



REPUBLIC OF KENYA



**In re Estate of Steve Peter Gitau (Deceased) (Succession Cause  
24 of 2019) [2024] KEHC 10191 (KLR) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10191 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
SUCCESSION CAUSE 24 OF 2019**

**JN ONYIEGO, J**

**AUGUST 15, 2024**

**IN THE MATTER OF THE ESTATE OF STEVE PETER GITAU(DECEASED)**

**RULING**

1. The deceased herein died intestate on 12-03-2019 while domiciled in Kenya. He was survived by a widow known as Grace Nyokabi and children namely; Roseline Wanjiru; Judy Muthoni; Josephine Nyambura; Moses Mwangi; Jacob Murumbe; Ibrahim Kamande; Harun Munene; Enock Njenga and Emmanuel Mwathi.
2. According to the petition dated 07-12-2020, Lodged by the Widow as the sole petitioner, the deceased left the following assets for distribution;
  1. Plot No.B30 Githurai valued 20m
  2. Plot No. IMN/2666 Nyali valued 20m
  3. Garissa/619 valued 50M
  4. TRCC/MRR/C/50 Mororo valued 3m
  5. Plot No. Witeithe valued at 10m
  6. Mitubiri A Block 2/193 valued at 5m.
  7. 200 Shares with Kenya Airways-
  8. 40 Shares with Safari com.
3. Prior to filing the petition herein, the widow had obtained a limited grant of letters of administration Ad Colligenda Bona issued on 10-06-2019 for purposes of collection and preservation of the estate. The estate was gazetted in the Kenya gazette on 13-08-2021.
4. However, on 09-09-2021, Josephine Nyambura one of the children, lodged an objection claiming that; there was no family consultation prior to filing the petition; she was not informed of these proceedings until she learnt from a third party; some well-known assets e.g Kiharu Muranga, Mangu, Kabati and



- Loitoktok had been omitted from the list of assets and that; there had been no accountability and transparency about the monthly income accruing to the estate in form of rental income from several properties since their father died.
5. On 10-05-2022, Josephine filed an answer to petition thus stating that; although a direct beneficiary of the estate, her consent was not sought nor was she served with a citation; no family consultation was conducted before filing the petition and that she had completely been side lined by the rest of the family. Contemporaneously filed with answer to petition is a petition by way of cross-application for grant reiterating the content in the answer to petition.
  6. However, the court having persuaded the family to resolve the issue amicably, parties agreed to enter a mutual consent thus disposing the objection by recording a consent order dated 27-07-23 in which it was agreed that;
    - a. A grant of letters of administration intestate to issue in the joint names of; Grace Nyokabi; Josephine Nyambura Too; Roseline Wanjiru Gitau and Ibrahim Kamande Gitau.
    - b. The joint administrators shall open a joint bank account into which all rent accruing to the estate shall be banked.
    - c. The administrators to appoint a registered estate agent to manage collection and banking of all accruing rent.
    - d. Parties to agree within 30 days on subsistence allowance and any other necessary expenses arising from monthly utilities.
    - e. The administrators to apply for confirmation of the grant after holding family consultation and in any event not later 45 days.
    - f. Mention on 25-09-2024 for further directions
    - g. The objection herein be and is hereby marked as withdrawn.
  7. Consequently, a grant of letters of administration intestate dated 27-07-23 was issued to the four nominated administrators jointly.
  8. Subsequently, Josephine Nyambura filed a summons dated 25-01-24 seeking confirmation of the grant thus proposing the mode of distribution as follows;
    - a. All shares to be registered in the widow's name
    - b. Plot No.IMN/2666/Nyali be registered in Josephine Nyambura Too's name;
    - c. Plot No. B30 Githurai, plot no. Grsa /619, TRCC/MRR/C/50 Mororo, plot No.Weteithie 859, Mituburi/Wempa Block 2/193, plot in Kiharu Murang'a , plot in Loitoktok, and plot in Kabati to be registered in the joint names of all beneficiaries except Josephine Nyambura.
    - d. Ancestral plot in Mangu to be registered in the joint names of all the sons namely; Ibrahim; Harun; Enock; Emmanuel; Jacob and Moses.
  9. In response, the petitioner opposed the proposed mode of distribution vide an affidavit sworn on 14-02-24 thus stating that; the entire family is opposed to the proposed mode of distribution; the family is not against Josephine the applicant herein; the applicant cannot claim Nyali property as it is the most valuable asset of the estate; the applicant has been threatening everybody in the family; Loitoktok plot is unknown to the rest of the family; plot described as Kiharu in Muranga and ancestral land in Mangu do not form part of the estate as they are registered in the name of Paul Ngwenji



Gitau father to the deceased; plot known as Kabati is the same one referred to as Mitubiri/Wempa block 2 /193; the deceased had prior to his death directed that the plot in Kabati was to constitute family home to be established through equal contribution of all the family members; the property in Mororo is completely depleted and of no economic value and that the applicant had failed to include mv registration KCT 817 Q as part of the estate assets.

10. She suggested that the properties be leased out and the income realized be shared out equally amongst beneficiaries or in the alternative, the estate be distributed equally amongst the beneficiaries save for shares which should go to her as the widow.
11. Pursuant to the said response, Josephine swore a supplementary affidavit seeking to withdraw plots in Kiharu, Kabati, loitoktok and ancestral plot in Mangu from the list of assets thus retaining the assets as listed in the original petition. She stated that she would prefer her share to be separated from those of the rest of the family members as any joint ownership will frustrate her given the family hostility against her. Regarding the motor vehicle in question, she claimed ownership thus denying that it was part of the estate.
12. In her further affidavit sworn on 24-06-24, Grace the widow to the deceased proposed that Nyali plot, mororo plot and Githurai plot be sold off and the proceeds be distributed equally amongst all beneficiaries. As to mitubiri property, she insisted that it be registered in the joint administrator's names for purposes of building a family home as per the deceased's wishes. For Garissa plot and Witeithie property, she urged that they form part of her matrimonial home hence should be given to her absolutely as the wife to the deceased and mother to her children.
13. During the hearing, counsel adopted the contents contained in their respective affidavits in support or in opposition to the application.
14. I have considered the application and the response thereof. There is no dispute that the persons listed in the application and or the petition are beneficiaries of the estate by virtue of being a widow and children to the deceased. The only issue for determination is the share entitlement for each beneficiary.
15. Section 35 of the *law of succession* provides as follows;

Where intestate has left one surviving spouse and child or children-

1. Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
  - a. the personal and household effects of the deceased absolutely; and
  - b. a life interest in the whole residue of the net intestate estate:  
Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.
2. A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.
3. Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his



representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

4. Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to—
  - a. the nature and amount of the deceased's property;
  - b. any past, present or future capital or income from any source of the applicant and of the surviving spouse;
  - c. the existing and future means and needs of the applicant and the surviving spouse;
  - d. whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
  - e. the conduct of the applicant in relation to the deceased and to the surviving spouse;
  - f. the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and
  - g. the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.
5. Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

[[Act No. 8 of 1976](#), s. 7, [Act No. 16 of 1977](#), Sch.]

16. Under the above provision, the petitioner being a widow is entitled to life interest on the net interest of the estate and to the right of user as long as she is a live. In the case of [Eddah Wangu & another Sacilia Kivuti \(deceased\) substituted with Riberata Ngai](#)(2021) e KLR the court held as follows;

“It is emerging from Section 35 of [Law of Succession Act](#) and case law, that the estate of a deceased person in which the surviving spouse has a life interest is not available for distribution unless that parent bequeaths them whatever he or she pleases to them”.

17. However, in this case, the widow is proposing that some properties be sold and proceeds thereof be shared equally among the beneficiaries and two properties out of the estate be preserved for her on grounds that they form part of matrimonial property. On the other hand, the applicant one Josephine is seeking to benefit only from one property. The two sides are in agreement that shares in Kenya Airways and Safaricom be given to the widow/petitioner absolutely.



18. In the case of *In re Estate of Samuel Michael Ndirango (Deceased)* (Succession Cause 65 of 2018) [2022] KEHC 10656 (KLR) (5 August 2022) (Judgment) Kasango J had this to say in respect to the issue of life interest;

“ [16] The 2nd Wife is the widow of the deceased. By virtue of Section 35 of Cap 160, she is entitled net interest of the estate. That net interest includes the rental income of deceased’s properties. In this regard, I cite the case of *In re Estate of Mungai Munyaka (Deceased)* 2017) eKLR:-

“Section 35 of the *Law of Succession Act* provides for the mode of distribution on an intestate’s estate where the deceased is survived by a spouse and child or children. ...

In interpreting this section, Musyoka (J) in the case of *Tau Katungi -v- Margrethe Katungi & Another* (2014) eKLR stated that:-

“The effect of section 35(1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children’s right to the property crystallises upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income, she would be the person entitled exclusively to the income so generated.’

Accordingly, since the widow is still alive and has not remarried, her life interest in the property is yet to be terminated.”

[17]. As was decided in the case *Tau Katungi vs. Margarethe Katungi & Another* (2014) eKLR life interest confers limited rights to the surviving spouse or the intestate estate. The surviving spouse does not enjoy absolute ownership of the property. That surviving spouse cannot dispose the property without consent of all adult children and the court”.

19. The above provision notwithstanding, the petitioner did not plead nor claim life interest. At paragraph 14 and 15 of her affidavit in response to the application for confirmation, the petitioner proposed that the properties in question save for shares be leased out and the income realized therefrom shared equally and in the alternative they be shared equally. In my view, this a more equitable manner of distributing the estate rather than the individualized mode of distribution. I find the content contained in the further affidavit of the petitioner seeking to restrict distribution to certain properties an after- thought thus contradicting her earlier position.

20. However, the petitioner raised a critical question in her further affidavit that plot No.619 Garissa constitutes her matrimonial home and that she has nowhere to go if not given to her. While attending court, it emerged that the old lady is in poor health condition. She definitely struggled with her husband to acquire the property in question. To sell the property constituting her matrimonial home will be akin to condemning her to oblivion or death. She has no ability to start a new home yet she has a home.

21. In the circumstances of this case, it is only fair that her prayer in respect to Garissa plot 619 be allowed to the extent that she shall hold life interest in respect of that property until she dies or remarries which in her age is inconceivable. She shall however apportion any benefits accruing from the said property



- to her children as gifts as she may in her wisdom desire. Upon her death or remarrying, the property shall be shared out equally amongst the children.
22. On the claim that the deceased prior to his death directed that mitubiri/Wempa plot be preserved for construction of a family home, there was no proof of such direction as there was no written or oral will to confirm the alleged wishes. To that extent, that prayer is not tenable.
  23. Regarding the claim by Josephine that she be given Nyali plot absolutely, it is not possible as the value indicated for that property in the petition application is to the tune of 50m out of the total estate value of 108m making it the most lucrative asset constituting almost half of the estate. This court cannot justify the selective allocation in the absence of a will. To that extent, it is my finding that that request will disenfranchise the rest of the family members.
  24. Concerning shares, parties are in agreement that the petitioner shall benefit by getting shares in Kenya Airways and Safaricom absolutely. I am therefore inclined to order that the said shares do devolve to the widow absolutely.
  25. Regarding the motor vehicle in question, there was no proof that the deceased ever owned that property hence it does not constitute part of the estate.
  26. Having held as above, the application for confirmation is allowed and the grant herein confirmed with orders that the estate be distributed as hereunder;
    - a. That Plot numbers IMN/266 Nyali, Githurai B30, TRCC/MRR/C/50 Mororo, Witeithie 859 and mitubiri/Wempa block 2/193 shall be shared equally and if not divisible to be sold and proceeds thereof distributed equally amongst all beneficiaries.
    - b. That plot No. 619 Garissa be held on life interest by the petitioner Grace Nyokabi until she dies or remarries in which case the property shall be shared equally among the children.
    - c. That 2000 shares in Kenya Airways and 40 Safaricom shares shall be registered in the name of the petitioner Grace Nyokabi absolutely
    - d. That mv registration Number KCT 817Q does not form part of the estate.
    - e. That the beneficiaries shall mutually agree on a registered valuer to value the assets identified for distribution for purposes of sale if applicable and thereafter share the proceeds.
    - f. Each party shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 15<sup>TH</sup> DAY OF AUGUST 2024**

**J. N. ONYIEGO**

**JUDGE**

