



REPUBLIC OF KENYA



**Njoroge v Kaguku (Succession Cause 96 of 2017)
[2022] KEHC 11576 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 96 OF 2017**

**CM KARIUKI, J
JULY 28, 2022**

BETWEEN

NAOMI WAITHIRA NJOROGE PETITIONER

AND

MARGARET WANGURI KAGUKU OBJECTOR

JUDGMENT

1. The instant matter is at least 25 years plus since inception vide the dilapidated records in court showing records of 1997.
2. It is immoral and a grave injustice for matter to take such time to be concluded that draining the contestants energy and resources to the bone. This is a situation which should be condemned unreservedly. Justice delayed is justice denied, be that as it may be.
3. The instant dispute sharing of LR No. Nyandarua/Silibwert/420, by acreage 32.6 acres while the objector claims half of the land, the Petitioner claims that the Objector ought to get 5 acres.
4. The parties testified on the issue of sharing and then filed submissions for their arguments.

Petitioner's Case and Submissions

6. The petitioner filed this petition way back in 1997 vide Nyahururu PM Succession Cause No. 35 of 1997.
7. It was subsequently transferred to the High Court at Nakuru and allocated Cause No. 440 of 1999 and eventually transferred to the Nyahururu High Court and allocated the current cause number.
8. The petitioner claims for a half share of the parcel of land number Nyandarua/silibwet/420 Measuring 13.2 Hectares translating to 32.6 acres.



9. The petitioner herein gave an account and history of how the parcel of land herein was acquired and subsequently registered in the names of the deceased who was her co-widow. She testified that at the time of the allocation of the land herein by the Settlement Fund Trustee the policy was that where there were two widows they would be allocated once parcel of land which would be registered in the names of the first wife of the deceased. This is exactly what happened.
10. This evidence was corroborated by the witness for the petitioner who went as far as to testify that there were indeed several other families within Silibwet location who were polygamous and the parcel of land would be registered in the names of the first wife who would hold in trust for both families and that subsequently they would share the land equally amongst the two houses.
11. The petitioner testified that since the land was allocated and registered in the names of the deceased, she was to hold in trust on behalf of herself as well as on behalf of the petitioner and their respective families.
12. Further evidence was led by the petitioner that indeed the two accounts at the Co-operative Societies where repayments of the loan through farm produce were opened in the names of the deceased and the Petitioner herein and allocated number 420A and 420B.
13. In terms of the use of the land the petitioner testified that all along she has been using 15 acres out of the suit land though she has been facing constant interferences and disruptions from Objector which has at times necessitated her to seek help from the Provincial Administration.
14. The petitioner has indeed established that the suit land herein is held in trust for herself and the deceased. The petitioner has proposed that the land be shared out equally between herself and the objector who is the wife of one of the sons of the deceased.
15. Evidence was led to the effect that the deceased had 4 children out of whom two are deceased and two are surviving. Further that of the 4 children of the deceased none has a claim over the estate and that they have renounced their rights over the estate leaving the objector as the wife of one of the sons to claim the estate.
16. Under the circumstances that bearing all the factors into consideration and bearing the fact that only the Petitioner and the objector are staking claims to the suit land herein and further considering that the Petitioner has been on the suit land since it was allocated way back in 1965 and utilizing a clean and distinct portion of 15 acres, she should be allocated the same with the rest going to the objector.
17. The proposal by the objector to give the petitioner 5 acres in oppressive, inequitable and clearly unjustified.

Objector's submissions

19. The Objector Margaret Wangari Kagukuis the wife of SISTO Kaguku S/O Wanjiku Njoroge GichehE the deceased herein. She holds a grant ad item in respect of Sisto Kaguku's estate issued to her on the 21/8/2007 in Nyahururu SPM Succ Cause No. 100 of 2007. The objector's husband died on the 3/7/2006 before the cause herein could be determined and the objector was allowed to substitute him in the proceedings.
20. The Naomi Waithira Njoroge is the Co-wife of Wanjiku Njoroge Gicheru the deceased herein. Their husband died before independence and he did not leave behind any real estate or assets for distribution.
21. The deceased left behind LR No Nyandarua/ Silibwet/420 and 4 children surviving her. 3 of her children are not interested in the estate as confirmed by DW2.



22. The petitioner has proposed that the property be shared equally between herself and the Objector whereas the Objector has proposed that the Petitioner gets a portion of 5 acres which she occupies and which was bequeathed to her by the deceased prior to her demise and she be allocated 27.6 acres which is what was to be inherited by her husband Sisto Kaguku Njoroge
23. The petitioner testified and called 1 witness. It was her evidence that the deceased herein was her co-wife and the registered Proprietor of L.R. Nyandarua/Silibwet/420 and that the land was allocated to both of them by the Settlement Fund Trustee as their husband was deceased and it was registered to the 1st wife the deceased herein as a trustee. She admitted that the deceased was using a bigger portion of land during her lifetime. She claimed that the two repaid the Settlement Fund Trustee's Loan equally but she did not have documents in proof.
24. PW 2 Zacharia Kahari claimed to be the treasurer of Mukeu Farmers' Co-operative Society but he did not produce any document in proof of the same. He did not confirm having worked with the Settlement Fund Trustees and his claim that land was registered in the name of the 1st wife where a deceased person had more than one wife were just hearsay as Mukeu Farmers' Co-operative Society was not the allocating authority.
25. During cross examination, he was unable to categorically state how much was paid by the parties herein on the loan.
26. The objector testified and called 1 witness. It was her evidence that the deceased was allocated the land by the Settlement Fund Trustee in her personal capacity and not by virtue of her being the deceased wife but she invited her co wife the petitioner to the land as a licensee as she worked out on getting her own land, she was allowed to settle on a portion of 5 acres where she would farm pyrethrum and she paid Kshs 80/- for loan repayment as confirmed in the letter dated 5/10/2020 produced as exhibit No. 9. This is against a sum of Kshs. 24,047/= paid by the deceased as per the receipts and records produced as exhibits. She denied that the petitioner was entitled to half share of the property and maintained that she should get the 5 acres was given by the deceased.
27. The petitioner did not call a witness from the Settlement Fund Trustee to support her allegations that the suit land was allocated to the deceased as the 1st wife of their deceased husband to hold in trust. How did the Settlement Fund Trustee know that they were co wives? How comes their husband who died during the emergency period (1952-1960) was entitled to land posthumously?S
28. The petitioner being a co-wife of the deceased herein does not rank in priority over the objector who represents a son of the deceased and she is not entitled to her estate. This is as was held in the case of *Njeri Mbugua v Peter Kariundi Gathaiya & ano.* (2012) eKLR as follows:
- “ the Appellants although co-wives, in law are not recognized as relatives of Rachel but apart from the above, when the court as to determine the party who has priority or who is entitled to be issued with letter of administration, section 66 of the Law of Succession gives general guidance of how the court should exercise its discretion to grant the letters of administration while bearing in mind the priority of the beneficiaries as provided for under part V of the Law of Succession Act”.
29. In the case of *Rebecca Wamaittha Githae v Peter Mwangi Githae & 2 others* (2009) eKLR, the court held that:
- “Section 38 of the law of Succession Act is categorical that the net intestate estate shall devolve upon the surviving child or be equally distributed among the surviving children of



the deceased that is what precisely the Learned Trial Magistrate held. She cannot be faulted in any way. There is no provision in law or at all that an intestate property should devolve to a co wife”.

Issues Analysis and Determination

30. After going through the record and parties’ submissions, I find that the issues are whether the suit land should be shared equally and what is the order as to costs?.
31. Under *Evidence Act* cap 80 laws of Kenya, provisions of section 107“(1) states, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. The objector testified and called 1 witness.
32. It was her evidence that the deceased was allocated the land by the Settlement Fund Trustee in her personal capacity and not by virtue of her being the deceased wife but she invited her co wife the petitioner to the land as a licensee as she worked out on getting her own land, she was allowed to settle on a portion of 5 acres where she would farm pyrethrum and she paid Kshs 80/- for loan repayment as confirmed in the letter dated 5/10/2020 produced as exhibit No. 9. This is against a sum of Kshs. 24,047/= paid by the deceased as per the receipts and records produced as exhibits. She denied that the petitioner was entitled to half share of the property and maintained that she should get the 5 acres was given by the deceased.
33. The petitioner did not call a witness from the Settlement Fund Trustee to support her allegations that the suit land was allocated to the deceased as the 1st wife of their deceased husband to hold in trust. It was incumbent upon petitioner to prove the Settlement Fund Trustee knew that they were co wives and that their husband who died during the emergency period (1952-1960) was entitled and was allocated land posthumously.
34. The Petitioner being a co-wife of the deceased herein does not rank in priority over the objector who represents a son of the deceased and she is not entitled to her estate. This was held in the case of *Njeri Mbugua v Peter Kariundi Gathaiya & ano* (2012) eKLR as follows:

“ the appellants although co-wives, in law are not recognized as relatives of Rachel but apart from the above, when the court as to determine the party who has priority or who is entitled to be issued with letter of administration, Section 66 of the Law of Succession gives general guidance of how the court should exercise its discretion to grant the letters of administration while bearing in mind the priority of the beneficiaries as provided for under part V of the Law of Succession Act”.
35. In the case of *Rebecca Wamaiitha Githae v Peter Mwangi Githae & 2 others* (2009) eKLR, the court held that:

“Section 38 of the law of Succession Act is categorical that the net intestate estate shall devolve upon the surviving child or be equally distributed among the surviving children of the deceased that is what precisely the Learned Trial Magistrate held. She cannot be faulted in any way. There is no provision in law or at all that an intestate property should devolve to a co wife”.
36. Thus, the court finds that the suit land belonged to the deceased herein and had given objector 5 acres to occupy and use thus sharing shall be as follows;



- (1) Naomi Waithira Njoroge thepetitioner shall get 5 acres and Margaret Wangari Kaguku The objector 27.6 acres.
- (2) Parties to bear their own costs.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 28TH DAY OF JULY 2022.

CHARLES KARIUKI

JUDGE

