



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

In re Estate of Gideon Itotia Ng'ang'a (Deceased) (Succession Cause 143 of 2017) [2022] KEHC 11058 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 143 OF 2017**

RB NGETICH, J

JULY 28, 2022

**IN THE MATTER OF THE ESTATE OF GIDEON ITOTIA
NG'ANG'A (DECEASED)**

BETWEEN

PENINNAH NYAKIO ITOTIA 1ST OBJECTOR

ESTHER WANJIRU ITOTIA 2ND OBJECTOR

AND

SAMUEL NJUGUNA NG'ANG'A 1ST RESPONDENT

PETER GITHAIGA WAITHANJE 2ND RESPONDENT

JOSEPH NJENGA KARUGU 3RD RESPONDENT

JENIFFER WANJIRU ITOTIA 4TH RESPONDENT

JUDGMENT

1. The matter relates to the estate of Gideon Itotia Ng'ang'a who died testate on 1st April 2017. The petitioners filed petition for a grant of probate of the written will on 8th December 2017. A grant of probate of the written will was issued on 16th April 2018 to the Petitioners who are the executors of the deceased's will.
2. On 4th March 2019, the executors filed summons for confirmation of the grant. The schedule of distribution was as per the annexed will. The consent was signed by Jennifer Wanjiru, Patrick Nganga and Faith Itotia being the second wife and her children respectively while the applicant and her three children did not sign.
3. It is on the strength of the summons for confirmation of grant that the 1st objector filed Chamber Summons on 1st March 2019, seeking reasonable provision to be made to her as a dependant of the



- estate of the deceased on the ground that the deceased's written will fail to make reasonable provision for her and the same discriminate against the applicant without any justification whatsoever.
4. In support of the application the 2nd objector Esther Wanjiru who is a daughter to the 1st objector Peninah filed an affidavit on 23rd September 2019. She averred that Limuru/Bibirioni/T.26 is the matrimonial property of Peninah while Jeniffer lives in Nyandarau. She further averred that if the will is not disturbed, the children of 1st objector Peninah will not have a place to call home.
 5. In response, the Executors filed a replying affidavit sworn on 20th June 2019 in which they deponed that their duty as executors was to distribute the estate of the deceased as per his wishes and stated that the deceased was survived by 7 dependants for whom he made reasonable provisions.
 6. Executors further averred that the 1st objector is the former wife of the deceased and were separated in 1970 and the separation orders were issued by the court in 1980. The deceased bequeathed six (6) properties which are highly valuable to the 1st objector. They contend bequeathing the applicant more property will bring an inequitable, unfair situation. They averred that parcel known as Limuru/Bibirioni/T.26 (matrimonial home) claimed by the applicant is where the 2nd wife Jeniffer lives with the children and the applicant has never lived in the suit property since 1970; that the deceased's will be honoured and they urged court to dismiss the application.
 7. Directions were given for the Chamber Summons proceeded through *Viva-voce* Evidence.

OBJECTOR'S EVIDENCE

8. Pw1 Peninah Nyakio Itotia adopted her affidavits dated 19th July 2018 and 12th September 2019 as her evidence. She stated that she is a wife of the deceased married under *marriage Act* Cap 150(repealed) but judicially separated by order issued on 17th November 1980. She attached the order to her affidavit in support of the application. She stated that before the separation, she lived in Limuru/Bibirioni/T.26. She stated that Jennifer has also lived on the same plot since she was married by the deceased.
9. In cross-examination, she indicated that the only property she has an issue with is Limuru/Bibirioni/T.26 which is her matrimonial property. In her affidavit she estimated the value of the matrimonial home at Kshs 3,500,000/= and all assets of the deceased less debts, expenses and liabilities at Kshs 33,000,000/=. She further stated that rental income from Limuru/Bibirioni/T.945 is Kshs 40,000/= per month and value of the land is Kshs 1,250,000/=.
10. She further stated that she does not own any capital assets in her name but during the currency of the marriage to the deceased, they jointly acquired assets including matrimonial home which was registered solely in the deceased's name.
11. The 1st objector further stated that she is currently unemployed with no income and rely on her daughter Ann Njeri Itotia who resides in United States of America for her upkeep. She stated that she does not have possibility of having a source of income considering her age; that she has medical condition that requires constant check ups ,rent for premises she lives in, food, clothing and means of transport. She stated that her anticipated future needs include a home to relocate to when she moves back to Kenya. She added that the deceased did not make any gifts to her during his life time.
12. She added that the deceased was ordered to pay alimony for her; but he did not comply but she did not seek to enforce or fight him for marrying a second wife because she wanted peaceful co-existence.
13. The 1st objector further averred that the second wife Jeniffer resides in Limuru/Bibirioni/T.26 and receives rent of Kshs 40,000/= per month from rental houses on Plot No.Limuru/Bibirioni/T.945.



14. She averred that the matrimonial home between herself and the deceased stand on Plot no. Limuru/Bibirioni/T.26 which the deceased has bequeath to Jeniffer Wanjiru Itotia leaving her children without a place to call home and ; that she has been forced to stay in United States of America despite her wish to come back home.
15. She averred that besides being evicted from her matrimonial home she has not been given right to collect rent from commercial houses erected on Limuru/Bibirioni/T.945; that in respect to shares and money in the bank. Jenifer who is a wife like her has been granted equal rights and all prime properties forming estate of the deceased have been given to Patrick Nganga Itotia who is Jeniffer's son;that it is unreasonable that the second family gets the lion share.
16. She stated that she prays to bequeath matrimonial home standing on Limuru/Bibirioni/T.26 either wholly or to have life interest over and to hold it over to her children to exclusion of the second house.
17. Pw2, Esther Wanjiru Itotia stated that she does not challenge the written will but the only problem is Plot No. Limuru/Bibirioni/T.26 which she proposes should be bequeathed to the 1st Objector. She stated the property is where the 2nd wife Jeniffer lives with her children.

Respondent's Case

18. DW1 Jeniffer Wanjitu adopted her affidavit sworn on 18th June 2019. In her affidavit she listed the applicant and her three daughters and also listed herself, her son and daughter as persons listed by the deceased in his will. She averred that the applicant is former wife of the deceased having separated with him in 1980; that she later moved to the United States of America where she resides and works for gain; she further averred that the applicant is a resident of United States and she lives a comfortable life there.
19. She averred that upon separation, the deceased was granted custody of the children and she brought them up with the deceased to responsible grown ups. She listed six (6) properties bequeath to the applicant and said they are highly valuable located in Ngarariga area close to Limuru town each valuing approximately 4 million.
20. She further averred that the applicant having separated with the deceased, she(Jeniffer) lived with the deceased and the children in their home in Land Title No.Limuru/Bibirioni/T.26 and that it became a matrimonial home for the deceased and herself(Jeniffer).
21. She averred all of the applicant's children were bequeath property; further the applicant's children were bequeath shares in various companies and money in bank accounts; and the property will remain in the first House's family domain and the applicant will suffer no prejudice once grant is confirmed as per the deceased's will.
22. That the bequests to applicant's children indicates deceased's fairness; and deceased's investment in various companies and money in his bank were acquired after the applicant had judicially separated with the deceased and has no contribution of the applicant.
23. In her oral evidence, Jeniffer Itotia testified that she used to plough Nyandarua land and come back to Limuru. She further said that deceased used to visit her over the weekends in Nyandarua and that she has lived in Limuru for 40 years. She said she was not living in Limuru permanently. She further said while in Nyandarua ,she would come to Limuru over the weekend. She said she has not been apportioned any other land apart from Limuru/Bibirioni/T.26. She testified that she lived with the children of 1st Objector Peninah since 1979 and the applicant has never lived on the property since they separated with the deceased. She is opposed to the applicant being granted the property Limuru/Bibirioni/T.26.



24. On cross examination, Jeniffer stated that she found the house in Limuru/Bibirioni/T.26 having been built and lived in it since 1979. She said she found the applicant's children and their grandmother living in the house and confirmed that the applicant used to go and see her children in the house.
25. On further cross examination, she said she used to cultivate the land in Nyandarua and come back to Limuru but they later agreed that she stays there because they did not have a reliable person to take care of the land. She said there was a temporary house which they improved so that she could live in while in Nyandarua. She said the deceased would go and sleep there over the weekend.
26. On re-examination, she said there is no time she left Limuru/Bibirioni/T.26 completely and the house in Nyandarua was for a worker. She said she used to go to Nyandarua alone leaving the children in Limuru.
27. DW2 Peter Githanji urged the court to adhere to the wishes of the deceased.

Applicant's Submissions

28. Counsel submitted that the testamentary freedom of the deceased should be interfered with for the failure to make a reasonable provision to the applicant as per Section 26 of the [Law of Succession Act](#).
29. He submitted that the circumstances to be taken into consideration are set out in Section 28 of the [Law of Succession Act](#) and submitted that deceased's estate is estimated at Kshs. 100,000,000/= and as such there are sufficient assets to cater adequately for all surviving beneficiaries.
30. He further submitted that the applicant relies on the daughter for upkeep and every other beneficiary has received a portion of the shares, bank deposits, rental income and dividends whereas the applicant has not been bequeathed.
31. Counsel submitted that Limuru/Bibirioni/T.26 is matrimonial property acquired during the subsistence of the marriage between the deceased and the applicant; it remained as such and was held in trust by the deceased as per Section 93 of the [Land Registration Act](#) 2012. He further submitted that the applicant contributed to the acquisition of the property thus upon the demise of the deceased, the matrimonial property does automatically revert to the applicant.
32. Counsel further submitted that the applicant and the deceased were not divorced and therefore the properties were not distributed and as per Section 8 of the [Matrimonial Property Act](#), property is obtained in a polygamous marriage and Matrimonial property acquired by the man and the first wife shall be retained equally between the man and the first wife; and the applicant should not be denied her property rights simply because Jeniffer moved in and settled with the deceased as a second wife.
33. Counsel submitted that by virtue of Section 5 of [Succession Act](#) which purports to permit the deceased to deprive the applicant of her matrimonial home through his will, is in contravention with Article 40(2) of the [Constitution](#).
34. Counsel submitted that the 2nd wife and her children will not suffer prejudice if the property Limuru/Bibirioni/T.26 is given to the 1st Objector as the matrimonial property for Jeniffer was in Nyandarua where she lived with the deceased at some time.
35. Counsel for the 1st objector urged this court to interfere with the deceased testamentary freedom and distribute Limuru/Bibirioni/T. 26 to the 1st objector. The 1st objector also pleaded to be allocated 1/7 of the shares of the deceased as well as half of the rental income from the rental houses on Plot Limuru/Bibirioni/T.945.



Petitioner's Written Submissions

36. The petitioner's Advocate filed submissions on 23rd May 2022. He submitted that the only issue is whether the deceased testamentary freedom should be interfered with.
37. He submitted the deceased was well within his rights and freedom to will away his property as he wished.
38. Counsel further submitted that the allegation the deceased failed to adequately provide for the objector is malicious as the objector is a former wife of the deceased. The home the applicant left in the year 1980 after separation from the deceased is now home to Jeniffer who was married to the deceased and living together until the demise of the deceased.
39. That Jeniffer made a significant non-monetary contribution by offering companionship to the deceased and taking care of the children and thus was bequeathed Limuru/Bibirioni/T.26.
40. Further, the 1st objector was not being maintained by the deceased immediately before his death. The property is known as Limuru/Bibirioni/T.26 was solely owned by the deceased alone and the 1st objector voluntarily left the matrimonial home without making any absolute claim over it.
41. The court was urged to find the 1st house was adequately provided for by the deceased and to honour the deceased wishes.

Analysis And Determination.

42. I have considered averments in affidavits filed by parties, oral evidence, perused documents filed and submissions filed. From the record, the deceased had two (2) wives, three children from the first wife and two children from the second wife. From the averments all the survivors of the deceased have been bequeath property. The applicants is however opposed to property known as Limuru/Bibirioni/T.26 being bequeath to the second wife Jeniffer Wanjiru Itotia. She also prayed for half of rental income be allocated to her for upkeep.
43. The applicants argument is the Limuru/Bibirioni/T.26 is where she had established matrimonial home with the deceased before they judicaily separated in 1980. She said she left the deceased with the children and their grandmother in the matrimonial home. She wants the same allocated to her instead of Jeniffer. The applicant's argument is reasonable provision has not been made to her.
44. Section 5(1) of the [succession Act](#) gives a testator testamentary freedom as follows: -

“Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses”.
45. However the freedom to dispose property by written will is not absolute and the court can alter the terms of the will under Section 26 of the Act. Section 26 provides as follows:-

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for



that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate”.

46. The Court of Appeal in *Elizabeth K. Ndolo v George.M.Ndolo* Civil Appeal 128 of 1995 held as follows:-

“ in Section 5 every adult has unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime.”

47. Further, in *James Maina Anyanga v Lorna Yimbiba Ottaro & 4 others* [2014] eKLR the court stated as follows:-

“ Failure to make provision for a dependant by a deceased person in his will does not invalidate the will as the court is empowered under Section 26 of the *Law of Succession Act* to make reasonable provision for the dependant.”

48. I note that the 4th respondent Jeniffer Wanjiru Itotia and counsel for the respondents in submissions refer to the 1st objector as former wife. However record show that the 1st objector and deceased had judicial separation in 1980 as per judgment delivered on 17th November 1980. There is no divorce order filed. The 1st objector therefore remained the 1st wife of the deceased up to the time he died.

49. It is not also disputed that the 1st objector and the deceased lived in property Plot No. Limuru/Bibirioni/T.26 being their matrimonial home up to 1979 when they separated. Her children remained in the house with the deceased and their grandmother. The second objector thereafter moved into the house and lived together with 1st objector's children in 1979 as per her evidence.

50. The 2nd objector testified that the deceased built a house for the 4th respondent in Nyandarua after failing to harmoniously live with the 1st objector's children. The 2nd objector testified that the 4th respondent lived in the Limuru house during the last days of her father, the deceased herein.

51. There is no doubt that the property LR No. Limuru/Bibirioni/T.26 existed at the time the 4th respondent started living with the deceased. The property was acquired and matrimonial home built by the time the 1st objector separated with the deceased. It is agreed that the 1st objector left her children in the house together with the deceased and his mother. The 4th respondent confirmed that when she started living with the deceased in 1979, she found the 1st objector's children and their grandmother.

52. Though the 4th respondent said she lived in property Limuru/Bibirioni/T.26, she admitted that she was utilizing land in Nyandarua which had a temporary house for a worker and at some point, the deceased improved the house so that she could stay there and take care of the land. She admitted that the deceased would go to stay there over the weekend with her.

53. Though the 4th respondent stated that she never left Limuru/Bibirion/T.26 permanently, there is no doubt that she also settled in Nyandarua land and deceased would also join her there after improvement of a house in that land.

54. There is no dispute that 1st objector's children lived in Limuru/Bibirion T26 before and after their mother separated with their father. The 2nd objector testified that she has not been to the home for four(4) years now since the 4th respondent obtained a court order to restrain them from accessing the home .



55. The 1st objector has stated that she lives in the United States of America and rely on her daughter for upkeep; that she has not been provided for save for plots subdivided from one parcel of land.
56. There is no doubt that the 1st objectors's children have known Limuru/Bibirion/T.26 as their home. The home existed at the time their mother separated with their father. From evidence adduced, the 4th respondent established another home with the deceased in Nyandarua. She has also been bequeath all rental income from Limuru/Bibirion/T.945. All her children have been provided for. The 4th respondent said the 1st objector is a resident of USA where she works for gain and is comfortable.
57. I however saw the 1st objector in court. She appeared to be of advanced age and I am persuaded to believe her evidence that she is relying on her daughter. It is unlikely that she is still in employment in view of her age.
58. In my view bequeating Limuru/Bibirion/T26 to the 4th respondent amount to disentitling the 1st objector and her children a place they have known as their home; a home established when the 1st objector and deceased were living together.
59. I hower note that 6 plots were bequeath to the 1st objector. She said Limuru/Bibirion/T.26 is approximately valued at Ksh3,500,000/=. I am of the view that she be allocated Limuru/Bibirion/T.26 and she surrenders 3 of the 6 plots bequeath to her and rental income be shared equally between the 1st Objector and 4th Respondent.
60. Final Orders:-
1. Property Limuru/Bibirioni/T.26 is allocated to the 1st objector Penina Nyakio Itotia.
 2. Rental income from Limuru/Bibirioni/T.945 to be shared equally between 1st objector Penina Nyakio Itotia and Jeniffer Wanjiru Itotia.
 3. Three plots allocated to Penina Nyakio Itotia allocated to Jeniffer Wanjiru Itotia.
 4. Each party to bear own costs.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 28TH DAY OF JULY, 2022

.....

RACHEL NGETICH

JUDGE

In the Presence of:

Kinyua – Court Clerk

Ms. Nzilani holding brief for Ngaya for Petitioner/Respondents

Mr. Wilson for Objector/Applicants

