

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT SUCCESSION APPEAL CAUSE NO. 37

OF 2017

IN THE MATTER OF THE ESTATE OF THE IBRAHIM

GATHOGO MUGAMBI (DECEASED)

ESTHER WAIRIMU GATHOGO.....

.....APPELLANT

VERSUS

GLADYS NJERI GATHOGO.....

.....RESPONDENT

JUDGMENT

(Being an appeal against the decision of Hon. M. K. Mutegi (SRM) delivered on the 23rd August 2017 vide Senior Principal Magistrate's Succession Cause No. 129 of 2013 at Engineer)

1. On 5th August, 2023 Esther Wairimu Gathogo (herein the appellant) and the late Lucia Muguru Gathogo filed a petition for grant of letters of administration intestate in the estate of Ibrahim Gathogo Mugambi (herein "the

deceased”) initially at Naivasha Law courts and transferred to Engineer vide Engineer Principal Magistrate’s Court succession cause 129 of 2013. The letters of grant were subsequently issued.

2. However, on 25th August, 2003 Gladys Njeri Gathogo (herein “the respondent”) filed objection proceedings opposing the confirmation of the grant on the ground that she was married to the deceased as a 2nd wife and were blessed with six (6) children. Contemporaneously, she filed a cross-petition for application of a letter of administration intestate.
3. Subsequently, on 18th October, 2009 grant of letters of administration intestate was issued to; Esther Wairimu Gathogo, Lucia Muguru Gathogo and Gladys Njeri Gathogo but before confirmation of the same Lucia Muguru Gathogo passed on.
4. Subsequently, Esther Wairimu Gathogo, filed an application dated 2nd December 2009 seeking to substitute the deceased administrator and prayed that she remains the sole petitioner and/or administrator. She further filed an application seeking revocation and/or annulment of the grant issued to the three

administrators on 18th October, 2009. However, Gladys Njeri Gathogo opposed the application vide a grounds of opposition dated 27th December, 2009.

5. Notably thought not clear on the record, the appellant appealed to the High Court and the grant of letters of administration to the three administrators was revoked.
6. Be that as it were, the respondent's objection was set down for hearing, and on 20th May, 2013, the respondent testified before Hon E. Riany (RM). However, on 9th September, 2013, the respondent's advocate requested the matter be transferred to Engineer Law Courts and it start afresh. The request was allowed and the matter was transferred accordingly.
7. On 8th December 2015, parties agreed to canvas the objection proceeding by adopting witness statements and submissions and by a ruling dated 25th October 2016 the trial court held that the objector had proved on a balance of probabilities that she had capacity to marry under Kikuyu customs which allowed polygamous marriages. Further, the ruracio and/or

dowry was paid to her father and that one Mweru wa Maina was a witness thereto.

8. Consequently, the trial Magistrate directed that the objector be included in the letters of administration and as a result, a grant of letters of administration dated 25th October, 2016 was issued to both the appellant and respondent herein.
9. The respondent subsequently, filed summons for confirmation of grant application dated 23rd May 2017 and prayed that distribution of the estate of the deceased be done strictly in accordance with section 40 of the Law of Succession Act (cap 160) Laws of Kenya and proposed a mode of distribution in paragraph 6 of the supporting affidavit.
10. However, the appellant opposed the application vide a replying affidavit sworn on 12th June 2017 and an undated further affidavit. The gist of her arguments is that she was aggrieved by the ruling of the trial Magistrate and her family was consolidating finances in order to lodge an appeal, and she was therefore not ready to participate as a co-administrator. Further, the application was premature as no joint grant letters of

administration had been issued in pursuant to the ruling on 25th October, 2016.

11. She further averred that the respondent did not prove her nexus to the deceased's estate and therefore distribution should be between the two houses namely; that of herself and Lucia Mugure Gathogo (deceased).
12. Furthermore, the parcel Nyandarua/Ol Aragwai/68 was wrongly describe to measure 45 acres while it actually measures 42 acres. Additionally, some of the properties listed in the application were fictitious, and that the respondent had failed to disclose other properties she was holding.
13. The appellant further opposed the proposed mode of distribution on the ground that the respondent included a non-existent person who was not related to the deceased. That, the chief's letter relied on was a fabrication and she wished to cross-examine the chief on the same. Moreover, she argued that the respondent had no children with the deceased and she sought to cross-examine the said children and demanded proof of their identity cards, birth certificates and proposed DNA tests to be conducted.

14. The parties agreed to adopt the affidavits as evidence. Subsequently, the trial court delivered a ruling bearing two dates: 2nd or 23rd August 2017 and held that the objections by the appellant was overruled on the grounds that, a grant of letters of administration was issued on 25th October 20152 in accordance with the court's ruling of 25th October 2016 and that the application for confirmation was filed seven (7) months after the said date.
15. Further, the respondent had failed to file an appeal or apply for a stay of the ruling of 25th October 2016 seven (7) months after that ruling and failed to prove that the chief's letter was a fabrication and/or filed a contradictory letter thereto; and held that the estate be distributed in accordance with the provisions of section 40 the Law of Succession Act that governs the division of a polygamous estate.
16. The trial Magistrate ordered that the estate of the deceased be distributed in the manner proposed by the respondent in paragraph 6 of her supporting affidavit.

17. However, the appellants are aggrieved by the decision of the trial court and appeals against it on the following grounds as verbatim reproduced: -

a) That the entire ruling of 23rd August 2017 herein was erroneous and misguided both in fact, law and procedure and was contrary to entire rules of the succession law and standards evidence under the Civil Procedure Rules.

b) That the Honourable learned Magistrate of the lower court misled himself in determining the entire term of distribution of the Estate of the Deceased most specifically by including the respondent and all her alleged children without seeking proof of nexus or marriage to respondent or consanguinity or biological relationships between the deceased and alleged children.

c) That the learned Magistrate of the lower court erred in law and in fact and by unfairly, unprocedurally distributing the estate of the deceased to strangers including the respondent and her alleged children inter alia.

d) The learned trial Magistrate erred in Law and in fact in absolving the plaintiff of gross misrepresentation upon circumstances surrounding her alleged marriage relationship.

e) That the learned Magistrate erred in law and fact by not adhering to strict rules of evidence in reaching at his ruling of the 23rd August 2017 which was devoid of any legal principle or evidence.

f) That the learned Magistrate erred in law and fact by disregarding the appellant's entire evidence for no apparent reason.

g) That the leaned Magistrate decision was arrived at to the extent that this was done on wrong principles of law.

h) Any other reason to be stated at appeal.

18. The appeal was disposed of by way of submissions. The appellant in submissions dated 14th March 2023, contended that the onus of proving customary marriage lies with the person alleging it, in this case the objector, as held in the case of; M.W.G vs E.W.K [2010] eKLR, Hotntesiah Wanjiku Yawe vs Public

Trustee Civil Appeal No. 13 of 1976, and In re Estate of John Kariuki Wanuthu (Deceased) [2022] eKLR.

19. The appellant argued that no witnesses were called to support the objector's allegation that she was married to the deceased, including the alleged person who received the dowry. That, the trial Magistrate ignored her pleadings and witness statements, and without ascertaining what gifts and/or animals were allegedly given to the objector's father as dowry held that the objector was the deceased's wife. That despite the trial Magistrate stating that the impugned marriage was not proved she sympathised with the respondent because she was old and had married in 1947.
20. The appellant further argued that, the allegation that the objector ran away due to harassment from her co-wives was unsubstantiated. Further, the objector failed to satisfy that she was a dependant and/or wife of the deceased as required under section(s) 29 and 40 of the Law of Succession Act.
21. The appellant urged the court to dismiss the respondent's submissions as a narration that lacks

support of case law or judicial precedent, and prayed that the appeal be upheld.

22. However, the respondent in submissions dated 1st March 2023 argued that the grounds of appeal fail as the only evidence adduced was the respondent which remained uncontroverted. Further, the estate is polygamous and therefore the trial court was right in distributing it strictly in terms of section 40 of the Succession Act.
23. In considering the appeal in the light of the material before the court it suffices to note that, the issue of whether Gladys Njeri Gathogo is a widow of the deceased continues to be argued throughout this matter. However, that issue rested with the ruling of the court rendered on 25th October 2016, and there has been no appeal on the same as such the net effect is that, in the absence of any other finding on the issue by a court of higher jurisdiction, Gladys Njer Gathogo is a widow of the deceased.

24. Indeed, the appellant had indicated that, she would appeal that ruling but as at the time of writing this decision, that has not been done. As a result the issue of the widows of the deceased is settled, that, he had three (3) wives.

25. Be that, as it were, the appeal herein relates to the ruling dated 23rd August 2017. The ruling is in relation to the summons of confirmation of grant dated 23rd May 2017. At this stage I note that, although the appellant contested that the summons for confirmation was premature due to lack of a grant issued to both parties, that argument was erroneous as the trial court dealt with the issue by noting that, the letters were issued on 25th October 2015.

26. However, I note that, the year 2015 cannot have been the correct year, as the ruling that gave rise to the order to issue a letter of administration in joint names of the parties was rendered on 25th October 2016. Consequently, the said letters could only be issued after that date. That said, I have perused the trial

court's record and note that, the letters of administration intestate were issued to both parties herein on 25th October 2016 and not 25th October, 2015 as stated in the impugned ruling.

27. Be that as it were, it is evident that, the appellant objected to the proposed mode of distribution indicated in the summons of confirmation of grant on the grounds already alluded to herein mainly inter alia that; application was “unjust and unequitable”, the assets of the estate needed to be verified before the proposed distribution was approved.

28. Further that, the respondent was holding property which she had failed to disclose and therefore the application should have been heard through “tendering of proof”. Further that the proposed distribution be stayed pending proof that the respondent children were the deceased's children and the same be done vide cross-examination and production of their; “identity cards, birth certificates and DNA. That the matter proceeds through viva voce evidence.

29. Upon consideration of the trial court's record it is evident that the summons for confirmation of grant was canvassed through filing of affidavits. Hence no viva voce evidence was adduced as sought by the appellant. Further there is no record to indicate that, the beneficiaries appeared before the trial court to be examined on the proposed mode of distribution. This is more so, taking into account that, there was no consent by all beneficiaries filed alongside the summons for confirmation of the grant.

30. Furthermore, at paragraph 6 of the affidavit in support of the application, the applicant merely stated that "I propose the distribution of the estate of the deceased be distributed strictly under section 40 of the Succession Act and made a proposal of how the estate ought to be distributed and that is what the trial court ordered without hearing all the parties.

31. In allowing the application the trial court stated that "the mode of distribution be in the manner proposed in

paragraph 6 of the supporting affidavit of one Gladys Njeri Gathogo”.

32. Furthermore, the trial court did not address the issues raised by the appellant in the two affidavits sworn opposing the confirmation of the grant. It is a principle of natural justice not to condemn a man unheard and article 48 of the Constitution of Kenya allows every person unhindered access to justice.
33. Taking into account the historical facts of this case, the fact that, the matter was highly contested on whether the respondent and her children were beneficiaries of the deceased's estate, and bearing in mind that the ruling of 25th October 2016 only resolved the issue of the respondent per se and not her children, the matter should not have proceeded on affidavit but viva voce evidence that would iron out a lot of contented issues.
34. Even if the court thought otherwise the application should not have been allowed without hearing the beneficiary(ies) who opposed it, and more so in the absence of their consent to the same.

35. As a result of the aforesaid, I set aside the ruling of the court herein dated 23rd August 2017 and order that, the subject application for confirmation of grant be placed before the Chief Magistrate at Naivasha for hearing/determination.

36. In view of the age of this matter I direct that, the matter be mentioned before the Hon. Chief Magistrate on 9th April 2026 at the Naivasha Chief Magistrate's court to fix a date within two (2) weeks when the matter will be heard and determined.

37. I further direct that all the beneficiaries be present in court on the date of hearing of the matter for expeditious disposal thereof. The costs of the appeal be in the cause.

38. It is so ordered.

Dated, delivered and signed this 2nd day of April 2026.

GRACE L. NZIOKA

JUDGE

In the presence of: -

Mr. Kimani for the appellant

Mr. Ngunjiri for the respondent

Ms. Hannah: Court Assistant