



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO. 338 OF 2013

***IN THE MATTER OF THE ESTATE OF DAVID THIONG'O MAHUTI ALIAS THIONG'O
MAHUTI (DECEASED)***

JOSEPH MWANGI THIONG'O.....1ST PETITIONER

VERSUS

FRANCIS MWANGI THIONG'O.....1ST PROTESTOR

ESTHER MWITHAGA THIONG'O.....2ND PROTESTOR

JECINTA WANJIKU THIONG'O.....3RD PROTESTOR

PAUL WAITHAKA THIONG'O.....4TH PROTESTOR

SAMUEL MUIRURI THIONG'O.....5TH PROTESTOR

JUDGMENT

The grant of Letters of Administration Intestate of the estate of David Thiong'o Mahuti *alias* Thiong'o Mahuti (deceased) who died domiciled in the Republic of Kenya on 12th August 2008 was made to the Petitioner and Francis Mwangi Thiong'o (the 1st Protestor) on 18th July, 2011.

The deceased had married two wives and each of these wives had four children. It would appear from the petition that his wife in the first house predeceased him but was survived by the four children in that house. These children are named in the petition as Joseph Mwangi Thiong'o, the 1st Petitioner herein, Margaret Wanjiku Mwangi, Jane Wambui Gitiko and Eunice Muthoni Waweru.

The second house comprises the deceased's second widow Esther Mwithaga Thiong'o, Francis Mwangi Thiong'o (the 1st protestor), Jecinta Wanjiku Thiong'o, Paul Waithaka Thiong'o and Samuel Muiruri Thiong'o.

According to the petition lodged in court for letters of administration, the deceased's intestate estate comprised land parcel **Loc. 20/Kambirwa/477** measuring approximately 8 acres, as the only asset; the estate had no liabilities.

By a summons dated 16th January, 2012, the petitioner sought for confirmation of the grant of letters of administration; in the affidavit in support of the summons the petitioner proposed to distribute the estate equally between the two houses.

The surviving widow and her entire household protested against the proposed distribution of the estate in the manner suggested by the petitioner.

In the affidavit of protest sworn by Francis Mwangi Thiong'o, on his behalf and on behalf of the rest of the protestors, the protestors deposed that it was the wish of the deceased that each of his sons gets equal share of the estate. In their affidavit they annexed what they described as a "note" allegedly signed by the deceased expressing his wishes on the distribution of his estate.

In their oral evidence the parties reiterated the contents of their affidavit; in particular Francis Mwangi Thiong'o testified how in a meeting attended by him, the deceased, the deceased's step brother, Thomas Mwangi Mahuti, Mary Nyambura Mahuti, Paul Waithaka and Esther Mwithaga Thiong'o at their home, the deceased said that each of his four sons will cultivate two acres of land. This meeting was allegedly held on 31st October, 1992 and that it is on this date that the deceased's wishes were reduced into writing.

It was also Francis Mwangi Thiong'o's evidence that the deceased had excluded his daughters from the list of persons that would benefit from his estate; his own sisters, that is, the deceased's daughters from the second house, had allegedly renounced any claim on the deceased's estate.

One of the people who are alleged to have been in the meeting of 31st October, 1992, Thomas Mwangi Mahuti, and who testified on behalf of the protestors denied the petitioner having been in that meeting. He in effect recanted what he had sworn in his affidavit in the protest against the distribution.

On his part, the petitioner adopted the affidavit he filed in support of the summons for confirmation of grant and the one he swore in response to the affidavit of protest by the protestors. He denied that his late father ever left a will or any other document representing his desire on how his estate should be distributed upon his demise. He contended that his sisters are entitled to a share of his father's estate as much as his brothers and to this end each house should get a half of the estate.

I have considered the evidence adduced by both parties; in my humble view, what the protestors are agitating for is clearly contrary to the law applicable on distribution of intestate estates. **Section 40 (1)** of the **Law of Succession Act, Cap. 160** provides as follows:-

40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal 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.

Section 40(1) is of more relevance as far as the issues here are concerned.

It is clear from this provision of the law that the distribution of the estate in a polygamous set up is influenced by the number of houses and the number of children in those houses. Wives in those houses are considered as additional units that must also be taken into account.

The deceased in this particular case had two wives each of whom had four children. All the children in these houses are adults and therefore the issue of who could have been more dependent on the estate or such other factors as to whether some of the children are young and would need more resources to see them through life do not exist. There is every reason for each house to get an equal share of the deceased's estate more so because each of these houses has an equal number of children.

Although the wife in the first house predeceased the deceased, her demise is of no consequence as far as distribution of an intestate estate under section 40 is concerned. This is because the "house" contemplated in section 40 of the Act is defined in **section 3** of the **Act** in the following terms:-

“ house in the case of a deceased person who has married under any system of law allowing polygamous marriages, means a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife.”(Underlining mine).

As for the children there is no segregation between male and female; regardless of the sexes, they are all entitled to inherit the estate of the deceased. The protestors cannot therefore be heard to say that it was not the wish of the deceased for his daughters to inherit any portion of the estate; such a wish cannot be given effect as long as it is contrary to the express provisions of the law. In any event, whatever was presented as evidence of the deceased's wish does not fit the description of such wish as is known in law; it fell far below the requirements of a will which would have been the legal declaration of the deceased's wishes or his intentions as far as disposition of his property is concerned. Needless to say, the petition for letters of administration intestate was made in the manner that it was made solely because there was no valid will that the deceased made.

As for the allegation that the deceased's daughters in the second house had renounced their right to inherit, there is no evidence of such renunciation on record; if per adventure some of the deceased's daughters chose not to inherit the estate of their deceased father, their choice should not affect the right of the rest of the deceased's children who want to and are rightly entitled to a share of the deceased's estate.

To the extent that the protestors' protestation is contrary to **section 40** of the **Law of Succession Act**, I would reject it; I would, instead allow the summons dated 16th January, 2012 and confirm the grant made to the Petitioner and Francis Mwangi Thiongo in the following terms:-

1. The parcel of land known as **Loc.20/Kambirwa/477** shall be divided and shared equally between the first house and the second house; for avoidance of doubt, the first house shall get half of land parcel number **Loc. 20/Kambirwa/477** while the second house shall get the other half.
2. Joseph Mwangi Thiong'o, Margaret Wanjiku Mwangi, Jane Wamui Gitiko and Eunice Muthoni Waweru shall share in equal shares the half portion of the land allocated to the first house.
3. Esther Mwithaga Thiong'o. Francis Mwangi Thiong'o, Jecinta Wanjiku Thiong'o, Paul Waithaka Thiong'o and Samuel Muiruri Thiong'o shall share in equal shares the other half portion of land allocated to the second house.

There will be no order as to costs.

Signed, dated and delivered in open court this 6th day of October 2014

Ngaah Jairus

JUDGE