



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 612 OF 2016

IN THE MATTER OF THE ESTATE OF MATTHEW KIMANI KIMANGA (DECEASED)

GRACE WANJIKU KIMANI.....1ST OBJECTOR/APPLICANT

CAROLINE WANGARI KIMANI.....2ND OBJECTOR/APPLICANT

LAWRENCE KIMANGA KIMANI.....3RD OBJECTOR/APPLICANT

VERSUS

PETER KIMANGA KIMANI.....1ST ADMINISTRATOR/RESPONDENT

KELVIN MWANGI KIMANI.....2ND ADMINISTRATOR/RESPONDENT

RULING

1. What is for determination herein is an application for confirmation of grant filed via summons dated 24th September, 2018. The application seeks that the grant of letters of administration intestate made to Peter Kimanga Kimani, Kelvin Mwangi Kimani and Lawrence Kimanga Kimani on 10th November, 2017 be partially confirmed.

2. In the affidavit filed in support of the summons for confirmation of grant, Lawrence Kimanga Kimani deposes that the deceased was survived by the following beneficiaries:

First House:

- a. Jane Nduta Kimani - Widow
- b. Peter Kimanga Kimani - Son
- c. Kelvin Mwangi Kimani - Son
- d. Joan Wanjiru Kimani - Daughter
- e. Kennedy Waiganjo Kimani - Son

Second House

- a. Grace Wanjiku Kimani - Widow
- b. Caroline Wangari Kimani - Daughter
- c. Lawrence Kimanga Kimani - Son

3. According to the affidavit, the inventory of the deceased's assets is as follows:

- a. Shares of Standard Chartered Bank (Share A/c No. [...])
- b. Retirement Benefits with Pensions Department of National Treasury.
- c. Shares in the Estate of Peter Kimanga Waiganjo.

4. The Applicants, who are all members of the second house, consented to a mode of distribution which proposes that:

- a. All the shares held with Standard Chartered Bank Kenya Limited be sold and the proceeds therein distributed equally among the two (2) houses.
- b. The Retirement Benefits with Pensions Department of the National Treasury be distributed equally between the deceased's widows: Jane Nduta Kimani and Grace Wanjiku Kimani.
- c. The deceased's shares in the Estate of his late father Peter Kimanga Waiganjo be distributed equally between the two (2) houses.

5. On 18th July, 2019 Peter Kimanga swore a replying affidavit in response to the application as one of the Administrators of the deceased's estate and a representative of the First House. In it he deposes that the Summons for Confirmation of Grant ought not to be confirmed as filed as it offends the statutory provisions of **section 40** of the **Law of Succession Act (CAP 160)**.

6. Peter Kimanga asserted that the mode of distribution proposed by the Second House is prejudicial to the First House whose members outnumber those of the Second House. That to distribute the shares equally amongst the two (2) houses would mean that the Second House would stand to gain more. He instead proposed that the deceased's intestate estate be, in the first instance, 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.

7. The matter came up for directions on 12th February, 2020 during which time the court directed that the application be disposed of by way of written submissions.

8. Learned Counsel Mr. Kimani Maina filed written submissions dated 25th February, 2020 on behalf of the Objectors/Applicants. Counsel submitted that the Objectors/Applicants proposed that the deceased's estate be divided into two (2) halves, one for the First House and the other half for the Second House because the dependants had initially agreed to distribute the deceased's estate as such. He asked the court to uphold the proposed distribution stating that to distribute the estate otherwise would raise a discrepancy, an inconsistency, unfairness and inequality as people ought not to manipulate situations to their convenience. To this end, he referred to the decision in **Succession Cause No. 262 of 2012 Re Estate of Kimani Mungai**. A wholesome reading of the persuasive decision however reveals that the circumstances therein do not lend themselves to the instant case.

9. Mr. Kimani Maina urged that despite the provisions of the law, the Court should uphold the interpretation of **section 40** of the **Law of Succession Act** in a manner that upholds equality and fairness which is provided in the Constitution.

10. In opposition, learned Counsel Mr. Okatch filed written submissions dated 6th March, 2020 on behalf of the Administrators/Respondents in which he submitted that the mode of distribution proposed by the present application does not conform to the statutory provisions which apply where a deceased was polygamous.

11. Mr. Okatch contended that at the time of his death, the deceased was polygamous and his intestate estate ought therefore to be distributed in line with the provisions of **section 40** of the **Law of Succession Act**. To buttress his argument, Counsel referred to the decisions in **Re Estate of John Musyambai Katumanga – (Deceased) [2014] eKLR**; **Saweria Wamuruoma Muchanji vs. Jimano Ngare [2008] eKLR**; **Re Estate of Ikubu Kinyungu Mwaga (deceased) [2017] eKLR** and **Succession Cause No. 110 of 2010-In the matter of the Estate of Samwel Miriti (deceased)**.

12. Mr. Okatch invited the Court to find that the law applicable in the instant case is **section 40** of the **Law of Succession Act** and proceed to lump up the deceased's children from the First House being four (4) units to those of the second house being (2) units and the spouses as two (2) additional units to make a total of eight (8) units. That in this regard, the property ought to be shared in the manner proposed by the 1st and 2nd Administrators/Respondents.

13. The deceased whose estate is in issue herein died intestate on 4th October, 2012 as evinced by the Certificate of Death of serial number 299029 which is on record. At the time of his death, the deceased was domiciled in Kenya. Having died after the commencement of the **Law of Succession Act**, the distribution of the deceased's intestate estate is subject to the provisions of the **Act** by dint of **section 2** thereof.

14. The law governing intestate succession is found under **Part V** of the **Law of Succession Act**. In the instant case, the deceased had married twice and was therefore polygamous at the date of his death, the applicable law under the **Part** is **section 40** which stipulates thus:

“(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”

15. From the arguments advanced by the respective parties, it is evident that what is for determination herein is the import of **section 40** of the **Law of Succession Act**. Whereas both parties are in agreement that the deceased was polygamous and that **section 40** is the applicable provision of the law in the distribution of the estate of the deceased, there is discord as to the interpretation of the section.

16. In the persuasive decision of **Re Estate of John Musyambai Katumanga – (Deceased) [2014] eKLR** Musyoka, J while deliberating on the provisions of **section 40** observed thus:

“Under section 40 of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the Law of Succession Act, the children would divide the estate equally amongst themselves...

The spirit of Part V, especially sections 35, 38 and 40, is equal distribution of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in sections 35(5) and 38 is “equally” as opposed to “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.

17. The provision under **section 40** is couched in mandatory terms as it employs the use of the word “shall” and it is therefore unequivocal. As such, the estate of the deceased ought to be divided equally adding each surviving spouse as an additional unit. The Objectors’/Applicants’ contention that the estate ought to be divided into two (2) equal shares between the two (2) Houses is therefore unfounded.

18. In the instant case, the beneficiaries of the deceased’s estate comprise five (5) units in the First House and three (3) units in the Second House, making a total of eight (8) units. In light of the fact that there are no previous benefits to be taken into account, bearing in mind that none of the parties raised arguments in this respect, I am in agreement that the deceased’s net intestate estate ought to be shared equally amongst the 8 units as proposed by the 1st and 2nd Administrators/Respondents and I so find.

19. It is noteworthy that none of the deceased’s wives was married under a monogamous system and that they were married in quick succession; one in 1988 and the other in 1991.

20. Accordingly, the grant of letters of administration intestate of all of the deceased’s net intestate estate made to Peter Kimanga Kimani, Kelvin Mwangi Kimani and Lawrence Kimanga Kimani on 10th November, 2017 be and is hereby confirmed. The assets comprising the deceased’s estate shall be shared equally amongst the deceased’s eight (8) beneficiaries. It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 27TH DAY OF MAY, 2020.

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L. A. ACHODE

HIGH COURT JUDGE