



**In re Estate of Michael Thomas Kinyany (Deceased) (Succession Cause
9 of 2019) [2023] KEHC 19399 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 9 OF 2019
RE ABURILI, J
JUNE 29, 2023**

BETWEEN

JAMES MUDHUNE KINYANY PETITIONER

AND

MARY JOSEPHINE KINYANY PETITIONER

JUDGMENT

1. Before me for determination is the Summons for Confirmation of Grant dated November 25, 2021 and brought under Sections 35 and 71 of the [Law of Succession Act](#) as well as a protest. The 2nd Petitioner Mary Josephine Kinyany desires that the grant of letters of administration intestate made on October 28, 2019 be confirmed and that the assets of the estate be distributed as proposed by her in her annexed schedule of distribution.
2. Her Co-administrator, James Mudhune Kinyany a son to the deceased filed an affidavit of protest against confirmation of grant on March 4, 2022. He deposed that an asset described as Kisumu Municipality/Block XXXX ought not to be left to the petitioner alone as she had failed to show why the same ought not to be distributed to her entirely to the exclusion of the deceased's other beneficiaries.
3. It was the petitioner's case that she and her deceased husband Michael Thomas Kinyany bought Kisumu Municipality/Block XXXX together in 1985 at Kshs 40,000 as a plot and subsequently constructed a house and moved into it. It was her testimony that she contributed to the acquisition of the suit property as she was a civil servant and further that she also contributed to its maintenance as well as the maintenance of 2 houses in their ancestral home in Gem from 2015 to date.
4. The petitioner testified that she and the deceased moved from Nairobi to Kisumu and that the deceased closed the business, a Bazaar distribution, which they had operated jointly from 1973 to 1985, and used the proceeds to fund purchase of the property as well as the construction of the house.



5. Further, the petitioner testified that the deceased registered the property in his name and as a wife, she did not have any problem with that. It was her testimony that she lived in the house from 1990 to date together with her children and that the house had sentimental value to her and should not form part of the deceased's estate for distribution.
6. In cross-examination, the petitioner reiterated that she contributed to the acquisition and construction of the suit property and the home therein and further that she would allow the children of her co-wife to come and visit at the house. She further stated that she was willing to forego other assets so as to retain the suit property.
7. In re-examination, she stated that she had no issue with the suit property being registered in the deceased's name.
8. The parties filed submissions to dispose of the Summons for confirmation of the grant and the protest.

The 2nd Petitioner's Submissions

9. On behalf of the petitioner, it was submitted that the evidence on record that was unchallenged was that she and the deceased acquired the suit property in 1985 and subsequently moved there in 1990 and had been staying there to date.
10. It was further submitted that there was no shred of evidence that the her co wife contributed towards the acquisition of the suit property and thus the suit property was not available for distribution as part of the deceased's estate.
11. The petitioner's counsel submitted that the petitioner had been living on the suit property for the past 33 years and the proposal by the protestor that the land be sold and the proceeds be shared between the deceased's beneficiaries would render her homeless.
12. The petitioner relied on the case of *In re Estate of Josephat Mwaniki Gitau (Deceased)* [2017] eKLR where it was held inter alia that a matrimonial home does not only have fiscal value but also has a great sentimental value to a surviving spouse and children of the deceased and thus the protestor's demand that the same be divided is not tenable given that the petitioner has an overriding life interest in the same.
13. It was submitted that inequity would arise if the petitioner was evicted as she had demonstrated that she was staying with the deceased on the said property at the time of his death and that it would be contrary to Article 45 (3) of the *Constitution* if her rights to the said property were violated and that the *Constitution* guaranteed her equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
14. The petitioner's counsel further relied on the Court of Appeal case of *Esther Wanjiru Gitbatu v Mary Wanjiru Gitbatu* [2019] eKLR where it was held that a resulting trust was created in a case where the spouse was found to have contributed towards the acquisition of property and that the property would not be available for distribution as part of the deceased's estate.
15. Further, it was submitted that the protestor had not proved contribution to the suit property and that had the petitioner not worked tirelessly to have the suit property maintained to its current condition, then it may have not reflected its current valuation.



The Protestor's Submissions

16. It was submitted that contrary to the petitioner's assertions, there was no application before the court with respect to a claim for matrimonial property as provided in section 7 of the *Matrimonial Property Act*, Rule 5 (1) and 7 (2) of the *Matrimonial Property Act* and that to raise the issue of matrimonial property after the deceased's death amounted to a one-sided hearing where the deceased was unable to address court with regards to their contribution.
17. Further, the protestor submitted that it would follow that the deceased also contributed to the acquisition of the suit property and thus his interest devolved to his estate thus negating the petitioner's claim for a 100% in the suit property.
18. The protestor submitted that the suit property was registered in the name of the deceased and formed part of the deceased's estate as envisaged under section 40 of the *Law of Succession Act* that envisaged equal distribution of the assets of the deceased's estate as opposed to inequitable distribution.
19. It was further submitted that the protestor also participates in maintenance of the assets of the deceased's estate through payment of land rents and rates and thus the suit property was not solely maintained by the petitioner.
20. The petitioner further submitted that the petitioner intended to circumvent the law and ensure that the disputed property remained the sole possession of her two biological children thus ensuring that 60% or more of the deceased's estate would remain in the petitioner's house while 40% would remain with the other house.
21. The protestor submitted that the petitioner had not established any cogent ground in law or fact for this court to exercise its discretion to establish a mode of distribution that was contrary to the equal distribution mandated by section 40 of the *Law of Succession Act*.
22. The protestor further submitted that his proposed mode of distribution would not disenfranchise the petitioner as she was entitled under section 40 to a fair share of the deceased's estate.

Analysis and Determination

23. I have considered this parties' respective rival positions in the pleadings therein and the contending submissions of the parties. The deceased was a polygamous man and the deceased having died intestate, his estate should be administered in accordance with Section 40 of the *Law of Succession Act*, which states as follows:
 - “ 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 net intestate estate within each house shall then be in accordance with the rules set out in section 35 to 38.”
24. Before the distribution of the deceased's estate can be done, the deceased's free property that is available for distribution, must be identified.



25. The 2nd petitioner herein claimed that the suit property, Kisumu Municipality/Block 4/319, did not form part of the deceased's estate but was matrimonial property that she contributed to its purchase, construction and subsequent maintenance.
26. In response, the protestor alleged that the petitioner had not taken the correct steps to have the suit property declared matrimonial property and that even if the suit property was matrimonial property, the deceased had an interest therein which devolved to his beneficiaries.
27. The issue that has been argued before me and which is for determination, is whether, the petitioner made any contribution towards the purchase of the suit property, and if so, whether a resulting trust arose in the petitioner's favour in regard to the suit property, such that her interests under the trust can be identified and excluded from the estate. Secondly, whether, the resulting trust can be enforced, in succession proceedings after the death of the deceased. Concurrently, with those issues, is the determination of the free property of the deceased available for distribution in accordance with section 40 of the *Law of Succession Act*.
28. During the oral hearing, the petitioner adduced evidence of how she and the deceased acquired the suit property through the raising of funds after the sale of the deceased's Bazaar business and further how she subsequently maintained the suit property. It also emerged from the petitioner's testimony that at some point, the protestor paid land rates and rent to the suit property but that the same was done during a waiver call and that the protestor was to be reimbursed the said funds from the deceased's estate.
29. The protestor did not call any evidence in support of his case and had no evidence to controvert the evidence of the petitioner, that the petitioner was actively involved in the acquisition, construction and maintenance of the suit property wherein she lived for over 33 years as her matrimonial home. This leads this court to agree with the petitioner that there was sufficient evidence to establish that the petitioner, Mary Josephine Kinyany, contributed to the acquisition of the suit property, Kisumu Municipality/Block XXXX, and thus it was proper that the petitioner's interest pursuant to her contribution, be identified and set aside before the net estate of the deceased was distributed. The mere fact that the suit property was registered in the name of the deceased, without mention of the petitioner's interest does not change this position.
30. It was argued by the protestor in his submission that the petitioner had not filed an application to have the suit property declared as matrimonial property.
31. I must note that matrimonial property has such a great and important sentimental value to the occupier. Section 2 of the Matrimonial Act defines matrimonial home as follows: -

“Matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.”
32. In the circumstances, Section 6 of the *Matrimonial Property Act* 2013 shall come to play. Under that Section it is clearly stated that:

“For purposes of this Act, matrimonial property means the matrimonial home or homes, any other immovable and movable property jointly owned and acquired during the subsistence of the marriage”.



33. In the circumstances having established that the suit property was acquired with contributions from the petitioner, I find that the suit property amounted to matrimonial property and was not available for distribution and ought to be registered in the petitioner's name during her lifetime as she exercises her life interest thereon and upon her death or remarriage, the same shall be shared out equally amongst the remaining 8 beneficiaries equally. This is the position which the court in the case of *Bob Njoroge Ngarama vs Mary Wanjiru Ngarama and another* (*supra*) took that:

“A matrimonial home does not only have fiscal value but also has a great sentimental value to a surviving spouse and children of the deceased.

The objector/applicant's demand that the same be divided is not tenable given that the petitioner/respondent has an overriding life interest in the same.....” In the circumstances I find that at the present time this Port Reitz plot is not available for distribution. The court will not countenance the eviction of the widow so as to satisfy the wish of any beneficiary for a share. A life interest remains with the petitioner/respondent and it is only after her demise and or remarriage the said plot will be distributed to the other four beneficiaries.”

34. However, I must clarify that the 2nd petitioner could only have filed suit under section 7 of the matrimonial properties Act during the lifetime of her now deceased husband and only if there was dissolution of marriage between them by way of divorce.

35. I further observe that the 2nd petitioner has sacrificed her interests in the rest of the assets of the estate in favour of all other beneficiaries.

36. On the basis of my analysis and findings above, I hold that the 2nd petitioner Mary Josephine Kinyanyis exclusively entitled to the property Kisumu Municipality/Block XXXX and she will enjoy an overriding life interest in the said property Kisumu Municipality/Block 4/319 as her matrimonial property until her last day on earth upon which the property shall devolve to the surviving beneficiaries.

37. In the end, as there is no other dispute regarding the distribution of the rest of the deceased's estate, I hereby allow the Summons for Confirmation of grant dated November 25, 2021. I confirm the grant issued to both petitioners herein on October 28, 2019 and order that the assets of the estate of the deceased shall be distributed as proposed by the 2nd petitioner in her affidavit of proposed mode of distribution of the estate sworn on November 25, 2021.

38. A certificate of confirmation of grant to issue forthwith and the administrators to distribute the estate of the deceased within six months of this order, and comply with the law as stipulated in section 83 of the *Law of Succession Act*, file into court a true and accurate accounts of how the estate of the deceased was administered and in accordance with the law.

39. Each party to bear their own costs of these proceedings as parties are family members.

40. This file is therefore closed.

Dated, Signed and Delivered at Kisumu this 29th Day of June, 2023

R.E. ABURILI

JUDGE

