IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO. 273 OF 2013

IN THE MATTER OF THE ESTATE OF KINUTHIA MUNYU (DECEASED)

VIRGINIA WANJIKU KINUTHIA…….APPLICANT

VERSUS

MUTHONI KINUTHIA……1ST RESPONDENT

SAMUEL MUNIU KINUTHIA……...…….2ND RESPONDENT

JUDGMENT

By a summons for confirmation of grant dated 20th June, 2012 the applicant applied to have the grant made to the respondents on 28th February, 2012 in respect of the estate of the late Kinuthia Munyu (herein "the deceased") confirmed.

In the affidavit sworn in support of the summons, the applicant described herself as the second widow of the deceased; the first respondent is described in the same affidavit as the deceased's first widow while the second respondent is one of the three children that the deceased's marriage with the first widow was blessed with. The other children in this household have been identified as Lydiah Wanjiru Mirara who is said to be married and Naomi Njeri Kinuthia who is deceased but was survived by some children.

The applicant and the deceased were blessed with eleven children; they are named as David Muniu Kinuthia, Joyce Wanjiku Kinuthia who is deceased but is also survived by her own children, Susan Wangari Kinuthia, Hannah Wanjiku Kinuthia, Mary Njeri, Grace Njambi Kinuthia, Nancy Wangui Kinuthia, Rachael Waitherero Kinuthia, Caro Waruguru Kinuthia, Margaret Waithira Kinuthia and Lilian Magiri Kinuthia.

The applicant disclosed in her affidavit that the deceased's estate comprised parcels of land, shares or stocks in several corporations and a bank account; it is not apparent from the affidavit whether there were any balances in this account. The parcels of land are identified as **Loc.2/Marira/1028** which measures 3.5 acres, **Loc. 2/Marira/1156** which measures 2.5 acres and **Loc. 2/Marira/1576** measuring 4.8 acres.

The applicant has proposed these parcels of land be distributed in proportion to the number of units in each house against the total units available. According to this formula, since the two houses combined constitute sixteen (16) units, the first house which has four units should get four-sixteenth (4/16) which is equivalent of a quarter of the estate; the second house which has twelve units should get twelve-sixteenth (12/16) or three quarters of the entire estate.

Going by the applicant's proposed formula, the parcel of land known as **Loc. 2/Marira/1028** which

measures 3.5 acres should be distributed as follows:-

a. The first respondent will get 0.877 acres to hold in trust for herself and her household;

b. The applicant will get 2.613 acres to hold in trust for herself and her family.

As for land parcel known as **Loc. 2/Marira/1156** which measures 2.5 acres, the distribution will be as follows:-

a. The first respondent will get 0.625 acres to hold in trust for herself and her household;

b. The applicant will get 1.875 acres to hold in trust for herself and her household.

Finally, in respect of land parcel **Loc.2/ Marira/11576** which measures 4.8 acres, the proposed distribution is as follows:-

a. The first respondent will get 1.2 acres to hold in trust for herself and her household;

b. The applicant will get 3.6 acres to hold in trust for herself and her household.

Finally, the applicant has proposed that the deceased's shares in Barclays Bank, Kenya Commercial Bank, Murata Sacco, Ikumbi Tea Factory and Kenya Tea Development Authority be shared out equally between the applicant and the first respondent.

In response to the applicant's proposed distribution of the deceased's estate, the first respondent filed an affidavit of protest in which she conceded that the beneficiaries of the estate are as identified by the applicant; however, she deposed that the applicant had omitted land parcel **Loc.7/Ichagaki/2023** from the list of the assets of the deceased. According to her, this parcel of land was as amongst the assets of the deceased's estate which she had included in the petition of letters of his administration.

Besides pointing out the applicant's omission of part of the deceased's estate in the proposed distribution, the first respondent also objected to that proposal for various reasons. According to her, she got married to the deceased in 1950 and in 1959, they combined efforts and purchased land parcel **Loc.2/Marira/1576** where she has always had a home and lives to date. They both developed the farm and amongst these developments are mature 3,500 tea bushes which they both planted and from which she enjoys the proceeds thereof.

The 1st respondent has also deposed that in 1969, she collaborated with the deceased to buy land parcel **Loc.2/Marira/1156** where they also planted 9000 tea bushes.

According to the first respondent, the applicant only came to the picture in 1977 when she got married to the deceased and that it is from that time that the deceased assumed the sole responsibility of managing land parcel **Loc.2/Marira/1156;** after his death the applicant took over the running of the farm and was solely benefitting from the proceeds of the tea in that farm until such a time that the court ordered those proceeds be shared equally between them.

Apart from the two parcels, the first respondent claims that together with the deceased, they purchased land parcel **Loc. 2/Marira/1028** where they planted tea and coffee; it is in this parcel that the applicant has a home and lives with her household. The applicant is said to be solely benefitting from the proceeds of the tea and coffee which she picks from this farm.

As far as land parcel **Loc.7/Ichagaki/2023** is concerned, the first respondent claims that the deceased purchased this parcel out of the proceeds of shares she jointly owned with him; this parcel is said to have been, as far as I understand the first respondent, on a periodic lease at the time of the deceased's death.

According to the first respondent, there was a dispute between her and the deceased over these parcels of

land during his lifetime; this dispute was resolved by the provincial appeal committee to the effect the tea bushes in parcel number **Loc. 2/Marira/1156** be shared equally between them.

It is the first respondent's case that, compared to the applicant, she contributed more towards acquisition of the estate; she proposes that the two of them should inherit parcels of land where their separate homes are situated and where they have all along been living and the rest of the parcels be registered in her names for her benefit and in trust for her children. In particular the first respondent has suggested that:-

a. Land parcel **Loc.2/Marira/1576** be registered in her name for herself and in trust of her children;

b. Land parcel **Loc.2/Marira/1028** be registered in the name of the applicant for herself and in trust of her children;

c. Land parcel **Loc. 2/Marira/1156** be registered in her name herself and in trust of her children;

d. Land parcel **Loc. 7/Ichagaki/2023** be registered in her sole name;

e. Shares in Ikumbi tea factory, Barclays Bank, Kenya Tea Development Authority and Family Bank be registered in her sole name; and

f. Shares at Kenya Commercial Bank, Murata Sacco and British American Tobacco be registered in the name of the applicant.

On 22nd October, 2013 parties' counsel took directions to the effect that the in view of the protest filed by the respondents, the summons for confirmation of grant be determined by way of *viva voce* evidence; however, when the summons came up for hearing on 20th March, 2014, counsel varied their positions and opted to file written submissions based on the affidavit evidence on record. The orders of 22nd October, 2013 were varied accordingly and parties filed and exchanged written submissions based on the affidavits sworn in support of the summons and in protest to the distribution of the estate as proposed in the summons for confirmation of grant. I have duly considered the depositions in those affidavits and the counsel's submissions.

In the absence of any dispute on the extent of the deceased's estate and the number or identity of his survivors who are entitled to benefit from his estate, the only question for determination in this summons is the mode of distribution of the deceased's estate and, inevitably, how much each of these beneficiaries is entitled to. This question, fortunately, is not a novel one because it has been answered on several occasions by this Court and the Court of Appeal whenever it has cropped up. Though neither of the parties' counsel cited any court decision in support of the positions they have adopted, I stand guided and, indeed as far as the Court of Appeal decisions are concerned, I am bound by the answers these courts have given to this question in the cases that I came across when I retreated to write this judgment.

The law on the devolution of property on intestacy in circumstances of this case is found in **section 40 (1)** of the **Law of Succession Act**, **Cap. 160**; it 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.***

Of more concern here is **section 40(1);** the "net intestate estate" referred to in that subsection has been defined in **section 3** of the Act to mean ***"the estate of a deceased person in respect of which he has died intestate after payment of the expenses, debts, liabilities and the estate duty set out under the definition of "net estate", so far as the expenses, debts, liabilities and estate duty are chargeable***

against that estate."

Looking at form **P&A. 80** in the petition for letters of administration filed by the respondents, the deceased had no liabilities and thus the deceased's assets constitute his net intestate estate as known in law.

In the decisions which I had the opportunity to look at on the question of application of **section 40(1)** of the Act, the courts appear to adopt the position that the distribution of an intestate estate is not based on any particular mathematical formula; neither is it an exercise whose sole objective is to ensure that each of the beneficiaries gets an equal share of the estate. Equality as a factor in the sharing out of the estate may be considered but this consideration is only taken into account on the understanding that it is not the determining factor; it is a factor considered alongside other factors which the court, upon which the task of distribution of the estate rests, deems appropriate. At the end of it all, it is what is fair, and not necessarily what is equal, that matters whenever **section 40(1)** of the **Law of Succession Act** is called into question; the court's path to this result has been set by the discretion with which the court is clothed.

In the **Eldoret Civil Appeal No. 66 of 2002, Mary Rono versus Jane Rono & William Rono (2005) eKLR** where this question arose, the learned counsel for the appellant argued in that appeal that each of the two houses that survived the deceased should share the assets and the liabilities of the estate in equal measure. The respondents' learned counsel was of the contrary view; he was of the opinion that the first house should get a larger share of the estate considering, amongst other factors, that it contributed more to the acquisition of the estate.

In the leading judgment by Waki, J.A., the learned judge wrote:-

> ***"I think, in the circumstances of this case there is a considerable force in the argument by Mr Gicheru (for the appellant) that the estate of the deceased ought to have been distributed more equitably taking into account all relevant factors and the available legal provisions. I now take all that into account and come to the conclusion that the distribution of the land, which is the issue falling for determination must be set aside and substituted with an order that the net estate of 192 acres of land be shared out as follows:-***
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> a. ***Two (2) acres for the farm house now commonly occupied by all members of the family be held in trust by the joint administrators of the estate;***
> b. ***Thirty (30) acres to the first widow, Jane Toroitich Rono***
> c. ***Thirty (30) acres to the second widow, Mary Toroitich Rono***
> d. ***Fourteen decimal four four (14.44) acres to each of the nine children of the deceased."***

Although the learned judge appeared to agree with the argument by the learned counsel for the appellant that the estate should be shared out ***equally,*** he nevertheless stated that the estate ***"ought to have been distributed more equitably…"*** and proceeded to do exactly that ***"taking into account all relevant factors and the available legal provisions."***

Justice Omolo J.A. was more categorical in the same judgment; the learned judge discounted any notion that the estate should have been distributed amongst the beneficiaries in equal shares because there is no such requirement under the Act. The learned judge said:-

> "***I had the advantage of reading in draft form the judgment prepared by Waki, J.A., and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned Judge to be laying down any principle of law that the Law of Succession Act, cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr Gicheru. I can find no such provision in the Act."***

The learned judge proceeded to quote **section 40(1)**, which is also quoted hereinbefore, and said of it as

follows:-

> ***"My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has discretion to take into account the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.***
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> ***Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in a case of young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality."***

It is clear from this judgment that equality as a decisive factor in the distribution of a net intestate estate is ruled out; it is equally clear that in this exercise of distribution of an intestate estate, the court has discretion to consider such other factors as may be necessary for instance the number of children in each house and their station in life. The list of these factors, in my humble view is not exhaustive, and the court will obviously in exercise of its discretion consider such factors as are relevant in any particular case.

In Nyeri Civil Appeal No. 131 of 2012 Douglas Njuguna Muigai Versus John Bosco Maina Kariuki & Another (2014) eKLR, the Court of Appeal cited with approval its decision in **Rono versus Rono** (supra) and held that failure to acknowledge a spouse's contribution towards acquisition of an estate as factor in distribution of an net intestate estate under **section 40(1)** of the Act amounts to discrimination. The court held:-

> ***"Back to section 40(1), the Law of Succession Act, that provides that a widow shall be considered as a unit alongside the children of the deceased when it comes to the distribution of the deceased's estate. In this case, Jerioth Wangechi the first wife of the deceased who even participated in the dowry negotiations for her co-wives is equated to the last born child of the 3rd wife of the deceased. Her contribution and support to the deceased is not recognised and in our view that failure to recognise her contribution is tantamount to discrimination."*** (See page 10 of the judgement).

The import of this decision is that it is not just the number of children in a house that matter in the distribution of an estate; the court will also consider such other factors as a spouse's contribution towards acquisition of the estate.

Musyoka J. cited **Rono versus Rono** (supra) in **Nairobi High Court Succession No. 399 of 2007,** In the Matter of the **Estate of John Musambayi Katumanga (2014) eKLR** but proceeded to hold that **section 40** of the Act speaks of equality in the division of an intestate estate; however, the learned judge appreciated that this position disadvantages minor children and for this reason he suggested an amendment to the relevant provisions of the law. Before such an amendment is effected and in order to mitigate the disadvantaged position of vulnerable persons such as minors, the learned judge found refuge in **article 53(2)** of the **Constitution** that elevates a child's best interest in any matter concerning children above any other consideration. The learned judge proceeded to distribute the estate taking into account such factors as the age of the children and their present and future needs which, in my humble view, is consistent with the position adopted by the Court of Appeal in the two decisions I have cited hereinabove despite the learned judge's reservations with **section 40** of the **Law of Succession Act**.

In its material respects the dispute before court is no different from the disputes in the cases I have cited; the issues are more or less similar. Just like in **Rono versus Rono** (supra), there are two houses which survived the deceased; these houses constitute the deceased's widows and children; the number of children in these two houses is unequal; and, all these children are adults. These are important factors that need to be considered in the distribution of the deceased's estate.

It is equally important to consider the contribution that the first widow made in the acquisition of the estate.

The affidavit evidence on record shows that the first widow was married to the deceased as early as the year 1950. At that time, the deceased had absolutely nothing and worse still, his own father expelled him together with his newly married wife, the first respondent herein, from the family home. Through the first respondent's father's help, the young couple was able to secure shelter and sustain their marriage at its infancy.

Out of the financial help the first respondent received from her father, she was able to facilitate the deceased to travel to Nairobi to look for a job while she remained at home in the village where she started trading in bananas. According to her evidence, it is out of this business that she purchased or contributed to the purchase of the family's first parcel of land which is referred to as **Loc.2/Marira/1576** where they planted tea and had their matrimonial home. Together with the deceased, the first respondent also purchased land parcel Loc.2/**Marira/1156;** she also planted tea on this parcel.

It is also the evidence of the first respondent that together with the deceased they pooled resources and purchased the land parcel referred to as **Loc.2/Marira/1028;** the first respondent made the initial payments while the deceased cleared the outstanding balance. It is on this land that the deceased settled with the second widow, the applicant herein, when he married her in 1977.

As for the land parcel **Loc. 7/Ichagaki/2023,** the first respondent contends that it was purchased by the deceased but out of the proceeds of shares she jointly owned with him. The court notes that despite the fact that it is listed amongst the assets of the estate of the deceased, the applicant does not claim any part of it.

No affidavit was filed to contest the first respondent's evidence on how the parcels of land that form a substantial portion of the deceased's estate were acquired; it follows that the evidence that the first respondent purchased or contributed to the purchase of the deceased's estate's immoveable assets long before the applicant was married is not in dispute.

The applicant herself in her affidavit in support of the summons for confirmation of grant does not appear to raise any dispute on when and how the deceased's estate was acquired. All she is concerned with is, regardless of how the estate was acquired, she should, together with her children, be awarded three quarters of the estate while the first respondent should be content with the remaining quarter. The basis of the applicant's proposal is the number of children in each house.

In view of the court decisions in the cases I cited earlier in this judgment on the interpretation of **section 40(1)** of the Law of Succession Act, it would be unfair and indeed it would work an injustice against the first widow if her efforts and contribution towards the acquisition of the deceased's net intestate estate are not acknowledged in the distribution of the estate. While it is true, and I agree with the learned counsel for the applicant, that the number of children in each house ought to be considered in the distribution of the estate, I would, in the circumstances of this case, hesitate to elevate the number of children to a level where it is the only decisive factor in in the distribution of an intestate estate. If the number of children in each house were to attain the status of such significance, a wife in a polygamous family set-up would be reduced to an instrument whose main purpose is to churn out as many children as possible in the belief that the house with the largest number of children is guaranteed the lion's share of the estate. This cannot have been the intention of the legislature in section 40(1) of the Act.

In my respectable view, the first widow ought not to be disadvantaged in the distribution of the estate simply because she has fewer children than her co-wife; she should instead be commended; her efforts and contribution towards the accumulation of the deceased's estate ought to be acknowledged and rewarded regardless of the number of children her marriage with the deceased was blessed with. In any event, her children, however few they may be in number, should enjoy the fruits of their mother's labour; this must certainly have been her motivation and aspiration when she toiled to acquire or contribute to the acquisition of the assets which now comprise the deceased's estate.

My final consideration in the distribution in the quest for distribution of the deceased's intestate estate would be the parcels of land of the estate on which the respective houses have settled. From what I gather the first widow together with her children have a home and have always lived on land parcel **Loc.2/Marira/1576,** having settled on this parcel in **1959** and have since lived there for more than half a century. Her co-wife, the applicant, on the other hand, settled on land parcel **Loc.2/Marira/1028 in 1977** when she got married to the deceased; she has lived here for close to forty years. In my humble view, it would not serve the interests of the parties to dislocate either of the houses from their homes under the guise of distribution of the estate; neither will it be of any use to interfere with their quiet possession or enjoyment of the respective parcels of land on which they have settled.

Taking all the factors I have attempted to analyse hereinabove into consideration I would distribute the estate of the late Kinuthia Munyu as follows:-

1. Land parcel number **Loc.2/Marira/1576 measuring 4.8 acres** shall be shared out amongst Muthoni Kinuthia and her children in the following shares**.**

a. **Muthoni Kinuthia…….1.8 acres**
b. **Lydia Wanjiru Mirara…….1.5 acres**
c. **Samuel Kinuthia Muniu……1.5 acres**

2. Land parcel number **Loc.2/Marira/1028** which measures 3.5 acres shall be registered jointly in the name of Virginia Wanjiku Kinuthia and her children.

3. Land parcel number **Loc.7/Ichagaki/2023** measuring approximately 0.3 acres shall be registered in the name of Muthoni Kinuthia.

4. Land parcel number Loc. **2/Marira/1156** measuring approximately 2.5 acres shall be divided equally between the Muthoni Kinuthia and Virginia Wanjiku Kinuthia.

5. The deceased's shares in Ikumbi Tea Factory, Barclays Bank and Kenya Tea Development Authority shall be registered in the name of Muthoni Kinuthia.

6. The deceased's shares in Kenya Commercial Bank, Murata Sacco and British American Tobacco shall be registered in the name of Virginia Wanjiku Kinuthia.

7. Any credit balance in Family Bank Account No. 007704868101 shall be shared equally between Muthoni Kinuthia and Virginia Wanjiku Kinuthia.

The grant of letters of administration intestate made to Muthoni Kinuthia and Samuel Muniu Kinuthia on 28th February, 2012 is thus confirmed in the foregoing terms. The costs of the summons dated 20th June, 2012 shall be in the cause. That is the order of the court.

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

Ngaah Jairus

JUDGE