



REPUBLIC OF KENYA



In re Estate of Samuel Michael Ndirango (Deceased) (Succession Cause 65 of 2018) [2022] KEHC 10656 (KLR) (5 August 2022) (Judgment)

Neutral citation: [2022] KEHC 10656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 65 OF 2018
MM KASANGO, J
AUGUST 5, 2022**

IN THE MATTER OF THE ESTATE OF SAMUEL MICHAEL NDIRANGO (DECEASED)

JUDGMENT

1. The administration of the estate of the deceased hereof seemed to have had a good start but now at the tail end, seem to have ran into head wind.
2. It is not denied that the deceased was married to Christine Nyakio Ndirango (hereinafter the 1st wife) in 1961. Theirs was a Christian marriage celebrated at the Catholic Church Riara. There was a breakdown of that marriage and from the documents before court, it would seem the first wife filed a petition for divorce. The deceased in his answer to that petition pleaded that the 1st wife deserted their matrimonial home on 13th August, 1974. The deceased pleaded particulars of 1st wife's cruelty towards him and prayed for the marriage to be dissolved on the grounds he presented. No evidence has been presented to this Court showing that the said marriage was indeed dissolved. It is clear from the evidence and submissions before court that the 1st wife and deceased lived apart from that period until the death of the deceased.
3. It is also not denied that Grace Njeri Ndirango (hereinafter 2nd wife) got married to the deceased on 9th July, 1976, under the Kikuyu Customary Law.
4. According to the Chief's letter dated 20th September, 2017, the following were the persons who survived the deceased:-Christine Nyakio Ndirango – (1st wife)Grace Njeri Ndirango – (2nd wife)George Gathu Ndirango – sonMartin Ruhui Ndirango – sonAlyta Wanjiu Githire – daughterSilvester Gathu Ndirango – sonPauline Anita Wambui Ndirango – daughterAlexandra Angela Wangui Ndirango – daughterChristine Njeri Njoroge – daughter in lawRaya Nyakio Wainaina – grand daughterJomo Ndirango Wainaina – grandson (minor)Ian Michael Ndirango – grandsonBrian Morris Moses Kiruga Nginyo – grandson
5. The petitioners for grant of letters of administration in this cause are:-Grace Njeri Ndrango – (2nd wife)George Gathu Ndirango – sonMartin Ruhui Ndirango – sonSilvester Gathu Ndirango – son



6. A grant was issued to all the petitioners on 16th November, 2018. The 2nd wife, by summons dated 3rd March, 2020 solely filed sought confirmation of that grant. Amongst the issues the 2nd wife raised in that application is determination whether 1st wife was divorced and therefore was not entitled to inherit from the deceased's estate.
7. There is protest filed protesting the mode of distribution proposed by the 2nd wife by the application for confirmation of grant. The protesters are George Gathu Ndirango and Martin Ruhui Ndirango.
8. I have considered the affidavit of 2nd wife and the protestors, and the submissions filed by the protestors.
9. When the petition was filed, the assets of the deceased were listed as:-
 - (a) Title Dagoretti/Riruta/xxxx.
 - (b) Title LR.209/xxxx Kileleshwa
 - (c) Title Kiganjo/Gatei/xxxx
 - (d) Vehicle KBZ xxxx
10. When the 2nd wife applied for confirmation of grant in addition to the properties listed in the petition, she stated that the deceased had an account with KCB and had investments with UAP.
11. The protestors introduced titles Ngong/Ngong/xxxx to xxxx as additional properties that belonged to the deceased. There was no evidence either by way of copy of title deeds for those property or by official searches which proves those properties indeed belong to this estate.
12. Before making final orders in this matter, there are issues that I need to determine, which will assist in determination of the distribution of this estate. The issues come out form the affidavit and submissions filed herein. The issues are:-
 - (a) What is the status of the 1st wife in this estate?
 - (b) Should the 2nd wife be called upon to refund the income derived from the rental income of deceased's estate?
 - (c) What is the extent of the deceased's estate?
 - (d) Who are the beneficiaries of this estate?

Issue (a)

13. Deceased was married to the 1st wife in a catholic church. That marriage was monogamous. There is no evidence of dissolution of that marriage. There is however evidence that the said marriage broke down and the deceased and the 1st wife did not cohabit with each other after separation, which seems to have occurred on 13th August, 1974. The protestors erred in arguing that the deceased had two households as envisaged by Section 40 of the *Law of Succession Act* Cap 160. Deceased estate was not polygamous. Deceased was separated from his 1st wife when he married his 2nd wife under the Kikuyu Customary Law. The best definition of the 1st wife can be found in Section 29 of Cap 160. That Section defines dependant to include the "wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death."
14. My determination of this issue is therefore that the 1st wife is a dependant as defined under Section 29 of Cap 160.



Issue (b)

15. Section 35 of Cap 160 is the section that will resolve this issue. That section provides thus:-

“ 35. 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.

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.



18. I therefore hereby determine that the 2nd wife shall not have to account for the rental income of deceased's estate.

Issue (c)

19. The court will determine the extent of the deceased's estate on what has been proved by documentation before court. The deceased's estate, as thus far proved is:- Title Dangoretti/Riruta/xxxx Title L.R. xxxx Title Kiganjo/Gatei/xxxx Funds in Kenya Commercial Bank. Old Mutual Investment Group Ltd Account No. xxxx Motor vehicle KBZ xxxx

ISSUE (d)

20. The beneficiaries of this estate are the two wives and their children. I have set out above, in this judgment their names. I do however note from the affidavits filed that some of those children of those two wives have passed away. I will require that any party be at liberty to file further affidavits before the partial confirmed grant is issued.

Disposition

21. I hereby order for a partial confirmed grant to issue. This is due to the fact that parties need to prove what further properties are owned by this estate and also there is need to confirm who would inherit instead of the deceased children of the two marriage.

Partial distribution

22. Title Dangoretti/Riruta/xxxx and Title L.R. xxxx shall be sold. The proceeds shall be shared as follows:-
- (a) Grace Njeri Ndirango shall receive 20% of the proceeds of the sale of the two properties.
 - (b) 80% of the sale proceeds shall be shared equally between:-
 - (i) Christine Nyakio Ndirangu
 - (ii) George Gathu Ndirango
 - (iii) Martin Ruhui Ndirangu
 - (iv) Alyta Wanjiru Githire
 - (v) Beneficiary of Catherine Wambui (deceased)
 - (vi) Beneficiary of Clement Wainaina (deceased)
 - (vii) Silvester Gathu Ndirango
 - (viii) Pauline Anita Wambui Ndirango
 - (ix) Alexandra Angela Wangui Ndirango
23. Title Kiganjo/Gatei/xxxx to be shared equally between Christine Nyakio Ndirangu and Grace Njeri Ndirango.
24. Vehicle registration No. KBZ xxxx to go to Grace Njeri Ndirango.
25. Funds in KCB and Old Mutual Investment Group Limited shall be shared equally between Christine Nyakio Ndirangu and Grace Njeri Ndirango.



26. Before the partial confirmed grant is issued as set out above, I require any party do file an affidavit setting out beneficiaries of the estate of Catherine Wambui (deceased) and Clement Wainaina (deceased).
27. Another date will be fixed for court to receive information on the beneficiaries of those who are deceased as set out in the previous paragraph.
28. There shall be no orders to costs in respect to the summons dated 3rd March, 2020.
29. Orders accordingly.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 5TH DAY OF AUGUST, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice

For Grace Njeri & Silvester Gathu :- N/A

For George Ndirangu & Martin Ruhui :- Mr. Mwaniki

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE

