



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 614 OF 2006**

**IN THE MATTER OF THE ESTATE OF THE LATE KAMAU KUNG'U (DECEASED)**

**WANJIRU KAMAU.....PETITIONER**

**VERSUS**

**JULIA WANGARI KAMAU.....PROTESTOR**

**J U D G M E N T**

1. Kamau Githua Kungu died on 30th July 2006. According to the petitioner he left the following beneficiaries;

1ST HOUSE

1. JULIA WANGARI KAMAU - 1ST WIDOW/WIFE
2. LUCY WANJIKU KAMAU - DAUGHTER
3. JECINTA WAIRIMU KENJA - DAUGHTER
4. JAMES GITHUA KAMAU - DAUGHTER
5. CHRISTINE WANJIKU KAMAU - DAUGHTER
6. NYAMBURA KAMAU - DAUGHTER
7. VERONICAH KIBUIYA - DAUGHTER
8. ANTHONY KIMANI - SON (MARRIED)
9. CATHERINE WANGECI KAMAU - DAUGHTER
10. SUSAN NJOKI KAMAU - DAUGHTER
11. CHARLES KUNGU KAMAU - SON (MARRIED)
12. MUCHAI KAMAU - SON (MARRIED)
13. PATRICK MWAURA KAMAU - SON (MARRIED)
14. STEPHEN KANYI KAMAU - SON (MARRIED)
15. GLADYS WACERA MUCHAI - DAUGHTER (MARRIED)
16. MARY WAHU KAMAU - DAUGHTER (UNMARRIED)

17. WANJIRU KAMAU - 2ND WIFE (WIDOW)
18. GRACE WAMBUI - DAUGHTER (MARRIED)
19. JAMES GITHUA KAMAU - SON (UNMARRIED)
20. PAULINE WAREGA KAMAU - DAUGHTER (MARRIED)
21. FRANCIS KINANJUI KAMAU - SON (UNMARRIED)
22. JANE WANJIKU KAMAU - DAUGHTER (UNMARRIED)
23. BENSON KUNGU KAMAU - SON (UNMARRIED)
24. ANN NJAMBI KAMAU - DAUGHTER (UNMARRIED)
25. SIMON MBURU KAMAU - SON (UNMARRIED)

2. A Grant of Letters of Administration of Estate intestate was made to Wanjiru Kamau on 7th May 2007. On 16th October 2008 she filed Summons for Confirmation of Grant in which she proposed distribute the deceased's estate as follows;

ITEM	PROPERTY	DESCRIPTION	TO	WHO	SHARE
1.	Njoro Ngata Block 1/2493	Julia Wangari Kamau	Whole		
2.	Njoro Ngata Block 1/3140	Stephen Kanyi Kamau	Whole		
3.	Lare Plot	Susan Njoki	Whole		
4.	Lare Plot	Susan Njoki	Whole		
5.	Rhoda Plot	Patrick Mwaura	Whole		
6.	Kabatini	James Githua	Whole		
7.	Kabatini	Jackson Muchai	Whole		
8.	Nakuru Municipality Block 2/487	Wanjiru Kamau	Whole		
9.	Njoro Ngata 2/2496	Wanjiru Kamau	Whole		
10.	Nakuru Municipality Block 2/351	Wanjiru Kamau	Whole		
11.	Nakuru Municipality Block 2/519	Wanjiru Kamau	Whole		

This is because according to hers some of the beneficiaries were already enjoying their share of the estate in the following terms: ;

a) *STEPHEN KANYI KAMAU registered as the owner of NJORO NGATA BLOCK 1/3140 a property initially purchased by the deceased. Copy of search attached and marked WKIX.*

b) *JULIA WANGARI KAMAU the citee registered as the owner of NJORO NGATA BLOCK 1/2493 a property initially purchased by the deceased. Copy of the search attached and marked WKX.*

c) *SUSAN NJOKI KAMAU who resides on a plot at Naishi Lare on the deceased's property.*

d) *PATRICK MWAURA KAMAU who resides on a plot at RHODA ESTATE in Nakuru a property purchased by the deceased.*

e) *JAMES GITHUA KUNGU who resides at KABATINI on a plot purchased by the deceased.*

f) *JACKSON MUCHAI KAMAU who resides on yet another plot belonging to the deceased at KABATINI.*

g) *SUSAN NJOKI KAMAU leases out a plot at Lare Naishi which is property of the deceased.*

3. The proposal was met with an affidavit of protest sworn on 2nd June 2009 by James Githua Kamau the first born to the deceased and son of the first citee- Julia Wangari Kamau the citee. He denied any knowledge of the administrator as his father's wife and noted that the

proposed distribution exposed her ignorance of the status of his father's estate. He deponed *inter alia* that: -

“16. THAT the parcel of land known as TITLE NO. NAKURU MUNICIPALITY BLOCK 2/351 was jointly owned between my father and my mother, sister and brother. Annexed hereto and marked "JGKI" is a copy of the title deed.

17. THAT upon death of my father the plot vested in the surviving owners and is not therefore part of the estate.

19. THAT NAKURU MUNICIPALITY BLOCK 2/487 is a property that was developed exclusively by my mother JULIA WANGARI KAMAU even before the Petitioner became a caretaker of my father's plot at Kiamunyi.

20. THAT NJORO NGATA BLOCK 3140 belongs to STEPHEN KANYI KAMAU and does not form part of the estate.

21. THAT NJORO NGATA BLOCK 1/2496 belongs to the deceased and this is the land that the petitioner has been taking care of and is available for distribution to beneficiaries of the deceased.

22. THAT none of the properties mentioned at paragraph 10(a) (b) (c) (d) (e) (f) and (g) of the affidavit of WANJIRU KAMAU are in the names of the deceased and none should be considered during the distribution of the estate as they do not belong to the deceased.

23. THAT it is my proposal to have the few properties forming part of the estate distributed to her legitimate beneficiaries namely JULIA WANGARI KAMAU and her children.

24. THAT should the court feel that the petitioner should get something then she may only benefit from a part of the Kiamunyi shamba and nothing more.”

4. In the supplementary affidavit sworn on 24th May 2012 Julia Wangari Kamau conceded that there was no dispute that the administrator was a wife of the deceased. That the only property that could be available for distribution would be 1/4 of Nakuru Municipality Block 2/351 which was registered in the names of the deceased and three others, if this court determined that they were registered as tenants in common.

5. The Petitioner and the 1<sup>st</sup> citee entered into a consent that settled the distribution of two properties and on 23rd July 2018 a certificate of partial confirmation of grant was issued in the following terms;

NAME	DESCRIPTION OF PROPERTY	SHARE OF HEIRS
(a) WANJIRU KAMAU	<u>NJORO NGATA BLOCK 1/2496</u> Measuring 1.314 Hectares	WHOLE SHARE
(b) JULIA WANGARI KAMAU	<u>NAKURU MUNICIPALITY BLOCK 2/519</u> Measuring 0.0697 Hectares	WHOLE SHARE

6. Hence these two properties cannot be subject of a new distribution.

7. Counsel agreed to proceed by way of written submissions.

8. In the petitioners submissions filed on 16th June 2020 in support of the Summons for Confirmation, she lists the deceased properties as follows:-

1. NJORO NGATA BLOCK 1/2493
2. NJORO NGATA BLOCK 1/3140
3. NJORO NGATA BLOCK 1/2492
4. NJORO NGATA BLOCK 1/2498
5. NJORO NGATA BLOCK 7/434 (CHUMO)
6. 3 PLOTS IN LARE - BAGARIA
7. RHODA PLOT
8. BAHATI/KABATINI BLOCK 1/12
9. BAHATI/KABATINI BLOCK 1/10
10. NAKURU/MUNICIPALITY BLOCK 2/487

11. NJORO NGATA BLOCK 2/2496
12. NAKURU MUNICIPALITY BLOCK 2/351
13. NAKURU MUNICIPALITY BLOCK 2/519 (emphasis mine)

9. It is submitted that the deceased was polygamous, and **Section 40 of the Law of Succession Act** ought to apply. Reliance is placed on the case of **In the matter of Estate of Mwangi Gitire [2004] eKLR, In the matter of the Estate of Samwel Miriti (deceased) MMM'M vs A.I.M. [2014] eKLR.**

10. It was further submitted that the first house had already benefited from the estate and **Section 42 of the Law of Succession Act** should apply, whilst the estate is divided between the two houses.

11. For the protestor it was submitted that save for **Nakuru/Municipality Block 2/487** the rest of the properties were not available for distribution. That **Nakuru Municipality Block 2/487** was reserved for the deceased's grand and great grandchildren on the protestor's side, she proposed that that be registered in her name in trust for those beneficiaries. That the wishes of the deceased in this respect be respected. That all beneficiaries of the deceased estate had benefited from the deceased as per his wishes, made before he died, and properties were given out in his lifetime.

12. Reliance was made on in **Re Late Marengo A. Mugun (deceased) [2019] eKLR.**

13. That **2/519** and **1/2496** were subject of the partial confirmation, not available. That **Njoro Ngata Block 1/2493** and **Nakuru Municipality Block 1/3140** were not available as registered in names of protestor and one **Stephen Kanyi Kamau** on 27th September 1999 and 12th March 2003 respectively.

14. That **Nakuru Municipality Block 2/351**, jointly owned by deceased, protestor, Stephen Kanyi Kamau and Mary Nyambura Kamau hence not available for distribution. For this the protestor relied on **Registered Land Act (Repealed) Sections 101, 102, 103 and 118 and Land Registered Act Section 91 (4)**. It was argued for the protestor that

*"That was the law then, for the Registered Land Act has since been repealed by the Land Registration Act, which has similar provisions at Section 91, which states as follows at subsection (4): If land is occupied registered jointly, no tenant is entitled to any separate share in the land and consequently:-*

*(a) a disposition may be made only by all the joint tenants.*

*(b) on the death of a joint tenant, the tenant's interest shall vest in the surviving tenant or tenants jointly; or*

*(c) Each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person and any attempt to so transfer an interest to any other person shall be void."*

15. That there was no evidence that the title was registered in common. See also **Isabel Chelang'at vs Samuel Tiro Rotich & 5 Others [2012] eKLR** and **Re Estate of Dorica Lumire Mapesa (Deceased) [2018] eKLR** where it was held;

*"A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and the "four unities". The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are;*

*(i) The unity of possession*

*(ii) The unity of interest*

*(iii) The unity title*

*(iv) The unity of time*

*Tenancy in common on the other hand is different from joint tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a direct share in the property which has not yet been divided among co-tenants. In other words they have separate interests only that it remains undivided and they hold the interest together. The largest factor that interests only that it remained undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required for a joint-tenancy may be present, only one, the unity of possession is essential."*

16. There are two issues: whether the said property was owned in joint or common tenancy; and whether the protest has any substance in it. It will be noted that some of these properties viz:-

Njoro/Ngata Block 1/2492, 2493 and 2496

Njoro/Ngata Block 7/434 Chumo

Nakuru Municipality Block 2/351, 519

were all subjects of my ruling delivered on 7th May 2020. 519 and 2496, where subject of the partial confirmation of 23rd July 2018 and the petitioner is aware and a beneficiary, so, that ought not to have been on the list for distribution.

17. In may said ruling I made the finding that 7/434 is registered in the name of the deceased's daughter and no evidence was availed that it was part of the estate; that Njoro/Ngata Block 1/2493 and Nakuru Municipality Block 1/3140 were registered in other beneficiaries' names and were not demonstrated to form part of the estate, and no fresh evidence has been availed to change that position.

18. Regarding Nakuru Municipality Block 2/351, no evidence was produced to show that the property was registered as tenancy in common.

19. The petitioner did not address the issue in 18 above and I found the authorities cited by the protestor on the distribution of joint tenancy and tenancy in common helpful. When property is registered in tenancy in common, the specific shares of each proprietor ought to be indicated. Where that is not the case, when the tenancy is a joint tenancy, where, upon the demise of the other tenant/tenants, the property devolves to the survivors.

20. In this case then number 1/351 devolved to the other registered proprietors and no evidence to the contrary was availed. In this case, there is no evidence that this was a tenancy in common and hence, the property devolved to the surviving proprietors.

21. That leaves us with three (3) plots in LARE, Rhoda plot, Bahati/Kabatini Block 1/10 and 12, Nakuru Municipality Block 2/487.

22. According to the protestor the deceased in his wishes, (he died on 30/7/2006) running from 22nd June 2001 to 3rd August 2005, he distributed his property.

23. On those wishes, the three plots in Kabatini and Rhonda named in the submissions appear to have been given to Githua Kamau, Muchai Kamau in 2001. There was no evidence to the contrary. The deceased's said wishes also demonstrate that the petitioner was also allocated certain properties, a plot and three (3) acre shamba. This position has not been contradicted by the petitioner.

24. The Rhonda plot is not specified by the petitioner hence the court could not be in a position to deal with it, neither are the plots in Lare, Bagaria specified.

25. The only specified property is 2/487, the protestors submissions do not have any support either in the wishes of the deceased or in any evidence that the property was for his grand and great grandchildren.

26. It is the only property that remains registered in the name of the deceased.

27. Should Section 42 of the LOSA apply? It states:

*Previous benefits to be brought into account*

*Where— (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*

*(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, **that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.***

28. That is to say that when the net intestate estate is being shared the benefit already accrued will be taken into account. In this case the "**net intestate estate**" which means "*the estate of a deceased person in respect of which he has died intestate after payment of the expenses, debts, liabilities and estate duty set out under the definition of "net estate", so far as the expenses, debts, liabilities and estate duty are chargeable against that estate*";

29. In this case the net intestate estate for the deceased was that one property Nakuru/Municipality Block 2/487.

30. Nakuru/Municipality Block 2/487 measures 0.3304 Ha about 0.8 acres. This is not a property that can be shared between the two houses because of the size.

31. The property be sold and the proceeds be shared in proportion of 40%:60%

32. Orders accordingly.

**Dated, delivered and signed at Nakuru this 3<sup>rd</sup> day of August, 2020.**

**Mumbua T. Matheka**

**Judge**

In the presence of: VIA ZOOM

Martin Court Assistant

M/s Karanja Mbugua & Co. Advocates N/A

Langat for Gordon Ogola, Kipkoech & Co. Advocates