



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 81 OF 2002**

**IN THE MATTER OF THE ESTATE OF TERESIA WANJIRU WANG'ERA DECEASED**

ELIZABETH WAIRIMU THIMBA

KENNETH MAITAMEI THIMBA

TERESIA WANJIRU THIMBA.....PETITIONERS

**VERSUS**

WILFRED NJOGU MBUTHIA.....OBJECTOR

JAMES MUNENE THIMBA & ANOTHER.....DEPENDANTS

**RULING**

1. The Chamber Summons dated 18<sup>th</sup> June 2013 and filed on 25<sup>th</sup> June has been brought under Sections 26, 29 and 35 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. It emanates from the judgment of this court made on 8<sup>th</sup> February 2013 in which it declared the proper beneficiaries of the deceased. In the present application the Applicants, dependants, now seek the following orders concerning the distribution of the deceased's properties-

*(b) that this court makes a definitive and final finding on the extent to which the applicants/dependants should inherit the net intestate estate of the deceased;*

*(b) that in respect of all the property that the court declares to be inherited by the Applicants/dependants, the Respondents/Petitioners be directed to execute transfer documents and surrender the title documents thereto for purposes of transferring the properties to the Applicants; and*

*(c) the costs of this application be borne by the Respondents*

2. The application is supported by the affidavit of James Munene Thimba sworn on 18<sup>th</sup> June 2013 and was unopposed.

3. In its judgment delivered on 8<sup>th</sup> February 2013, this court made a finding that the Applicants are grandchildren of the deceased and were therefore entitled to inherit through their father. Therefore, it directed the Administrators to make reasonable provision for them. The Administrators have been unable to abide with the court orders because they are unable to determine what amounts to “reasonable provision” and seek a final determination of the exact shares to which the dependants are entitled.

4. The deceased died intestate and her property must therefore be divided in the manner provided for under Part V of the Law of Succession Act (Cap. 160, Laws of Kenya). Under Sections 35-38 which provide for the division of the property priority is given to the spouse and surviving children of the deceased. The grand children of a deceased who are ranked second in the degree of consanguinity under Rule 7(1)(e)(iii) can only make their claim through their parents who have predeceased the intestate. Section 41 of the Law of Succession Act provides in this regard-

**41. “Where reference is made in this Act to the “net intestate estate”, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”**

1. In Law of Succession (Law Africa Publishers), William Musyoka expounds on the provisions of Section 41 in terms of the rights of grandchildren at page 102 -

**“The rule of substitution of a grandchild for his or her parent in all cases of intestacy where the parent dies before the intestate is known as the principle of representation. The law on this is section 41. If a child of the intestate has predeceased the intestate or dies before attaining the age of eighteen years, then that child's issue alive or en ventre sa mere at the date of the intestate's death will take in equal shares per stirpes contingent on attaining the age of majority, or if female marrying under that age.**

2. The term *per stirpes* is defined in the Black's Law Dictionary, 9<sup>th</sup> Ed to mean **“proportionately divided between beneficiaries according to their deceased ancestor's share.”** Therefore the grandchildren of the intestate are only entitled to take between them equally the share which their parent would have received had he not predeceased the intestate but on condition that at the time of his death whether before or after the intestate, he had attained eighteen years or if female, married under that age. Therefore reasonable provision as per the law refers to an equal share of what their parent's portion would have been.

3. The intestate had no spouse and only one child Joseph Solomon Wangera who had predeceased her. Had the deceased survived the intestate, the entire net intestate estate would have been devolved upon him by virtue of Section 38 of the Law of the Succession Act. Therefore, in terms of Section 41 all the children of the intestate's son are entitled to an equal share of that property that would have devolved upon their father in this case, the entire net intestate estate.

4. However, the beneficiaries have agreed to recognise the deceased's wife (intestate's daughter-in-law) as a beneficiary of the intestate. Further, both Counsel for the Applicants and the Respondents informed the court that the parties had agreed on partial distribution of the properties. They were now seeking the court's determination on the remainder. However, neither party filed in court an affidavit of the agreed properties and those whose distribution is in dispute. In addition Counsel for the Applicants intimated that the Court of Appeal has by a Ruling stayed the distribution of one of the properties. The property was however not identified nor was the Ruling availed to the court.

5. I will therefore proceed under the presumption that the agreed mode of distribution is as contained in the letter dated 25/04/2013 which has been annexed to the Supporting Affidavit of James Munene Thimba and marked as **“JM2”**. In that letter, the Administrators proposed to give the Applicants some parcels of land to divide between them equally. They then proposed that the remainder of the properties shall be divided in the manner proposed in the application for confirmation of the grant dated 29<sup>th</sup> January 2004.

6. The Applicants agreed with the proposal substantially and informed the Administrators by the letter dated 4<sup>th</sup> May 2013. However the Administrators subsequently withdrew the offer by the letter dated 16<sup>th</sup> May 2013 and in essence asked the court to distribute the estate by making reasonable provision for the applicants. Nonetheless there is no evidence of other form of partial agreement and without evidence of any other agreement by the beneficiaries, it shall be deemed to contain the agreement with regard to distribution of the properties.

7. Accordingly the mode of distribution of the properties proposed in the letter dated 25<sup>th</sup> April

2014 shall be adopted in so far as the same has been agreed to by all the beneficiaries. The dispute then is with regard to the parcels of land known as Municipality Block 2/613 and Nakuru Langa Langa/2 and the deceased's shares in Barclays Bank, Pyrethrum Board, Kenya Commercial Bank or Housing Finance Company Kenya Limited. The Applicants wished to be given either of these properties and some of the shares of the deceased.

8. In my view, the mode of distribution of the land as proposed by the beneficiaries in the letter dated 25<sup>th</sup> April 2014 is equitable. The Applicants have been given eight properties to share among and between themselves while the remainder is for division between Elizabeth Wairimu Thimba and her three children. I find no reason to interfere with the proposal of the Administrators with regard to division of the land. However I find that the Applicants should also be given some of the deceased's shares and will therefore receive all the shares in the Pyrethrum Board of Kenya to divide between them equally.

9. The Applicant sought an order of this court compelling the Administrators to process and execute all the documents necessary to transfer title to them. At this juncture, it is pertinent to remind the administrators their duties under Section 83 of the Law of Succession Act which include-

**(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;**

**(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.**

**(h)....**

**(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.**

10. The obligation of the Administrators to complete administration of the estate of a deceased person is one that is vested by law. He must ensure that the assets of the deceased are divided and distributed to the beneficiaries in the manner provided for by the law and complete the transfer within six months or such longer period as the court may allow. Thereafter he must produce in court an account of the completed administration. Section 95 proceeds to make it an offence for an administrator to willfully fail to produce an account under Section 83 for which if convicted he shall be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding one year or to both such fine and imprisonment. The obligation of the Administrators is one vested by law and which must be performed in accordance therewith and failure to which he is held liable.

11. For the above reasons I allow the application dated 18<sup>th</sup> June 2013 in the following terms-

**(i) The property of the deceased shall be divided between all the beneficiaries in terms of the proposal in the letter dated 25<sup>th</sup> April 2013 as follows-**

(a) Nakuru Municipality Block 27/355- James Munene Thima (½ share); Mary Wairimu Kirimi (½ share)

(b) Nakuru Municipality Block 27/356 James Munene Thima (½ share); Mary Wairimu Kirimi (½ share)

(c) Nakuru Municipality Block 27/357 James Munene Thima (½ share); Mary Wairimu

Kirimi (½ share)

(d) Nakuru Municipality Block 26/13- James Munene Thima (½ share); Mary Wairimu Kirimi (½ share)

(e) Nakuru Municipality Block 26/14- James Munene Thima (½ share); Mary Wairimu Kirimi (½ share)

(f) Kabazi/Kabazi Block 4/79 (Mutathini)James Munene Thima (½ share); Mary Wairimu Kirimi (½ share)

(g) Kabazi/Kabazi Block 4/952 (Mutathini)-James Munene Thima (½ share); Mary Wairimu Kirimi (½ share)

(h) Bahati Wendo Block 2/60 (Ruguru)-James Munene Thima (½ share); Mary Wairimu Kirimi (½ share)

(i) Solai/Ndungiri Block 3/1189 (Wanyoro “B”)- Teresiah Wanjiru (½ share); Kenneth Maitamei Thimba (½ share)

(j) Bahati/Kabatini Block 1/3093 (0.65 ha)- Keziah Naibutu Thimba (0.5 Ha); Teresiah Wanjiru Thimba (0.5 ha); Kenneth Maitamei Thimba (0.6055 Ha)

(k) Nakuru Municipality Block 2/613 (0.2906 Ha) Keziah Naibutu Thimba (whole share)

(l) Kiambogo Kiambogo Block 2/18 (Mwariki) 4.60 Ha Elizabeth Wanjira Thimba whole share

(m) Kiambogo Kiambogo Block 2/263 (Mwariki) 4.60 Ha Kenneth Maitamei (whole share)

(n) Githua Trading Centre/119- (0.0460 Ha) Keziah Naibutu Thimba (whole share)

(o) Nakuru/Langalanga/2 (0.0665 Ha- Kenneth Maitamei Thimba (whole share)

(p) Nairobi Block 60/330- Kenneth Maitamei Thimba (½ share) and Elizabeth Wanjira Thimba (½ share)

(q) Pyrethrum Board of Kenya Shares (Certificate No 006578)- Mary Wairimu Kirimi and James Munene Thimba equally

(r) Barclays Bank of Kenya Limited 194 shares (Certificate No. 00336735) – Mary Wairimu Kirimi and James Munene Thimba.

(s) Barclays Bank of Kenya Limited 162 shares (Certificate No. 00293935) Kenneth Maitamei Thimba 135 shares (Certificate No. 195744) Teresia Wanjiru Thimba 180 shares (Certificate No. 151476) Keziah Naibutu Thimba 100 shares (Certificate No. 36880)- Equally

(t) Kenya Commercial Bank

100 shares (Certificate No. 027855) Elizabeth Wanjira Thimba 50 shares (Certificate No. 85461)-

(u) Housing Finance Company of Kenya Limited 250 shares (Certificate No. 39970) –Elizabeth Wanjira Thimba

**(ii) the Administrators are ordered to ensure that the entire distribution process including the transfer of the the properties to the beneficiaries to whom they have been given is**

**completed within six months from the date herein.**

**(iii) the account of the completed distribution shall be filed in this court within two weeks from the date of when the six months expire.**

**(iv) being a family matter, each party shall bear its own costs of this application.**

Dated, signed and delivered at Nakuru this 5<sup>th</sup> day of December, 2014

**M. J. ANYARA EMUKULE**

**JUDGE**