



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 357 OF 2011

IN THE MATTER OF THE ESTATE OF FREDRICK KAGIO KINYUA (DECEASED)

AGNES GATHIGIA KAGIO.....1ST OBJECTOR

ANN WANJIKU NJURE.....2ND OBJECTOR

ROSE WANJIRU KAGIO.....3RD OBJECTOR

CECILIA WAHITO KAGIO.....4TH OBJECTOR

LILIAN WAKIURU KAGIO.....5TH OBJECTOR

VERSUS

ESTHER NJERI KAGIO.....PETITIONER/RESPONDENT

JUDGMENT

1. The deceased Fredrick Kagio Kinyua died intestate on 5th July 2010. He was survived by his widow Esther Njeri Kagio (the petitioner/respondent) and the following children:-

- (a) Agnes Gathigia Kagio (1st objector);
- (b) Ann Wanjiku Njure (2nd objector);
- (c) Rose Wanjiru Kagio (3rd objector);
- (d) Nancy Muthoni Kagio;
- (e) Charles Kinyua Kagio;
- (f) Cecilia Wahito Kagio (4th objector);
- (g) Jane Waithera Kagio;
- (h) Stephen Mutheu Kagio;
- (i) Lilian Wakiuru Kagio (5th objector); and
- (j) James Kabugu Kagio.

2. The estate of the deceased, according to the petitioner, comprised the following properties:-

- 1) L.R. No. Nyandarua/Lesirko/538;
- 2) L.R. No. Nyandarua/Lesirko/1523;
- 3) L.R. No. Nyandarua/Lesirko/3645;
- 4) L.R. No. Gikondi/Thimu/366;
- 5) L.R. No. Gikondi/Thimu/367;
- 6) L.R. No. Gikondi/Thimu/364;
- 7) L.R. No. Gikondi/Thimu/206;
- 8) L.R. No. Gikondi/Thimu/941;
- 9) L.R. No. Gikondi/Thimu/1164;
- 10) L.R. No. Gikondi/Thimu/916;
- 11) L.R. No. Gikondi/Thimu/935;
- 12) L.R. No. Gikondi/Thimu/207;
- 13) L.R. No. Gikondi/Kiirungi/1005;
- 14) L.R. No. Karatina Town Block I/355;
- 15) Plot Number CORE/C36 – Nyahururu;
- 16) L.R. No. 36/I/164 (Wangera House);
- 17) L.R. No. 36/VII/267 (Mlango Kubwa);
- 18) 50% shareholding in L.R. No. 36/VII/1096 (in partnership with Beth Muthoni Kariuki – Kamus House);
- 19) 50% shareholding in Plot No. 8 Gikondi (in partnership with Ndonga Kimaru);
- 20) 87% shareholding in Plot No. 1 Nduma (in partnership with Ndegwa Ngomanu);
- 21) 33.3% shareholding in Plot No. 30 Kiahungu (in partnership with Charles Ndegwa and Eliud Kirega Kinyua);
- 22) Plot No. 71 Kiahungu (Gachiriro);
- 23) Plots No. 1,8 & 54 Nduma Market;
- 24) L.R. No. 36/454/VII;
- 25) 20% shareholding in L.R. No. 36/985/111 Eastleigh Nairobi together with Ngunyi Karuri (deceased), Wambugu Gachoya (deceased), Taracisio Thumbi Gachau (deceased) and Mbugu Kihenu (deceased) trading as Kugeria House as tenants in common in equal shares;
- 26) 25% shareholding in L.R. No. 209/525/34 Nairobi together with Ngunyi Karuri (deceased), Wambugu Gachoya (deceased) and Mbugu Kihenu (deceased) trading as South Tetu United Breweries;
- 27) 20% shareholding in L.R. No. 209/2763/35 Nairobi together with Ngunyi Karuri (deceased), Wambugu Gachoya (deceased), Taracisio Thumbi Gachau (deceased) and Mbugu Kihenu (deceased) as tenants in common in equal shares;
- 28) Barclays Bank, Queensway branch, Account No. 1737137;
- 29) Barclays Bank, Queensway branch, Account No. 2901178;
- 30) Barclays Bank, Moi Avenue branch, Account No. 8148327;

- 31) Barclays Bank, Nakuru branch, Account No. 8433536;
- 32) KCB Bank, Moi Avenue branch, Account No. 1108999921;
- 33) Standard Chartered Account No. 0150422957500;
- 34) HFCK, Rehani House branch, Account No. 200-00-12202;
- 35) HFCK, Nyeri branch Account No. 200-00-0037091;
- 36) KCB, Mama Ngina Street branch, Account No. 101183783
- 37) Equity Bank, Fourways Towers branch, Account No. 0840294718734;
- 38) 14,732 shares in Nyeri Kamuchinde Hotels Ltd;
- 39) 6,738 shares in South Tetu Hotels & Bar Ltd;
- 40) 1000 shares in Wangera Restaurant Ltd;
- 41) 15,908 shares in Ndekaki Co. Ltd;
- 42) 2,500 shares in HFCK;
- 43) 200 shares in KCB;
- 44) 1,000 shares in Kenya Airways Limited;
- 45) 308 shares jointly owned with Mr Kariuki Gichimu in Kenya Breweries Limited;
- 46) 2,030 shares jointly owned with Muriro s/o Waithaka in Kenya Breweries Limited;
- 47) 147 shares in Kenya Breweries Limited;
- 48) 28 shares jointly owed with Kariuki Gichimu in East African Breweries Limited;
- 49) 1,000 shares in Taifa Sacco;
- 50) 783 shares in ICDC Investments Company Limited;
- 51) 2,268 shares in Centum;
- 52) 309 shares in Kengen;
- 53) 703 shares in Kenya Re-Insurance;
- 54) 225 shares in National Bank Ltd;
- 55) 1100 shares in Safaricom Ltd;
- 56) 192 shares in East African Breweries Limited; and
- 57) 1200 shares in Mumias Sugar Co. Ltd;

3. When the petitioner applied for the confirmation of the grant, she asked that the entire estate devolves to her. The application was dated 12th February 2018. The application was opposed by the objectors whose case was that the petitioner, as widow of the deceased, was entitled to a life interest in the property; that she was not entitled to absolute claim to the estate as proposed. They complained that, since the death of the deceased, the petitioner had collected a sum of Kshs.90,962,000/= in rents from certain named properties of the estate and she had not accounted for the same. The collected rents had since risen to Kshs.200,904,000/= as at December 2015, they stated. As to how the estate of the deceased should be shared, this is what they proposed:-

(a) the deceased's shares in Mumias Sugar Company Limited, East Africa Breweries Limited, Safaricom, National Bank Limited, Kenya Re-Insurance, Kengen, Centum, ICDC Investments Company Limited, Taifa Sacco, Kenya Commercial bank, Kenya Airways, HFCK, Ndekaki Company Limited, Barclay Bank, Standard Chartered and Savings and Loan should go to the petitioner;

(b) the shares at Equity Bank be shared between the petitioner and Stephen Muthuu Kagio;

(c) L.R. No. Gikondi/Thimu/366, L.R. No. Gikondi/Thimu/ 367, L.R. No. Gikondi/Thimu/206, L.R. No. Gikondi/ Thimu/941, L.R. No. Gikondi/Thimu/916, L.R. No. Gikondi/Thimu/935, L.R. No. Gikondi/Thimu/207, L.R. No. Gikondi/Kiirungi/ 1005, Plot No. 8 Gikondi, Plot No. 1 Nduma, Plot No. 30 Kiahungu, Plot No. 71 Kiahungu, Plot No. 1,8 & 54 Nduma Market be each shared by the petitioner, Stephen Muthuu Kagio and James Kaburu Kagio;

(d) L.R. No. Gikondi/Thimu/1164 goes to Charles Kinyua Kagio;

(e) L.R. No. Karatina Town/ Block I/355 goes to James Kabugu Kagio;

(f) CORE/C 36 – Nyahururu goes to James Kabugu Kagio;

(g) Nyandarua/Lesirko/1523 goes to the petitioner;

(h) L.R. No. 36/VII/454 goes to Charles Kinyua Kagio 50%, petitioner 16.67%, Stephen Muthuu Kagio 16.67% and James Kabugu Kagio 16.67%;

(i) L.R. No. 36.502/VII (Wangera Restaurant Ltd) goes to petitioner 25%, Charles Kinyua Kagio 17%, Stephen Muthuu Kagio 20%, and James Kabugu Kagio 29%;

(j) LR 209/7259 goes to petitioner;

(k) LR 12062/441 goes to the petitioner;

(l) Nyandarua/Lesirko/1523, LR No. 36/1/164, LR No. 36/VII/1096, Nyandarua/Lesirko/538, LR No. 36/VII/267, 14732 shares in Nyeri Kamuchinde Hotels Ltd and G.W.M. Kagio Ltd be each shared among the objectors, Nancy Muthoni Kagio and Jane Waithera Kagio.

4. After the objectors made this proposal, the petitioner filed an affidavit to state that, after reflecting on the matter, she had decided that the estate be shared in accordance with the **Law of Succession Act (Cap 160)**.

5. The petitioner filed a consent dated 5th March 2018 showing that Stephen Mathuu Kagio, James Kabugu Kagio, Charles Kinyua Kagio and Nancy Muthoni Kagio had agreed to the proposal by the petitioner that all the estate be registered in her name.

6. The petitioner was represented by Kabiro Ndaiga & Co. Advocates and the objectors by Kimondo Mubea & Co. Advocates. Counsel filed written submissions on the distribution of the estate.

7. The deceased left a widow (who is now 80) and ten (10) children (who are aged between 39 and 60). The relevant provision under the **Act** guiding the distribution of the widow's (the petitioner's) entitlement to the deceased's estate is **section 35(1)** which states as follows:-

“35(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.”

The petitioner is entitled to the personal and household effects of the deceased absolutely, and a life interest in the whole residue of the net estate of the deceased.

8. **Section 35(5)** of the **Act** provides as follows:-

“35(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

The petitioner has neither died nor re-married. Under the provision, the ten children of the deceased, irrespective of gender, have an equal claim to the net estate of the deceased.

9. In distributing the estate of the deceased, the court has to bear in mind the particular circumstances of the case, including what would be fair, just and equitable. The court has wide discretion in the matter, subject only to the provisions of the **Act**. It is also clear from **section 35(5)** of the **Act** that the gender of the children is not an issue.

10. The provisions of **section 35** of the **Act** have to be seen in the light of **Article 27** of the Constitution regarding equal protection and equal

benefit of the law and non-discrimination, and **Article 45(3)** which provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. I dare add that parties to a marriage have an equal claim to the estate left upon by the death of one of them. I consider that there are no personal and household effects that were named in this cause. Lastly, the petitioner herein is an elderly lady, and her children whom she got with the deceased, are all well beyond 18. She has stated, without demur, that the estate's acquisition and development had her imprints.

11. In **Stephen Gitonga M'Murithi –v- Faith Ngira Murithi [2015]eKLR** the deceased left a widow (aged 85) and 14 children (aged between 37 and 60). The High Court at Meru distributed the estate which comprised parcels of land. The widow was given portions of the parcels absolutely. The eldest son appealed to the Court of Appeal complaining that there was unequal sharing among the children and that his mother has been given outright portions of the estate, instead of a life interest only. The Court of Appeal allowed the appeal that the net estate to be shared equally among all the beneficiaries. Regarding the complaint that the mother should only have got a life interest in the estate, the Court observed as follows:-

“13. As for the issue of the widow having been given an outright tangible shareholding in the net intestate estate of the deceased as opposed to a life interest, we find nothing in section 40 of the Laws of Succession Act that can prevent a court of law from looking at the peculiar circumstances of each case and then determine whether to apply strictly the rule on life interest or temper with it in the interests of justice to all the affected parties. In the circumstances of this case having found that the principle in section 38 was the appropriate applicable principle, ordering a life interest would have occasioned injustice to all the dependants as opting for such an option would have only bestowed upon the widow Naomi a hovering interest over the individual interests of all the other beneficiaries thereby making it impossible for all the beneficiaries to enjoy freely the resulting benefits from the deceased's estate. We find it was prudent for the learned trial Judge to accord a direct unencumbered benefit to the widow Naomi as opposed to a life interest.”

12. In the particular circumstances of this cause, I find that the interests of justice will be best served by the petitioner being given an outright tangible share from the estate of the deceased; a share that will not encumber the rest of the beneficiaries; and a share that will ensure that she is not dependent on other beneficiaries (her children) for the remaining part of her life (**In Re Estate of M'Impwi M'Ikiugu (deceased) [2018]eKLR**). As for the ten (10) beneficiaries, I consider that the deceased left parcels of land in various places; not together; their values are different as some were developed and others not; and, therefore, equality has to be tempered with equity.

13. Regarding the issue of accounts sought from the petitioner, the documents filed by the petitioner and the objectors were not professionally obtained. They talked of gross income which was estimated. The estate was not subjected to any audited account. The actual income and profits of the rental income from some of the properties of the estate was not ascertained. Further, the estate was not valued.

14. It was not disputed that Gikondi/Thimu/366 and Gikondi/Thimu/367 constitute the matrimonial home of the petitioner. The objectors' proposed that the parcels should go to the petitioner jointly with Stephen Muthuu Kagio and Charles Kinyua Kagio. The petitioner had no issue with this proposal. I distribute the two parcels to the three. They will each have equal share in each parcel.

15. The shares in HFCK, KCB, Kenya Airways, Kenya Breweries Ltd, East African Breweries Ltd, Taifa Sacco, ICDC, Centum, Kengen, Kenya Re – Insurance, National Bank Ltd, Safaricom and Mumias Sugar Co. Ltd were agreed by either side to go to the petitioner. I will allow the petitioner to have these shares.

16. From the submissions of either side, it was agreed that the proceeds of the accounts in Barclays Bank, KCB, Standard Chartered HFCK and Equity should go to the petitioner. I allow that.

17. In the written submissions by counsel for the petitioner, it was agreed that the 14732 shares in Nyeri Kamuchinde Hotels Ltd should go to the objectors and their sisters as they had proposed. The objectors had sought both this property and LR No. 36/VII/1096. On her part, the petitioner asked that the later property be shared equally among her sons. I order that the 14732 Nyeri Kamuchinde Hotels Ltd shall be shared equally among Agnes Gathigia Kagio, Ann Wanjiku Ngure, Rose Wanjiru Kagio, Cecilia Wahito Kagio Lilian Wakiuru Kagio, Nancy Muthoni Kagio and Jane Waithera Kagio. The shares of the deceased in LR No. 36/VII/1096 shall go to Charles Kinyua Kagio, Stephen Muthuu Kagio and James Kabugu Kagio in equal shares.

18. The petitioner sought to be given the 6,738 shares in South Tetu Hotel & Bars Ltd. The objectors sought to have this property go to the women beneficiaries. This is an ongoing business, like the business in Nyeri Kamuchinde Hotels Ltd. I ask that the property goes to the petitioner, Charles Kinyua Kagio, Stephen Muthuu Kagio and James Kabugu Kagio in equal shares.

19. The objectors proposed that Gikondo/Kiirungi/1005 should go to the petitioner jointly with Stephen Muthuu Kagio and James Kabugu Kagio. However, the petitioner and her sons asked that it be given absolutely to Charles Kinyua Kagio. I agree with them and order that Gikondo/Kiirungi/1005 shall go to Charles Kinyua Kagio absolutely.

20. The objectors offered Nyandarua/Lesirko/1523 to the petitioner. On her part, the petitioner proposed that it should go to her female children. I accept her proposal and order that Nyandarua/ Lesirko/1523 shall go to the objectors, Nancy Muthoni Kagio and Jane Waithera Kagio. Each will have an equal share.

21. LR No. 36/VII/454, Plot 8 Gikondi, LR No. 209/525/34, LR No. 36/985/III and LR No. 209/525/34 were jointly owned by the deceased and other people. I ask that the shares of the deceased in LR No. 209/525/34 and plot No. 8 Gikondi shall go to the objectors, Nancy Muthoni Kagio and Jane Waithera in equal shares; LR No. 36/VII/454 shall go to the male children of the deceased in equal shares; and LR No. 36/985/III shall go to the same male children of the deceased equally.

22. The objectors proposed that the shares of the deceased in LR No. 36/502/VII (Wangera Restaurant Ltd) should go to the petitioner, James Muthuu Kagio, Charles Kinyua Kagio and Stephen Muthuu Kagio. There was no objection. Each of them shall have an equal share in the

property.

23. The objectors proposed that LR No. 36/1/164 and LR No. 36/VII/267 go to them jointly with their sisters Nancy Muthoni Kagio and Jane Waithera Kagio. This was not opposed as they are the ones managing these properties. Each of the seven women beneficiaries shall have equal share in each property.

24. The rest of the proposals by the objectors were not opposed. Consequently, Nyandarua/Lesirko/538 shall be shared equally by the daughters of the deceased; Gikondi/Thimu/206 941, 916 and 935, Plot No. 1 Nduma, Plot No. 30 and 71 Kiahungu, Plots Nos 1, 8 and 54 Nduma Market shall go to the petitioner's male children each in equal shares. LR No. Karatina Town/Block 1/.355 shall go to Stephen Muthuu Kagio absolutely; Plot No. CORE C 36 – Nyahururu shall go to James Kabugu Kagio; and Gikondi/Thimu/1164 shall go to Charles Kinyua Kagio.

25. In these terms the grant issued to the petitioner is hereby confirmed.

DATED and DELIVERED at NAIROBI this 9TH MARCH 2020.

A.O. MUCHELULE

JUDGE