthanje Njogu - 1.16 acres
- (d) Hillum Kariuki Njogu - 1.16 acres

(e) Elias Muriithi Njogu - 1.16 acres

2. LR. Kyeni/Kigumo/3643

(a) Antony Kamugane Kamuigu

(b) Lawrence Peter Macharia 0.62 acres in equal

(c) Lydia Muthoni Njeru shares

(d) Celeste Njeru Njogu

(e) John Ileri Njogu 0.62 acres in equal

(f) Martin Mugo Njogu shares

(g) Hillum Kariuki Njogu

(h) Elias Muriithi Njogu 0.62 acres in equal

(i) Johnstone Mwaniki Njogu shares

(j) Lucy Thaara Njogu 0.61 acres in equal

(k) Susan Muthanje Njogu shares

3. LR. Kyeni/Mufu/2202

(a) Agripina Igandu Wilson - 0.5 acre

(b) Hillum Kariuki Njogu - 0.5 acre

(c) Elias Muriithi Njogu - 0.5 acre

(d) Antony Kamugane Kamuigu

(e) Lawrence Peter Macharia 0.5 acres in equal

(f) Lydia Muthoni Njeru shares

4. Shares

(a) Kathangariri Tea Factory Co. Ltd. – Cert.

No.R0018447 - 257 shares

(b) County Sacco Society Limited –

A/C No. 6228-001-50100 - 2000 shares

- Antony Kamugane Kamuigu

- Lawrence Peter Macharia In equal shares

- Lydia Muthoni Njeru

(c) Kenya Tea Development Authority (KTDA)

– 22 shares

(d) Rahimtulla Trust Tower Building - 20 shares

- Agripina Igandu Wilson
- Celeste Njue Njogu In equal shares
- Martin Njue Njogu
- John Ileri Njogu

(e) Rukuriri Tea Factory Co. Ltd.

– Cert. No. 0000602 - 264 shares

(f) Mathudiri Competitive Co.

– Member No. 83 - 42 shares

- Hillum Kariuki Njogu
- Elias Muriithi Njogu In equal shares
- Johnstone Mwaniki Njogu

(g) Rukuriri Tea Factory Co. Ltd.

– Cert. No. 0003638 - 872 shares

- Lucy Thaara Njogu In Equal shares
- Susan Muthanje Njogu

For the purpose of executing of the grant this court makes the following orders:-

1. *That a fresh grant is hereby issued in the joint names of Agripina Igandu Wilson, Lawrence Peter Macharia and Hillum Kariuki Njogu.*
2. *That the grant be confirmed in terms of the foregoing distribution and the certificate to issue.*
3. *That the production of any title deed for the distributed assets be and is hereby dispensed with.*
4. *Each party to meet their own costs in this cause.*

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF OCTOBER, 2015.

F. MUCHEMI

J U D G E

In the presence of:-

Both protesters

1st petitioner