

REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Succession Cause 176 of 2009

IN THE MATTER OF THE ESTATE OF JAMES NGURE MWAI (DECEASED)

TABITHA ALICE WAIRIMU NGURE.....APPLICANT/OBJECTOR

VERSUS

SUSAN WAIRIMU NGURE.....1ST PETITIONER/RESPONDENT

JOYCE WANGUI NGURE.....2ND PETITIONER/RESPONDENT

RULING

In their Chamber Summons for Confirmation of Grant, dated 5th May 2011 and filed on 14th June 2011 the Petitioners Susan Wairimu Ngure, Joyce Wangui Ngure and Tabitha Alice Wairimu Ngure, sought the Grant of Letters of Administration Intestate made on 15th April 2010 and rectified by consent of parties on 30th March 2011 in favour of the Petitioners (Applicants) be confirmed as the six months had expired.

The Summons, was supported by the Affidavit of Susan Wairimu Ngure and Joyce Wangui Ngure sworn on 5th May 2011 on the mode of distribution of the Estate of the late James Ngure Mwai (the deceased). As there was some disagreement on the mode of distribution proposed by the two Petitioners, I allowed Tabitha Alice Ngure one of the beneficiaries, to file her own Affidavit of proposed distribution of the deceased's estate – her affidavit sworn and filed 21st July 2011.

In addition to the Affidavits, I also allowed Susan Wairimu Ngure to testify as to the composition of the family and her preferred mode of distribution of the deceased's estate.

According to her evidence, (and she was the only one who testified), her deceased father had two houses. She belonged to the first house, and they were three children, in number -

Joyce Wangui Ngure,
Joseph Mwai (deceased),
and Susan Wairimu Ngure (herself).

The second house comprised of her step-mother Tabitha Alice Wairimu Ngure, and that house comprised -

- (1) Tabitha Alice Wairimu Ngure (widow)
- (2) Teresia Wangui Ngure
- (3) Peter Murage Ngure
- (4) John Mwai Ngure
- (5) Harun Kibe Ngure
- (6) Ruth Wangare Ngure
- (7) Leah Mwangi Ngure
- (8) Sarah Wanja Ngure

All the members of this house all alive. For purposes of distribution of the estate, the acknowledged beneficiaries of the first house are -

- (1) Joyce Wangui Ngure
- (2) Francis (James?) Mwai (s/o Joseph Mwai – deceased)
- (3) Susan Wairimu Ngure

The only properties the deceased left upon his death are -

- (1) Land: (i) MOLO SOUTH/KERINGET BLOCK 2/128 measuring 3.862) Ha or approximately 10 acres,

(ii) RONGAI/RONGAI/BLOCK 3/37 measuring approximately one (1) acre.

Shares: Two hundred and sixty-six ordinary shares in Kenya Commercial Bank Ltd.

In their Supporting Affidavit of 5th May 2011, Susan Wairimu and Joyce Wangui Ngure, both of the 1st House proposed that the nett estate be divided equally among the two houses. In her evidence however, Susan Wairimu Ngure introduced a new element, that her father had expressed a preference on how his property should be shared among his family members upon his death.

Other than her own word, there was no evidence at all that the deceased made his wishes known only to Susan Wairimu Ngure. The document was allegedly drawn in the presence of four witnesses, Harun Kibe Mwai, Zacharia Muhoro, Esau Githuku and one Patrick Mwai who was alleged to be the Secretary. Apart from what appears to be the signature of Patrick Mwai, the Secretary, and a scroll/scratch by one Zacharia Muhoro, none of the other witnesses signed the expression of wishes – it is certainly not signed or thumb-printed by the deceased. The authenticity of the document is therefore strongly suspect and I reject it as a basis for distribution of the estate.

This therefore means the deceased died intestate, and the distribution of his estate therefore falls within the provisions of Part V (Intestacy) SS 35 – 42 of the Law of Succession Act, (Cap. 160, Laws of Kenya). Section 40 thereof provides -

40(1) where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate 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 nett intestate within each house shall then be in accordance with the rules set out in Sections 35 to 38.”

Section 35 of the Act grants the surviving widow the personal and household effects of her deceased husband, plus a life interest in respect of the whole residue of the net intestate, provided she does not remarry – and if remarries the interest ends or is determined by operation of law. The distribution of the net residue intestate is then divided equally among the children.

The deceased left two parcels of land, one measuring approximately 10 acres. There was a suggestion in the Affidavit of Tabitha Alice Ngure sworn on 21st July 2011 that the Petitioners had sold 4.7 acres of the parcel of land known as Molo South/Keringet Block 2/128, leaving some 7.8 acres. There was no evidence adduced to show any such sale, and if there were, then there must be some error in the total acreage of that parcel of land or the Certificate of Official Search is fake.

I say so because the Certificate of Official Search of the parcel of land shows an area of 3.862 Ha which in my conversion of Hectares to acres, at the rate of 1.0 Ha is equal to 2.4711 acres, works out to 9.5 acres, and not 12.5 acres as the Affidavit of Tabitha Alice Ngure suggests. Mrs Tabitha Alice Ngure also suggests, and is supported by the oral evidence of Susan Wairimu Ngure that part of the parcel contains a well – or is catchment area. Tabitha suggests that this catchment area be preserved and shared between the two houses equally. That is an excellent suggestion.

Subject therefore to a survey by the District Surveyor, to be paid for the two houses equally and setting aside at least three acres of the catchment area and the well, the area available for distribution in the Keringet parcel of land would in my computation be 6.5 acres. Both Tabitha Alice Ngure and Susan Wairimu Ngure have suggested that the parcel be divided equally among the two houses. That would work at 3.25 acres for each house. The individual distribution would thus -

A. MOLO SOUTH/KERINGET BLOCK 2/128 (3.862 Ha or 9.522 acres)

I. CATCHMENT AREA WELL – 3 ACRES – jointly owned.

II. FIRST HOUSE – 3.25 ACRES

1. Joyce Wangui Ngure – 1.0711
2. James Mwai s/o Francis Mwai Ngure – 1.0811
3. Susan Wairimu Nguru – 1.0811

B. SECOND HOUSE 3.25 ACRES

- (1) Tabitha Alice Waweru Ngure – 0.4059 acres
- (2) Teresia Wangui – 0.4059 acres
- (3) Peter Munge – 0.4059 acres
- (4) John Mwai – 0.4059 acres
- (5) Harun Kibe – 0.4059 acres
- (6) Ruth Wangare – 0.4059 acres
- (7) Laban Mwangi – 0.4059 acres

(8) Sera Wanja – 0.4059 acres

B: TITLE NO. RONGAI/RONGAI BLOCK 3/37 (1 ACRE)

FIRST HOUSE: 0.5 ACRES

(1) Joyce Wangui Ngure)

(2) James Mwai s/o Francis Mwai Ngure) jointly

(3) Susan Wairimu Ngure)

SECOND HOUSE – 0.5 acres (jointly)

(1) Tabitha Alice Waweru Ngure

(2) Teresia Wangui

(3) Peter Munge

(4) John Mwai

(5) Harun Kibe

(6) Ruth Wangare

(7) Laban Mwangi

(8) Sera Wanja

The costs of the survey and sub-division and issue of title to respective beneficiaries shall be borne by each beneficiary or house if all members agree.

There shall therefore issue a Certificate of Confirmation of the Grant Intestate in terms of the above distribution and order of costs.

Dated, signed and delivered at Nakuru this 13th day of July, 2012

M. J. ANYARA EMUKULE
JUDGE