



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE NO. 307 OF 1995

**IN THE MATTER OF THE ESTATE OF THE LATE BEDAN WAMBU NGARAMA
(DECEASED)**

BOB NJOROGE NGARAMA.....OBJECTOR/APPLICANT

VERSUS

1. MARY WANJIRU NGARAMA

2. PAUL KURIA WAMBU.....PETITIONER/RESPONDENTS

RULING

Before court is the chamber summons dated 20th August, 2009 and filed in court on 7th October, 2009. The objector/applicant makes the following prayers:

- “1. THAT the net estate of the deceased as described in the Form P&A 5 filed with the application for Grant of letters of administration herein be distributed equally among the five beneficiaries.**
- 2. THAT land register for Plot No. 6607/1/MN registered as LR No. 21642 and PLOT NUMBER 2344/VI/MW registered as LR. No. 11689 be rectified by cancelling all entries entered before the grant of letters of administration are confirmed and revert to the estate of the deceased BEDAN WAMBU NGARAMA.**
- 3. THAT this honourable court do order the administrators to apply for confirmation [of] the grant of letters of administration taking into account the order for distribution.**
- 4. THAT costs of this application be provided**

for.”

The summons was supported by the annexed supporting affidavit of the applicant/objector. The respondent **MARY WANJIRU NGARAMA** opposed the application and filed her replying affidavit dated 1st September, 2009. By consent it was agreed that the matter be disposed of by way of written submissions. Parties duly filed their submissions in court and highlighting was done on 28th March, 2013. **MR. MULWA** Advocate acted for the objector/applicant whilst **MR. ASIGE** appeared for the

petitioner/respondent.

The estate in question is that of the late **BEDAN WAMBU NGARAMA** who died in Mombasa on 23rd July, 1995. The deceased died intestate (that is without having left any written will). The identity of the beneficiaries to the estate of the deceased is not in any dispute. The objector/ applicant concedes that the list of beneficiaries given in the petition on 31st August, 1995 is correct. These include

- Mary Wanjiru Ngarama – the widow of the deceased
- Bob Njoroge Ngarama – a biological son of the deceased and stepson to Mary Wanjiru
- Erick Mugambi Ngarama son of deceased and Mary Wanjiru
- John Njenga Ngarama son of deceased and Mary Wanjiru
- Eva Margaret Ngarama daughter to deceased and Mary Wanjiru

Similarly the extent of the estate i.e. the assets left behind by the deceased are not in any dispute. These include but are not limited to

- Nyali plot No. LR 6607 section IMN
- Port Reitz LR 2344 section VI MW (with buildings and improvements)
- Three motor vehicles
- Bank accounts
- Medical clinic in Mombasa
- Café namely Chicken Corner in Mombasa

There has been very lengthy and vexatious litigation in this matter which accounts for the fact that almost twenty (20) years after the death of the deceased his estate is yet to be settled. I will not mention each and every application filed save to mention the most important and relevant steps taken. On 9th February, 1998 Grant of letters of administration intestate was made to Mary Wanjiru and one Paul Kuria Wambu as joint administrators of the estate. This Grant was confirmed by the High Court on 4th February, 2013. The court later revoked said confirmation '*suo moto*' under section 76(a) of the Law of Succession Act following complaints by the objector/applicant through his advocate that he was not served with the summons for confirmation and thus was not accorded any opportunity to be heard concerning the same. The objector/applicant sought that his application dated 20th August, 2009 be heard and determined before the Grant could be confirmed.

Counsel for the objector/applicant stated that the petitioner has acted in an attempt to disinherit the objector/applicant from securing a share in the estate of his late father. He submits that under sections 35 and 40 of the Law of Succession Act the objector/applicant is entitled to a share. He further submits that under the Intestacy Laws the objector/applicant being a step-son should be considered as a single unit alongside the petitioner and her three children. As such the estate ought to be divided into five equal portions and each beneficiary awarded a one-fifth share. It was alleged that the petitioner/respondent Mary Wanjiru has failed to faithfully administered the estate and more specifically it is alleged that she contravened section 82(b) of the Law of Succession Act by selling immovable property before confirmation of the Grant and without the consent of all the beneficiaries or of the court. The objector/applicant urged the court to order the sale of the remaining immovable property and have the proceeds shared out. To this end both parties filed valuation reports in respect of the properties making up the immovable assets.

Counsel for the petitioner submitted that it is a common misconception in this country that a child of a deceased person is automatically entitled to inherit his estate. He urged that the correct position was as per the provisions of section 35(a) of the Law of Succession Act – that is the surviving spouse is entitled to a life interest in the nett residue estate. As such barring her re-marriage or death the petitioner/respondent herein being the surviving widow of the deceased is absolutely entitled to the nett estate and therefore the present application for apportionment of shares has no basis. Counsel urged the court to confirm the Grant as issued to the petitioner/respondent and co-administrator. I now propose to deal with each of the prayers made in this application on an individual basis.

Rectification of the land Register for the two plots LR No. 6607/I/MN and LR No. 2344/VI/MN

This constitutes prayer (2) of the application. The two plots which form part of the estate of the deceased and which the objector/applicant prays should be returned to the estate and distributed equally amongst all the beneficiaries, are

(i) **Plot No. LR 6607/I/MN** – this particular parcel of land was disposed of the sale by the petitioner/respondent to a third party sometime in May, 1998 for Kshs. 3.0 million. Of concern was that the petitioner/respondent sold off this property **before** the Grant issued to her had been confirmed.

This certainly was irregular, unprocedural and contrary to the law. Section 37 of the Law of Succession Act provides:

“A surviving spouse entitled to a life interest under the provisions of section 35 or 36, with the consent of all co-trustees and all children of full age, or with the consent of the court, may during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance provided that in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.” [*my own emphasis*]

Similarly section 82(b) (ii) of the Law of Succession Act provides that personal representatives do have the power to sell any asset vested in them with the proviso that

“(ii) no immovable property shall be sold before confirmation of the Grant.” [*my emphasis*]

Therefore in selling this property the petitioner/respondent breached the law in two respects – Firstly she sold of the immovable asset before the Grant had been confirmed by the court and secondly there is no evidence that the consent of all the beneficiaries or of the court was obtained before such sale. The petitioner/respondent was behaving as if this plot was her personal property yet she was merely an administrator and was holding the same in trust on behalf of the beneficiaries to the estate.

Having found and recognized that an illegality had been perpetrated – what is the remedy. The objector/applicant had prayed that the sale be reversed and the said plot 6607/I/MN reverts back to the estate of the deceased. However there is now the existence of a third party – the purchaser. **W. MUSYOKA** in his casebook **on the Law of Succession** at page 581 states that:

“Where the assets have been misapplied by personal representatives and are traceable into the hands of a particular person, the law allows the beneficiaries entitled to such assets to follow them into the hands of the person holding such property.”

However, the author goes onto cite **RE DIPLOCK –VS – WINTLE [1984] ch 485** which makes an exception to this general rule in a case where the holder of such property is a bona fide purchaser for value. Thus a third party who was an innocent purchaser for value without notice cannot be penalized for an illegality which was not of his doing. Although the petitioner/respondent tries to argue that she made substantial contribution towards the acquisition of this asset, the fact that she listed the same as one of the assets of the deceased in her petition renders this line of argument moot.

Prayer (ii) of the present application has been submitted by counsel for the petitioner/respondent to be *res judicata*. On 29th May, 2008 the same objector/applicant filed an application in which prayer (4) sought that:

“(4) the transfer dated 8th May, 1998 by the petitioners to Onesmus Ndonga and transfer dated 20th December, 2004 to Dona Dona Investments on plot 6670/I/MN be declared illegal, unlawful, null and void and be cancelled.”

The above prayer (4) is similar in effect to the prayer (2) in the current application. On 8th October, 2008

Hon. Justice Festus Azangalala (as he then was) delivered his ruling on that application in which he held *inter alia* that:

“Having failed to establish a *prima facie* case with a probability of success at the trial, the order sought in paragraph 4 of the chamber summons is not available to the objector” [my emphasis] thereby dismissing the said prayer.

The doctrine of *Res Judicata* bars this court (and indeed any other court) from making a determination upon a matter already determined by a court of concurrent and competent jurisdiction. By this prayer (2) the objector/applicant is simply trying to rehash the previous application in a new language. I therefore find that with respect to plot No. 6670/I/MN the application is *res judicata* a decision having already been earlier rendered by Hon. Azangalala J.

Be that as it may what remedy has the objector/applicant in respect of this unlawful sale of an asset to which he was a beneficiary by the petitioner/respondent. Having sold the asset without the consent of the other beneficiaries and without court sanction the remedy is that the petitioner/respondent must apportion the proceeds of sale equally between all the beneficiaries. The property was sold for the price of Kshs. 3.0 million in 1998. Upon orders made by Hon. Nzioka J a valuation with respect to both plots was given. Plot No. 6607/I/MN was assigned a current valuation of approximately Kshs. 20 million. However, given the fact that the said plot was sold by the petitioner/respondent and exchanged hands in the year 1998, I would be inclined to assess the amount due to each beneficiary on the basis of the sale price. Since the petitioner/respondent received Kshs. 3.0 million for the sale, this ought to have been divided equally between all five beneficiaries,. Thus each beneficiary including the objector/applicant would be entitled to **Kshs. 600,000/=**. I therefore find that the objector/applicant is entitled to this amount payable to himself from the petitioner/respondent.

Port Reitz Plot No. 2344/VI/MW

This was the matrimonial home in which the petitioner/applicant lived with her deceased husband. It is submitted that being the matrimonial home this particular property is not open for distribution to the beneficiaries as prayed by the objector/applicant. The Land Act 2012 defines a matrimonial home as any property that is owned or leased by one or both spouses and is occupied by the spouses as their family home. The petitioner/respondent averred that she lived there and raised all her children including the objector/applicant who is her step-son in that home. The said property has not been transferred and/or sold – it remains the family/matrimonial home and is still registered in the names of the deceased. Section 28 of the Land Registration Act 2012 provides that:

“Unless the contrary is expressed in the register all registered land shall be subject to the following overriding interests as may from time to time subsist and affect the same, without their being noted in the register

a. Spousal rights over matrimonial property.....”

A matrimonial home does not only have fiscal value but also has great sentimental value to a surviving spouse and children of the deceased. The objector/applicant’s demand that the same be divided is not tenable given that the petitioner/respondent has an overriding life interest in the same. The property is still registered in the name of the deceased thus the prayer (2) of this present application would have no basis with regard to the Port Reitz plot.

In the circumstances I find that at the present time this Port Reitz plot is not available for distribution. The court will not countenance the eviction of the widow so as to satisfy the wish of any beneficiary for a share. A life interest remains with the petitioner/respondent and it is **only** after her demise and/or remarriage the said plot will be distributed to the other four (4) beneficiaries as follows:

- Bob Njoroge Ngarama ¼
- Eric Ngarama ¼

- John Ngarama ¼
- Evalyne Ngarama ¼

Mode of Distribution

Having exhausted prayer (2) of the present application I will now proceed to deal with prayer one seeking the equal distribution of the nett residue of the estate of the deceased to all five (5) beneficiaries in equal shares. Mr. Asige for the petitioner/respondent submitted that the nett estate is not available for distribution during the lifetime of the widow. He argued that it is a common misconception that upon the death of a man his estate is up for grabs amongst his offspring. I have considered the provisions of section 35 of the Law of Succession Act. Section 35(1) provides as follows:

“35(1) Subject to the provisions of section 40 where an intestate has left one surviving spouse and a child or children the surviving spouse shall be entitled to –

- a. **The personal and house hold effects of the deceased absolutely**
- b. **A life interest in the whole residue of the net estate**

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”

Section 35(2) provides:

“(2) A surviving spouse shall, during the continuation of the life interest provided by sub-section (1) have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving children, but that power shall not be exercised by will or in such manner as to take effect at any future date.”

The import of these provisions of the law are to my mind clear and unequivocal. The petitioner/respondent as the surviving widow of the deceased has a **life interest** in the nett residue of his estate. Her life interest would only come to an end upon her death or re-marriage. There is no evidence (neither is it alleged/that the petitioner/respondent has re-married). The surviving children of the deceased are only entitled to a bequest by way of gift under section 35(2) of the Law of Succession Act but such gift will be made at the sole discretion of the widow. As such the objector/applicant does not have a **legal right** to any portion of the estate of the deceased while his widow is still alive.

Counsel for the objector/applicant has urged the court to apportion the estate in terms of section 40 of the Act. Section 40 is applicable where a deceased man being polygamous has left more than one wife. There is evidence that the mother of the objector/applicant has no interest in claiming any share of the estate. There is no evidence adduced to prove that the mother of the objector/applicant was infact a ‘wife’ to the deceased. For this court to come to such a conclusion there would have to be evidence of a marriage. No such proof of a marriage to the objector/applicant’s mother exists. Section 40 does not apply in this case as there is only one widow. Therefore I find that during the subsistence of the life interest enjoyed by the petitioner/respondent the objector/applicant is not entitled to a share of the estate of the deceased and I decline to apportion shares as suggested in prayer (1). In this regard I find that the petitioner/respondent will enjoy a life interest in the nett estate of the deceased and upon her demise or remarriage the nett residue of the estate shall be divided amongst the remaining four beneficiaries equally that is ¼ share each.

Confirmation of Grant

The final prayer No. (3) made by the objector/applicant is that the Grant be confirmed. As Mr. Asige pointed out it is ironical that having objected to the earlier confirmation the applicant now comes to court seeking that the same Grant be confirmed. The objector/applicant has prayed for confirmation and distribution of the estate of all five (5) beneficiaries. However, in view of my earlier finding the estate is not available for distribution to all the beneficiaries. I therefore order that the Grant made on 8th

February, 1998 be and is hereby confirmed to the two administrators. The petitioner/respondent will enjoy a life interest in the residue of the estate of the deceased and upon termination of such life interest the nett estate **will devolve** to the remaining four (4) beneficiaries (including the objector/applicant) in equal $\frac{1}{4}$ shares each.

SUMMARY

1. Prayer (1) is dismissed
2. Prayer (2) is dismissed with respect to LR 2344/VI/MW being the matrimonial home.
3. With regard to the sale of plot No. 6607/I/MN I direct that the petitioner/respondent to pay to the objector/applicant the sum of Kshs. 600,000/= being the share due to him from the unsanctioned sale of that asset belonging to the estate.
4. The Grant as issued on 9th February, 1996 is hereby confirmed. A life interest in the nett residue of the estate of the deceased to vest in the surviving widow being the petitioner/respondent and upon her re-marriage or death the remainder of the estate to be shared out equally amongst the four (4) remaining beneficiaries.
5. This being a family matter I deem it prudent to order that each party bear its own costs.

Dated and delivered in Mombasa this 12th day of February, 2014.

M. ODERO

JUDGE