



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

SUCCESSION CAUSE NO. 84 OF 1999

IN THE MATTER OF THE ESTATE OF LABAN GIKONYO KAMAU (DECEASED)

JUDGMENT

1. The deceased in this cause Laban Gikonyo Kamau died on the 29th of November, 1998. On the 21st January 1999 Agnes Wangechi Gikonyo and Elizabeth Muhura Gikonyo describing themselves as wife and daughter petitioned the court for grant of letters of representation intestate and on the 30th March, 1999 a grant was issued.

2. In the petition 5 survivors were listed:

- a. Agnes Wangechi Gikonyo - wife
- b. Elizabeth Muhura Gikonyo – daughter
- c. Lucy Wanjiku Gikonyo – daughter
- d. David Ndegwa Gikonyo – son
- e. Dishon Kamau Gikonyo - son

3. No liabilities were listed. Listed as assets were the following properties: -

- a. Kayole Plot A 4-243
- b. Kayole Commercial Block A & B plot No. B 21
- c. Maki Commercial Agencies - Nanyuki Plot No. 257.
- d. Loc 19/Kiawambogo/2096
- e. Nanyuki Marura Block 6/380 (Endana)
- f. Laikipia – Mifugo CU Ltd plot No. 15 (Rugongo centre).

4. In the summons for confirmation of the grant filed on the 19th of May 2000 the Petitioners/Respondent introduced new names not in the original petition being names of deceased children of the testator as follows: -

- a. Robert Kamau Gikonyo - son
- b. Samuel Kiiru Gikonyo – son
- c. John Waithaka Gikonyo

5. And on the 3rd of July 2000 Robert Kamau Gikonyo filed an affidavit of protest to the said application for confirmation as he did not agree with the proposed mode of distribution and disputing that the allegation that deceased left behind a will. It was his contention that the document alleged to contain wishes of the deceased was instigated by the petitioner/respondent, which the deceased did not agree with, the deceased tore the same and did not distribute any of his properties as alleged, he further contended that his mother and himself contributed to the generation of income which purchased the properties the subject of the estate.

6. In another affidavit of protest filed on 9th of January, 2001 Mary Wanjiru Gikonyo described herself as the first wife of the deceased and the petitioner/respondent the 2nd wife. She claimed that the petitioner/respondent had concealed information when she stated that the deceased had no other wife, further she contended that she and the deceased were already in business before the petitioner/respondent came into the scene and the said business had made contributed largely to the acquisition of the properties forming part of the estate, that the deceased died intestate, had a polygamous set up and the estate therefore ought to devolve in accordance with the Law of Succession Act.

7. The Petitioner/Respondent rebutted the above averments in an affidavit dated 16th November, 2000 and 19th March, 2001, to the effect that when she got married to the deceased in 1978, he had no other wife, the two lived for 20 years before his demise in 1998. And all assets were acquired after marriage with the joint effort of the two. Further the Applicant (Mary) is a total stranger and unknown to her. However, in the affidavit of 19th March, 2001, she acknowledged Mary but described her as a former wife of the deceased.

8. Several other affidavits were filed for and against the application. The deponents did not testify and the veracity of their averments not tested. The same remain statements with no value as they were equally not adopted by either of the parties.

9. The matter proceeded by way of oral evidence. The protestor in her evidence she reiterated that the deceased had two wives herself and Agnes Wangechi. She has three sons namely:

Robert Kamau Gikonyo

Samuel Kiiru Gikonyo and

Johnson Waithaka Gikonyo

While Agnes has four children namely:

Elizabeth Muhura Gikonyo

Lucy Wanjiru Gikonyo

Dickson Kamau Gikonyo and

David Ndegwa Gikonyo

10. It is her case that both wives and their off springs named above are heirs of the deceased and ought to inherit his estate.

She contends that she contributed to the business that led to the purchase of the properties as she sold her 2 heads of cattle contributed to the start-up capital for the business, she assisted the deceased in the running of the business, they did well until the petitioner/ respondent came on the scene creating a rift between her and the deceased. It was her case also that the Respondent has not provided any evidence of her contribution towards acquisition of the said properties.

11. The applicant narrated how the deceased acquired the assets giving the following narration; -

Plot No.4A-243 Kayole was allocated to the deceased and the name of the Respondent appears as that of spouse. The allotment was not joint.

Maki Commercial Agencies - Nanyuki Plot No. 257 was acquired by the deceased with the help of her sons.

Nanyuki Marura Block 6/380 (Endana) is in the sole name of deceased.

Laikipia – Mifugo (8) CU Ltd Plot 15 is also in the name of the deceased.

‘ **Kayole Commercial Block A & B plot No. B 21** the deceased acquired with the help of her sons.

Plot No. 2062 was bought by the deceased solely.

Her contention therefore is that all properties belonged to the deceased.

12. **PW2** Robert Kamau, son of Mary also adopted his witness equally disputed the mode of distribution proposed by the Respondent. He stated that though in the meeting which the two families attended on the 1st of January 1992 being referred to as the day the will was written, the Respondent/petitioner rushed the deceased to divide his property in accordance with a document that had been drawn, the deceased declined and shred the same and therefore the document purportedly signed at the said meeting by the deceased was false. Further he stated that he and his mother contributed greatly to the generation of income that bought the properties in question. Further when the deceased moved to Nairobi he moved the witness, his mother and his siblings all assisted in the business their parents started. He contended that his mother was never divorced as alleged.

13. The Respondent’s case is that she got married to the deceased in 1978 and the said marriage formalized in 1994. And that upon marriage

she did not find a wife but found the deceased with his 3 sons. That in 1994 when her marriage was solemnised at CPK St. Catherine Church in Mihango there was no opposition. Further upon marriage she found the deceased living in a mud house in Baba dogo. She took care of the deceased children whose mother never made any appearance, she learnt that the children's mother had deserted the deceased in 1976 and went to live in Mweiga, she also assisted the deceased in his business and with their joint effort they acquired the assets.

14. It was also her case that she met the mother of her step children, Mary for the 1st time when the deceased called a meeting at Rwathia in Kangema, on 1st of January, 1992 where the deceased distributed his properties giving his Muranga property to Mary's sons.

15. She also informed the court that the deceased died in her presence and that of Samuel Kiiru while admitted at Guru Nanak hospital in Nairobi. She admitted that the Protestor was at the funeral with her friends at the Nanyuki property.

16. The petitioner/respondent claimed to have the Karagita property 3 weeks after the deceased died and it was her contention that since the properties were acquired by joint effort, they should revolve automatically to her.

She did not object to the step sons being given the ancestral land in Murang'a as that according to her was the wish of the deceased.

17. The 2nd Respondents witness was Jackson Kanyuira Kamau who is a brother to the deceased. It was his evidence that the Protestor, Mary lived with his brother from 1965 to 1976 after which his brother married Agnes. It was his contention that Mary was not been officially married.

He further testified that in January 1992 his father called a meeting in Murang'a where various issues were discussed in the presence of several family members including their younger sister Esther, the deceased, Mary and Agnes were present. That in the said meeting the deceased gave his Murang'a property to his 3 sons. And since then Robert Kamau and Kiiru live on the said land.

18. It was also his evidence that Mary the Applicant deserted the deceased and thereafter in 1978 the deceased married Agnes. He did not attend the church wedding of the two but heard of the same. He does not know where Mary lives.

19. From the pleadings, the evidence summarised above and submissions by counsel on record the issues for determination are:

- i. Whether the deceased had more than 1 wife during his life time.
- ii. Whether Mary Wanjiru Gikonyo may be considered as a wife within the meaning of the Law of Succession Act.
- iii. Whether or not the deceased had distributed his property during his life time.
- iv. Who are the beneficiaries of the estate of the deceased?

v. How is the estate to be shared?

20. What comes out clearly from the evidence of both parties is that the deceased was married to two women during his life time. He married Mary Wanjiru Gikonyo in the 60's and lived with her both upcountry and in Nairobi up to 1976 thereafter in Mary's own words the 2nd woman Agnes came into picture. It is not clear where Mary went thereafter but the union between her and the deceased begot 3 sons and the same was never resolved.

Agnes came into the deceased life in 1978 and lived with the deceased up to the time of his death.

21. Mary may not have lived with the deceased after 1976. There is however evidence that her father demanded dowry, the Respondent's witness, the deceased brother is aware that dowry was paid. However, even if that was not done, in the documents forming part of the Respondent's document said to have been minutes of a family meeting involving Laban, Agnes, Mary, their children and family the minutes are said to have been of a meeting between the deceased, his wives and children. Though the document is extremely contentious it confirms Mary's presence as a wife and a family member of Gikonyo's family.

22. Though Agnes contracted a church wedding in 1994 she got into the union knowing that the deceased had another wife before her. It is not clear whether Mary knew of the church wedding or not. And though petitioner /respondent alleges that the protestor was divorced this was not supported by any evidence. It is also obvious that the deceased was close to his children first family as Samuel Kiiru was at his death bed with Agnes.

23. **Section 3** of the Law of Succession Act (the Act) defines "wife" to include wife who is separated from the husband and the term "spouse" or "widow" has a corresponding meaning.

24. Section 3 (5) of the Act further provides as follows; -

“ Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous marriage or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular Sections 29 and 40 thereof, and her children are accordingly children within the meaning of the Act.”

In M N M vs. D N M K & 13 Others [2017] eKLR, the Court of Appeal held that:

“The section was introduced in 1981 by the *Statute Law (Repeals & Miscellaneous Amendments) Act, No. 10 of 1981*. The purpose of the amendment was to mitigate the rigours of decisions such as *Re Ruenji's Estate (supra)* and *Re Ogola's Estate (supra)*, which did not recognise as beneficiaries' widows and children born from a union of a man already married under statute and another woman during the subsistence of the statutory marriage. To the extent that a marriage arising from a presumption of marriage is a marriage that is potentially polygamous, the prior monogamous marriage of the deceased to M would not preclude E from being recognised as a beneficiary of the deceased. (See *Irene Njeri Macharia v. M Wairimu Njomo & Another, CA No 139 of 1994*, *Miriam Njoki Muturi v. Bilha Wahito Muturi, CA No. 168 of 2009* and *Muigai v. Muigai & Another [1995-1998] 1 EA 206*.)”

25. The above quoted sections were put in place to cater for such situations that many Kenyan women and children find themselves in; that is a reality for many families.

26. Based on the law and the facts of this case I find that the deceased had two wives Mary, his first wife and Agnes his second wife and therefore for purposes of distribution of his estate his two wives and children are to be considered as heirs entitled to inherit him in accordance with **Section 40(1) and (2) Law of Succession Act** which provides as follows:

“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.

(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 sections 35 to 38.

27. The Respondent alludes to wishes of the deceased as contained in the minutes of the meeting of 1st of January, 1992, however the said document does not in any way qualify as a will and clearly the mere fact of the Respondent having petitioned for a grant intestate reference to the document is an afterthought.

28. As for the contention by the Respondent that the listed properties were acquired together with the deceased, I find that the documents of ownership do not support this assertion. **Kayole Plot A 4-243** no allotment document was produced. A letter dated 26th November 1999 by Assistant Director Community Development Social Services and Housing Department indicates the allottee of the plot was Laban Gikonyo.

Kayole Commercial Block A & B plot No. B 21 despite an alleged transfer of same from deceased to petitioner/respondent the letter referred to above also indicates that the same was allotted to Laban G. Kamau. Further the authenticity of the alleged sale agreement and document of assignment are questionable, one indicates that the property was transferred based on love and affection the other indicates that the petitioner/respondent paid Kshs.80,000/= in consideration. The said assignment appears not to have been registered by or with any authority.

Nanyuki/Marura Block 6/380 (Endena) is registered solely in the name of Laban Gikonyo Kamau.

Maki Commercial Agencies the shareholder and allottee of plot No. 257 is Laban Gikonyo.

Kiosk A6/B5 belonged to Laban Gikonyo.

Plot No. 15 Rugongo is in the name of the deceased Laban Gikonyo.

Plot No. 2062 - Karagita in a letter dated 9th November, 2000 the managing director explains that the petitioner/respondent approached the company with receipts bearing the deceased name, there was a balance of Kshs.10,000/= had not been cleared by then.

Therefore, the photocopy receipt produced bearing the name of Agnes and a date in 1998 is a mere fraud so is the letter from the said managing director in support of Agnes ownership, a witness Agnes failed to call as a witness and written clearly aimed at perpetuating the fraud and is as afterthought. I find that the plot was acquired by the deceased solely.

Loc. 19/Kiamwambo Parcel 2096 the title indicates that the deceased father Dishon Kamau Gikonyo gifted the same to the deceased on the 20th of January 1993. The deceased did not own the property in 1992 and had no capacity to gift it.

29. Having determined the above issues, the protest is certainly merited. From the onset the two houses left behind by the deceased ought to have been involved in the process of succession.

30. The petitioner/respondent concealed material facts from this court which facts if brought forth would have necessitated the inclusion of the first family. Consequently, the court orders and directs as follows:

i. **That the grant issued on the 30th of March 1999 be and is hereby revoked.**

ii. In its place a fresh grant will issue to Robert Kamau Gikonyo representing the interest of the 1st house and Agnes Wangechi Gikonyo representing interests of the 2nd house as joint Administrators.

iii. Should the estate have any income generating assets the said income will be collected and banked in an escrow account to be opened in the joint names of counsel on record for the parties on the 5th day of every month beginning the 5th of April, 2020. The Escrow account be opened within the next 14 days of the date hereof.

iv. The administrators as appointed will jointly cause the assets of the estate to be valued for purposes of distribution within the next 60 days. Cost of valuation shall be shared between the 2 houses.

v. A joint proposal on distribution be filed in court within the next 90 days. Should the parties fail to agree, each house do file a separate proposal.

vi. Costs to the Protestors in any event.

Dated and Delivered in Nairobi on this 12TH day of MARCH, 2020.

ALI-ARONI

JUDGE