



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**SUCCESSION CAUSE NO. 444 OF 2012**

**IN THE MATTER OF THE ESTATE OF SIMON MAGONDU MBOGO (DECEASED)**

**CICILY WAWIRA MBUGUA.....1<sup>ST</sup> PETITIONER**

**AND**

**LYDIA KUTHII MAGONDU.....2<sup>ND</sup> PETITIONER**

**JUDGMENT**

1. The cause herein involves the estate of **Simon Magondu Mbogo** the deceased who died intestate on 13<sup>th</sup> August, 2009 as per Certificate of Death filed together with this petition for letters of administration by **Cicilly Wawira Magondu** and **Lydia Kuthii Magondu** the administratrixes in the cause. The deceased was married to two wives Hellen Waguama Magondu (deceased and 1<sup>st</sup> wife) and Lydia Kuthii Magondu (2<sup>nd</sup> wife).
2. The documents filed and uncontested evidence show that the deceased died intestate and left behind six children in the first house represented by Cicilly Wawira Mbugua and four children in the second house represented in this cause by Lydia Kuthii Magondu. The uncontested properties forming the estate are as follows:
  - i. Land parcel No. **BARAGWE/GUAMA/31** measuring approximately 3.9 acres.
  - ii. Land parcel No. **GICHUGU/SETTLEMENT SCHEME/1967** measuring approximately 0.6 acres,
  - iii. Land parcel No. **GICHUGU/SETTLEMENT SCHEME/1955** measuring approximately 1.5 acres.

The contested property is a plot at Kajiado known as **KTC/LOWER/T/RES./1/238**. I will come to the dispute later in this judgment.

3. **Cicilly Wawira Mbugua** and **Lydia Kuthii** were appointed joint administratrixes and issued with a grant of letters of administration on 2<sup>nd</sup> March, 2011. They could not agree on the mode of distribution forcing Cicilly Wawira Mbugua as the 1s administratrix/Petitioner to file Summons

for Confirmation of Grant dated 28<sup>th</sup> September, 2011 giving her own proposition on how the estate should be distributed. Lydia Kuthii Magonde the 2<sup>nd</sup> Respondent filed protest giving her own version of how the estate should be distributed.

4. According to Cicilly Wawira Mbugua, the 1<sup>st</sup> petitioner, her proposed mode of distribution as per affidavit sworn on 28<sup>th</sup> September, 2011 is as follows:

a. Land parcel No. **BARAGWE/GUAMA/31** measuring 3.90 acres to be shared equally among the following:

- i. Cicilly Wawira Mbugua
- ii. Priscilla Wambura Magonde
- iii. Janerose Wanjiku Kamau
- iv. Anesia Wanjira Magonde
- v. Rachael Wanjiru
- vi. Josephine Wangui Magonde
- vii. Elizabeth Kamori Magonde
- viii. Lydia Kuthii Magonde
- ix. Edwin Kariuki Magonde
- x. Nahason Muriuki Magonde
- xi. Evanson Mbogo Magonde
- xii. Lilian Wanjiru Magonde

b. Land Parcel No. **GICHUGU/SETTLEMENT SCHEME/1967** measuring 0.6 acres. The following to share it equally:

- i. Edwin Kariuki Magonde
- ii. Nahason Muriuki Magonde
- iii. Evanson Mbogo Magonde
- iv. Lydia Kuthii Magonde

c. Land Parcel **GICHUGU/SETTLEMENT SCHEME/1955** measuring approximately 1.5 acres. The following to share it equally;

- i. Cicilly Wawira Mbugua
- ii. Priscilla Wambura Magonde
- iii. Janerose Wanjiku Kamau
- iv. Anesia Wanjira Magonde
- v. Rachael Wanjiru
- vi. Josephine Wangoi Magonde
- vii. Lilian Wanjiru Magonde

5. On the other hand, Lydia Kuthii Magonde the 2<sup>nd</sup> administratrix/petitioner proposed in her protest that the estate be distributed as follows:

a. Land parcel No. **BARAGWE/GUAMA/31** measuring 3.90 acres

- i. Edwin Kariuki Magonde to get 1 acre.
- ii. Evanson Mbogo Magonde – 1 acre
- iii. Nahason Muriuki Magonde – 1 acre

The remaining 0.9 acres to be shared equally among the following:

- i. Lydia Kuthii Magonde
- ii. Cicilly Wawira Mbugua

- iii. Priscilla Wambura Magondu
- iv. Janerose Wanjiku Kamau
- v. Anesia Wanjira Magondu
- vi. Josephine Wangui Magondu
- vii. Elizabeth Kamori Magondu
- viii. Lilian Wanjiru Magondu

b. Land parcel No. GICHUGU/SETTLEMENT SCHEME/1967 measuring approximately 0.6 acres to be shared equally among the following:

- i. Lydia Kuthii Magondu
- ii. Cicilly Wawira Mbugua
- iii. Priscilla Wambura Magondu
- iv. Janerose Wanjiku Kamau
- v. Anesia Wanjira Magondu
- vi. Josephine Wangui Magondu
- vii. Elizabeth Kamori Magondu
- viii. Lilian Wanjiru Magondu

c. Land parcel No. GICHUGU/SETTLEMENT SCHEME/1955 measuring approximately 1.5 acres. To be shared equally among the following:

- i. Edwin Kariuki Magondu
- ii. Evanson Mbogo Magondu
- iii. Nahason Muriuki Magondu

6. The protest and Summons for Confirmation of Grant were heard simultaneously by way of oral evidence and the only issues which were contested and are for determination in this judgment are:

- i. Whether plot No. 238 at Kajiado Township belonged to the deceased

and therefore part of the estate and a subject for distribution.

- ii. Which mode of distribution is fair and just.

- 7. To begin with the first issue, evidence was adduced by the 1<sup>st</sup> petitioner, Cicilly Wawira Mbugua to show that the property belonged to her and not the deceased. She produced an allotment letter which was marked as P. Exhibit 1 to prove ownership. On the other hand the 2<sup>nd</sup> petitioner insisted that the property belonged to her husband Simon Magondu Mbogo. When challenged to show proof, she produced a copy of demand letter saying that the allotment letter together with receipts detailing rate payments got burnt.
- 8. In the absence of any tangible evidence placed before this Court, I am unable to find that the plot (**Plot No. 238**) at Kajiado Township belonged to the deceased. The documents produced by the 1<sup>st</sup> administratrix Cicilly Wawira Mbugua show that the said property is not part of the estate herein and cannot be subject to this succession proceedings. In any event when the petition was presented the said property was not listed as one of the assets comprising the estate. I find that the 2<sup>nd</sup> petitioner's claim on the said property is not backed by any evidence and is an afterthought.
- 9. The next issue for determination in view of the fact that the only properties comprising the estate are three (**Baragwe/Guama/31, Gichugu Settlement Scheme/1955 and 1967**) is the mode of distribution given that the number of dependants/beneficiaries is undisputed.
- 10. The 2<sup>nd</sup> petitioner or the protestor has proposed that the sons to the deceased be given a bigger share in the estate while the 1<sup>st</sup> petitioner has proposed that the estate be distributed equally among all the dependants or the beneficiaries. The law applicable in administration of estates of deceased persons in Kenya is the **Law of Succession Act** (Cap 160 Laws of Kenya). **Section 2(1)** provides as follows:

***“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 estate of deceased persons dying after commencement of this Act and to the administration of estates of those persons.”***

11. The deceased in this cause died on 13<sup>th</sup> August, 2009. The applicable law therefore is not in doubt. The relevant section that deals with distribution of the estate in this cause is **Section 40** of the same Act which provides as follows:

***“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 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.”***

12. The deceased died intestate as there was no will left behind. He was married to 2 wives under Kikuyu customary law that allows polygamy and therefore the law applicable in distribution of his estate is as provided above. The 2<sup>nd</sup> petitioner’s suggested mode of distribution favours the sons against the daughters which is against the law and indeed the Constitution which clearly prohibits discrimination on grounds of sex among other forms of discrimination under **Article 27(4)**. The protestor’s proposed mode is based on the wrong assumption that sons or boys in a family should be favoured against the daughters or girls when it comes to inheritance. Such assumptions though based on archaic customary practices are repugnant to justice and is unacceptable in the modern dispensation.

13. I find that the 1<sup>st</sup> petitioner’s suggested mode of distribution is supported by law as the distribution is equal to all the beneficiaries and Lydia Kuthii Magondu has been added as an additional unit in the distribution in accordance with the above cited law. Consequently the grant issued to the administratrixes herein on 2<sup>nd</sup> March, 2011 is hereby confirmed as per proposed mode under paragraph 5 of the affidavit of Cicily Wawira Mbugua sworn on 28<sup>th</sup> September, 2011.

14. I will make no order as to costs so each party shall pay own costs.

I shall further proceed to make further orders under **Section 47**

of the **Law of Succession Act** in order to bring this matter to an end. These are as follows:

- i. That the District/County Surveyor do visit the properties forming the estate and divide it in accordance with the confirmed grant herein and place beacons to mark out boundaries of each beneficiary.
- ii. The area chief and the area District Officer shall provide security to the Surveyor to conduct the exercise.
- iii. The Surveyor’s fees shall be paid by all the beneficiaries in equal proportions.
- iv. The District Land Registrar is ordered to dispense with production of documents like identity cards or Personal Identification Numbers by those beneficiaries who may be reluctant to cooperate to facilitate transmission of the estate to the respective beneficiaries.
- v. The Deputy Registrar of this Court shall execute documents on behalf of those beneficiaries who may be reluctant to execute the same to facilitate transmission.

It is so ordered.

***Dated and delivered at Kerugoya this 1<sup>st</sup> day of October, 2015.***

**R. K. LIMO**

**JUDGE**

1.10.2015

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Ngigi holding brief for Fatuma

Ithiga holding brief for Mwai

**COURT:** Judgment signed, dated and delivered in the open court in the presence of Ngigi holding brief for Fatuma and Ithiga for Mwai for the petitioner.

R. K. LIMO

**JUDGE**