



REPUBLIC OF KENYA



**In the Matter of The Estate of Sospeter Gathuka Petrol Gathigi alias
Sospeter Gathuka Gathigi (Deceased) (Succession Cause 78 of 2017)
[2022] KEHC 13000 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13000 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

SUCCESSION CAUSE 78 OF 2017

MM KASANGO, J

SEPTEMBER 22, 2022

(FORMERLY NAIROBI SUCCESSION CAUSE NO. 1304 OF 2012)

**IN THE MATTER OF THE ESTATE OF SOSPETER GATHUKA PETROL
GATHIGI ALIAS SOSPETER GATHUKA GATHIGI (DECEASED)**

JUDGMENT

1. Sospeter Gathuka Petrol Gathige *alias* Sospeter Gathuka Petrol Gathege (deceased) died on April 24, 2009 intestate. He left surviving him five wives and 33 children. This succession has travelled several paths. Those paths are not relevant to the determination I am to make in this judgment but I will highlight some of those paths. Initially, two widows of the deceased petitioned for grant of letters of administration intestate before the Nairobi High Court Petition No 1304 of 2012. While that succession was proceeding, one of the sons of the 1st house, Michael Karanja Gathuka petitioned for grant of letters of administration intestate before Githunguri Magistrate's Court being Succession Cause No 1 of 2015. In this latter succession cause, the grant was issued and confirmed on April 15, 2015. The petitioner had the properties of the estate distributed to him solely. He had in that petition indicated that he was the sole surviving beneficiary of this estate. Justice W. Musyoka, by his ruling dated May 3, 2017 revoked the grant issued by the Githunguri Magistrate's Court. Both succession were transferred to this court.
2. The beneficiaries agreed to appoint administrators as follows:-
 - a. Henry Kariuki Gichuru – 2nd house
 - b. Agnes Waithira Gathuka – widow 3rd house
 - c. Moses Mutori Gichuru - 1st house
 - d. Beatrice Mumbi Githuka – widow 4th house



3. A grant was issued to those beneficiaries on November 27, 2018. A contention has arisen at the stage of confirmation of that grant. That is what the parties requested this court to determine by this judgment, that is the dispute on distribution. Two summons for confirmation have been filed.
4. Agnes Waithera Gathuka (Agnes) filed her summons for confirmation dated December 16, 2019. Moses Muturi Gichuru (Moses) filed summons for the confirmation of grant dated September 16, 2020.
5. I have considered the affidavit evidence and the parties' submissions. Indeed I am grateful for the industry put by all the parties in providing facts and legal authorities. That effort has eased my duty.

Discussion and Determination

6. The deceased was polygamous and died intestate.
7. Agnes by the summons dated December 16, 2019 stated the inventory of deceased's assets are:-
 - a. Muguga/gitaru/133
 - b. Nyandarua/tulaga/462
 - c. Nyandarua/kitiri/264
8. Alice produced two pages unsigned written record of the deceased he allegedly made on; June 15, 1988 in his diary. That record is in Kikuyu language and no translation was provided. This is what she said in regard to that writing:-

“... when the deceased was healthy, both in mind and body, he (the deceased) expressed his wishes in writing as recorded in his diary – record that have (sic) recently been discovered by some members of his surviving family.”
9. Agnes further states that each household should remain where they were settled by deceased since they till that land. That the 3rd house, her house, because it was settled on the smallest parcel of land should get 10 acres in Nyandarua/Kitiri/264.
10. Agnes proceeded to give narration of how each house was allegedly settled by the deceased.
11. In respect to 1st house, Agnes stated that this house was settled in Nyandarua/Tulaga/462 (7.4 Ha) in 1967. The 1st house cleared the land and settled outstanding debt over that land. That the 1st house practices animal husbandry on that land as well as till it. That they also installed pipe water in that land.
12. That the widow of the 2nd house was divorced by deceased in 1981. That, the said widow was not settled on land by the deceased. Agnes suggested that the 2nd house be given property Nyandarua/Kiriti/264.
13. Agnes stated that her house, the 3rd house was settled by deceased on Muguga/Gutari/133(3.48 Ha) in 1965. Agnes stated that her household severally “defended the same parcel of land.” That she and her children continued to live on that land where she built permanent house thereon, including tilling and connected the property with electricity and water, and has been carrying on animal husbandry, including planting trees.
14. Further, that the deceased settled the 4th house on Nyandarua/Kitiri/264 in 1983, while 5th house was settled on the same land in 1994. Both household, according to Agnes, paid off a loan connected to this property. That both household have undertaken various activities on the land such as tilling the land,



practicing animal husbandry including carrying out various developed thereon. That the deceased's widows and their children and grandchildren are in occupation of that land.

15. Agnes in her affidavit dated December 16, 2019 stated thus:-

“That distribution of the estate should strive to cause the least minimal if any disruption to the beneficiaries who have lived and charted their ways of life on the premise of the parcels they were settled on by the deceased decades ago.”

16. Moses filed summons for confirmation of grant dated September 16, 2020. He relied on an affidavit in support and another affidavit that he swore in opposition to summons filed by Agnes.

17. Moses' deposition are that Agnes was not truthful in her application, he accordingly stated that he was opposed to suggested distribution of Agnes. He deponed further that:-

“That I know that our late father, ... was a man who valued peace and fairness. When he realised that he was becoming sickly from 2006 onward he began to put his affairs in order and called family meetings regarding his properties and what he would wish to see happen with the properties when he is gone.

That... Agnes Waithera Gathuka has chosen to hide the truth and has even failed to mention that she had sued our late father in Nairobi High Court Civil suit No 484 of 2006 in which our late father swore an affidavit on May 29, 2006 spelling out his clear wishes about his various property.”

18. Moses set out the deceased assets as:-

- a. Nyandarua/kitiri/264 - about 22 ha.
- b. Nyandarua/tulaga/462 7.40 ha.
- c. Muguga/gitaru/1333.48 ha.
- d. ½ acre of land Aspodea in Kitiri settlement scheme.
- e. 1 acre at Karima Nandarass.
- f. 1 acre at Ndinda Nandarass.
- g. 5 acres at Nadarass (Kihingo).
- h. East African Breweries Ltd shares.
- i. Other shares not revealed the administrators.

19. Agnes by her further affidavit termed the deceased's affidavit, referred to by Moses as false. She went further to admit that Halima Abdulla was allowed to occupy part of Muguga/Gitaru/133 but that the transaction of sale had not been concluded. She also confirm that she (Agnes) had not interfered with that occupation. She was in agreement that deceased shares be sold and the proceeds be shared equally amongst the beneficiaries.

20. Henry Kariuki Gichuru, by his affidavit sworn on September 6, 2021 proposed distribution be equally; that is Nyandarua/Kitiri/264, Nyandarua/Tulaga/462 and Muguga/Gitaru/133 be shared equally amongst the five houses.

21. Beatrice Mumbi Gathuka was in favour of the proposal and distribution made by Moses.



22. Section 40(1) of [Cap 160](#) provides for distribution of the estate of a polygamous deceased person. It provides thus:-

“40(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 estate 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.”

23. Discussing the provision of that section the court of appeal in the case of [In re Estate of Eliud Wanyama Saratuki \(deceased\)](#)(2021) eKLR, stated:-

“This provision has been subjected to judicial interpretation in a number of instances. In *Mary Ronoh v Jane Ronoh & another*, [2005] eKLR, for example, this court firmly reiterated the position that, in distributing the estate under that section, the judge has a discretion to take into account or consider the number of children in each house; and that the section does not set down any firm rule that, in the distribution of the estate, there must be equality between houses. The court explained that:-

“If Parliament had intended that there must be equality between houses, they would have been no need to provide in the section that the number of children in each house be taken into account.

Nor do I see any provision in the act that each child must receive the same or equal portion. That would clearly work injustice I am satisfied that the act does not provide for that kind of equality.” (per Omolo, JA).

24. It is clear from that section that it provides the court continues to retain discretion on distribution of an estate of a polygamous deceased. This is what was stated in the case of [Kyoa Ndewa v Patrick Mulyungi Ndewa & another](#)(2022) eKLR as follows:-

“In [Scholastic Ndululu Sura v Agnes Nthenya Sura](#)[2019] eKLR, the Court of Appeal weighed into that position when it held as follows: -

“It is therefore evident, that, although section 40 of the [Law of Succession Act](#) provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”

25. Although Agnes initially denied that the deceased made his intention know on distribution of the estate she later accepted that the deceased did express himself in an affidavit, which affidavit she termed as false.

26. In order to explain the background of the deceased’s affidavit which was revealed by Moses I will proceed by stating what it related to.

27. Agnes sued her deceased husband in Nairobi High Court Civil Case No 484 of 2006 seeking to restrain him from disposing the property she proposed in this succession, it be distributed to her house, being



Muguga/Gitaru/133. The deceased responded by an affidavit dated May 29, 2006. Because of the relevance of that affidavit, I will reproduce some portions of it as follows:-

“That it is not true that the plaintiff/applicant (Agnes) has exclusively occupied and utilised the parcel of land herein since 1965 as alleged, as indeed, all the other family members have equally benefited from it, and continue to do so to date.

That as regard the sale of land to Mr. Musalia Mwenesi Advocates, it is not true that the applicant was never involved, as indeed, the same was sold so as to specifically educate her children, and she was one of my witnesses in the said sale agreement.

That in view of the above, were the orders sought by the applicant to be granted, the applicant will have benefited from the proceed of the sale of the portion of the land to Mr. Mwenesi, while at the same time denying him the benefit and use of the land pursuant to the processing of the title documents thereof.

That as I am old and ailing, and to avert any disharmony amongst my wives and children, I recently convened a family meeting and expressed my desire to distribute my properties to the entire family as represented by the five households, all in an equal way, which decision was unanimously endorsed by all.

That in view of the above, I have decided to distribute my parcel of land amongst my wives and their children as follows:-

- a. The 17½ acres piece of land in Tulaga settlement scheme Plot No 802, each of the five households to receive 3 acres each, two acres to remain in my name together with the stone house comprised of three rooms standing therein, while the story house do remain in the household of Zipporah Wanjiku Gathuka, while the remaining portion do constitute access roads to the respective portions.
- b. The 51 acres piece of land in Kitiri settlement scheme, each of the five household to receive 10 acres each, while the remaining portion do constitution access roads thereof.
- c. The ½ acre of Aspodea in Kitiri settlement scheme do go to the household of Zipporah Wanjiku Gathuku exclusively.
- d. The 1 acre piece of land at Karima Nandarass be shared equally as between the households of Beatrice Mumbi Gathuka and Leah Wairimu Gathuka exclusively.
- e. The 1 acre piece of land at Ndinda (Nandrass) be shared equally as between the households of Edith Gathoni Gathuka and Agnes Waithera Gathuka exclusively.
- f. The five acres at Nandarass (Kihingo) be shared equally between the five households.

That as regard LR No Muguga/Gitaru/133 which is a purely commercial plot and divided into small plots thereof as per the attached copy of the sketch plan marked “SGG 1” the portion already sold to Mr. Musalia Mwenesi be curved out, and the remaining portion be shared amongst the five households, each received a portion of ¾ acres.



That after the above, the remaining portion, which also constitutes the commercial house under construction do remain in my name, for the common use by the entire family, and more so for the benefit of the young children still in school.”

28. It needs to be stated, as seen above, that the deceased in his life time sold part of Muguga/Gitaru/133 to Halima Abdullah Mwenesi this fact is admitted by most beneficiaries whilst others are passive, but do not deny. However, Agnes initially denied but later stated that the said purchaser was in occupation of part of that. Agnes termed what her deceased husband stated in his affidavit as false. Her denial of that sale by deceased is contradicted by her affidavit sworn on May 11, 2006 where in part she deponed.

“That the defendant [deceased] in fact went ahead and sold off some of the land to one Mr. Musalia Mwenesi ...

That am (sic) worried that he will dispose of the whole parcel of land and I will be left homeless and destitute.”

29. Agnes has argued that the purchaser not being a beneficiary was not entitled to be distributed any part of the deceased’s estate. Agnes has erred to so argue. The purchaser was sold the land by the deceased in his life time. This is evidenced by a hand written agreement between the deceased and the purchaser, which although undated is signed by both the deceased and the purchaser. That agreement acknowledged that there was a previous formal agreement of sale. It also acknowledge that the purchaser had paid deceased Kshs.910,000 and remained with a balance of Kshs.990,000 which was to be paid once a title was issued in the name of the purchaser. That agreement permitted the purchaser to henceforth take possession of the land purchased. It is useful to consider the case of *In re Estate of Joseph Mutua Munguti (Deceased)* (2018) eKLR as follows:-

“In this case the interests of the objector and the creditors were those of persons who had entered into sale agreements with the deceased for the sale of portions of the lands forming part of the deceased’s estate. If there were such agreements, then their interests can be legitimately taken into account in distributing the estate of the deceased. In dealing with a similar matter, Makhandia, J (as he then was) in *Titus Muraguri Warothe & 2 others v Naomi Wanjiru Wachira Nyeri HCSC No 122 of 2002* held that:-

“In the instant case the applicants are purchasers for value of a portion of the deceased’s estate comprised in the grant. There is uncontested and unchallenged evidence that before the deceased passed on, he had sold various portions of land to the applicants, and he had been fully paid and had indeed put each one of the applicants in possession of their respective portions that they had purchased. The applicants have to date been in continuous and uninterrupted occupation of those portions and have extensively developed them. The respondent who is the wife of the deceased was all along aware of these transactions involving her deceased husband and the applicants. The deceased, pursuant to the sale agreement and as required by law made an application to the Land Control Board for necessary consents to the subdivision of the said parcels of land and subsequent transfer to the applicants of the portions they had purchased. However, he passed on just before he could attend the board meeting. Yet the respondent knowing very well the interest of the applicants in the suit premises when she petitioned for the grant of letters of administration and later had the same confirmed completely ignored that interest of the applicants in the suit premises... Had the applicants been made aware of the application for the confirmation by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and



the resultant grant would have taken care of these interests. Further, had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is, therefore, the grant was obtained fraudulently by the making of a false statement and concealment from court of something material to the cause. The respondent knew of the applicants' interest in the estate of the deceased, yet she chose to ignore them completely in her petition of letters of administration intestate.

30. On how the deceased estate will be distributed, I will consider the deceased's wishes which I believe are best captured in the distribution proposed by Moses. Further, the affidavit evidence of deceased will be received by this court as provided under section 34 of the *Evidence Act*, Cap. 80. That section is in the following terms:-

“(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances :-

(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable.”

31. That affidavit is therefore part of the evidence to assist me determine distribution of this estate.

32. I am also persuaded by the holding of the decision in the case *Joseph Wairuga Migwi vs. Mikielina Ngina Munga* (2016) eKLR thus:-

“With respect, I think section 40 (1) cited above cannot apply where the deceased expressed his wishes and intention in a very clear manner as in this case and took steps to ensure his preferred wishes are effected.... Such acts or settlements effected are not subject to disruption, change or frustration. They are to honoured and effected..... the express wishes of the deceased cannot be ignored. To me, the deceased was clear in his mind as to what he wanted and he freely bequeathed each of his two wife's a parcel of land during his lifetime, and lived for another 10 years after doing so and no one raised an objection.... case of *Martha Wanjiku Waweru vs Mary Wambui Waweru* {2007} eKLR where Onyancha J observed inter alia as follows:-

‘In this case the deceased had in his lifetime distributed his estate as he wished. He had power to do so. His family members did not protest or change his mode of distribution which they had opportunity to do during his lifetime. He fixed clear physical boundaries which no one interfered with at any stage even after his death. In my view his wishes should have been respected.’”

33. The wishes of deceased shall be taken into account.

34. Additionally, I accept what was stated by Henry, that Muguga/Gitaru/133 is a valuable property. I believe that is why Agnes wishes it be distributed to her house. Equity would therefore require that each house does get a portion of that property.

35. The request that the deceased's share be sold and proceeds be shared equally finds favour with me.



Disposition

36. The judgment of this court is as follows:-

a. The grant issued on November 27, 2018 hereby confirmed as follows:-

House of Zipporah Wanjiku Gathuka

House of Edith Gathoni/

Peter Gathigi

House of Agnes Waithira Gathuka

House of Beatrice Mumbi Gathuka

House of Leah Wairimu Gathuka

Halima Abdullah Mwenesi

Nyandarua/Kitiri/264

11 acres

11 acres

14.5 acres

14.5 acres

Nyandarua/Tulaga/462

15 acres

Muguga/Gitaru/133

1.8 acres

1.8 acres

1¼ acres

1 acre

1 acre

3 acres

½ acre of land in Aspodea in Kitiri Settlement Scheme

½

1 acre at Karima Nandarass

-

-

-

½

½

-

1 acre at Ndinda (Nandarass)



-

½ acre

½ acre

-

-

-

5 acres at Nandarass (Kihingo)

1 acre

1 acre

1 acre

1 acre

1 acre

- b. East African Breweries Ltd shares shall be sold and the proceeds shared equally between the five houses.
- c. The balance of the purchase price shall be paid by Halima Abdullah Mwenesi and the same shall be shared equally amongst the five houses.
- d. There shall be no orders as to costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 22ND DAY OF SEPTEMBER, 2022.

MARY KASANGO

JUDGE

In the presence of

Coram:

Court Assistant : Mourice

For Moses Muturi Gichuru:- Mr. Mwenesi

For Agnes Waithera Gathuka : Orange HB for Nganga Mbugua

For Henry Kariuki & 2nd House : - Irungu Mwangi

RULING delivered virtually.

MARY KASANGO

JUDGE

