



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO 275 OF 2009

**IN THE MATTER OF THE ESTATE OF SHADRACK WAMAGATA WARUINGE
(DECEASED)**

THOMAS NDUNGU WAMAGATA.....1ST APPLICANT

EDWARD PETER WAMAGATA.....2ND APPLICANT

VERSUS

GRACE MAMBO WAMAGATA

FREDRICK GAITHO WAMAGATA

RUTH NJERI NDIHO

JOSEPHINE WANJIRU KINYANJUI

MARY NJOKI KAHANYA

PENINAH NDUTA WAMAGATA.....RESPONDENTS

RULING

On 7th January 2010, Nambuye J (as then was) delivered judgment in respect of a dispute between the Applicants and the Respondents. The dispute was in respect of distribution of properties that comprised the estate of the deceased. The Learned Judge observed that both the Applicants and the Respondents were in agreement that the Will and the codicil of the Will of the deceased should form the basis upon which the estate of the deceased should be distributed to the beneficiaries. At page 6 of her judgment, the Learned Judge made the following observations:

“Due consideration has been made by this court of this assertion, and the court is of the opinion that since the Will and the codicil are not being upset, then the only logical construction of the reservation is that the property should devolve to the entire family of the deceased as one unit. Where family includes Thomas. This being the case the court makes a finding that the reserved property Dagoretti/Kinoo/287 shall devolve to the following as joint trustees for themselves.”

- a. *Thomas Ndungu Wamagata*
- b. *Ruth Njeri Ndiho*
- c. *Josephine Wanjiku Kinyanjui*

- d. *Mary Njoki Kahanya*
- e. *Edward Peter Ngige Wamagata*
- f. *Fredrick Gaitho Wamagata*
- g. *Grace Mambo Wamagata*
- h. *Peninah Nduta Wamagata*”

It is apparent that the Applicants were aggrieved by this decision. Instead of filing an appeal, they made an application to this court purportedly under the provisions of **Section 47, 74 and 82** of the **Law of Succession Act** seeking the authority of this court to sell LR. No. Dagoretti/Kinoo/2087 (the reserved property) and thereafter distribute the proceeds therefrom to the beneficiaries of the estate of the deceased in equal shares. In the alternative, the Applicants prayed that the reserved property be divided into two (2) equal portions, one portion to be inherited by the Applicants, while the other portion be inherited by the Respondents. The Applicants further prayed that Peninah Nduta and Grace Mambo be ordered to account for the rents that they have received from the reserved properties from 7th January 2011 upto the date of the filing of the application. The Applicants further prayed that the funds held in the estate account at Barclays Bank of Kenya be withdrawn and the same be applied for the purpose of the survey and subdivision of LR. No. Maela Ndabibi/Block 2/125 to enable the designated beneficiaries to benefit as per the certificate of confirmation of grant. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Edward Peter Wamagata, the 2nd Applicant.

The application is opposed. Fredrick Gaitho Wamagata swore a replying affidavit in opposition to the application. He deponed that the dispute between the Applicants and the Respondents was determined by Nambuye J. He stated that the family was not willing to dispose of the suit parcel of land as demanded by the Applicants. The Respondents were of the view that the Applicants were the ones who were frustrating the beneficiaries from getting their respective bequests as ordered by the court. As regard the survey and sub-division of the Maela property, it was the Respondents' case that the beneficiaries who were designated to benefit from the said property should be required to contribute funds for the purpose of survey and subdivision of the said property. The Respondents urged the court to find no merit with the application and dismiss the same.

The application was argued before Mugo J on 18th December 2012. The Learned Judge is no longer a Judge in the Family Division. This Ruling is therefore written on the basis of proceedings argued before her. As stated earlier in this Ruling, it is apparent that the Applicants were aggrieved by the decision of Nambuye J. They did not appeal the decision; rather they have chosen to prosecute the present application. It is clear from the application that the Applicants do not wish the reserved property be held in trust for all the beneficiaries. They want to have their share from the reserved property. They have proposed that the reserved property be sold and the proceeds therefrom be distributed among the beneficiaries as ordered by the court. The Respondents are opposed to this proposal. They do not wish to have the reserved property sold.

There is obviously a stalemate. This stalemate must be resolved. This court directs that the reserved property be valued by a registered Valuer to be agreed by the Applicants and the Respondents, or where there is no agreement, each party to appoint a Valuer who shall present his valuation report to this court within thirty (30) days of the date of this Ruling. After determining the value, the Respondents shall pay to the Applicants their share of the reserved property as ordered by Nambuye J. As regard the survey and subdivision of LR.No. Maela Ndabibi/Block 2/125, this court agrees with the proposal made by the Respondents that the beneficiaries of the said property contribute pro-rata for the cost of survey and subdivision. The other properties have already been distributed in accordance with the certificate of confirmation of grant issued by this court on 6th July 2011. If the distribution has not been completed, the administrators are ordered to complete the same within ninety (90) days of the date of this Ruling. There shall be no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 2ND DAY OF JULY, 2014

L. KIMARU

JUDGE