



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**SUCCESSION CAUSE NO. 212 OF 2015**

**IN THE MATTER OF THE ESTATE OF THE LATE GITONGA INANGA EMONGI -  
(DECEASED)**

**LOICE MUTHONI GITONGA.....PETITIONER /APPLICANT**

**VERSES**

**JAMES KABII MIRITI**

**LUCY KAARE**

**JOSES GUANTAI.....RESPONDENTS**

**JUDGEMENT**

1. The late **GITONGA INANGA EMONGI** died intestate on 13<sup>th</sup> May, 2015 leaving behind the following beneficiaries:

- a) **Loise Muthoni Gitonga.....Widow**
- b) **Asenath Mukwanjagi Gitonga- Widow - (deceased)**
- c) **Mary Wanjiku Nkonge.....Daughter**
- d). **Elijah Mureithi Gitonga.....Son**
- e) **Jane Wairimu Maina.....Daughter**
- f) **Francis Macharia Gitonga.....Son**
- g) **Elizabeth Njoki Gitonga.....Daughter**
- h). **Deborah Wanjiru Bayona.....Daughter**
- i) **Isaac Kinyua Gitonga.....Son**
- j) **Harriet Gitonga.....Daughter**
- k) **James Kabii Miriti.....Son**

- l) Duncan Bundi Gitonga.....Son**
- m) Philis Kambura Gitonga.....Daughter**
- n) Joses Gwantai Gitonga.....Son**
- o) Mercy K. Gitonga.....Daughter**
- p) Lucy Gitonga.....Daughter**
- q) Catherine Kajuju Gitonga.....Daughter**
- r) Slyvia Mugure Mutegi.....Daughter.**

2. The deceased left behind the following properties;-

- A. IGONJI /GIKUI/1512**
- B. IGONJI/GIKUI/1199**
- C. IGONJI/GIKUI/1071**
- D. IGONJI/GIKUI/1260**
- E. IGONJI/GIKUI/1102**
- F. IGONJI/GIKUI/1209**
- G. PLOT NO. 164B LODWAR**
- H. PLOT NO. 273B LODWAR**
- I. PLOT NO. 25 AT NGURU THARAKA NITHI**
- J. PLOT NO. 66 AT LODWAR**
- K. ½ ACRE PLOT AT KITALE MUNICIPALITY/KARAU WA BECHAU**
- L. MOTOR VEHICLE REG. NO. KQQ 510**
- M . ACCOUNT NO. [xxxx] COOPERATIVE BANK**
- N. KENYA COMMERCIAL BANK SHARES**

3. **Loise Muthoni Gitonga** the second widow applied for grant and the same was issued to her on 28<sup>th</sup> January, 2016. The same was objected to by the Respondent but vide the orders of this court **James Kabii Miriti** from the first house was made a joint administrator so as to take the interest of their house since her mother the first widow had since died.

4. The Applicant then vide her application dated 13<sup>th</sup> December, 2016 applied for the confirmation of grant and gave a proposed mode of distribution. There was an objection from the 1<sup>st</sup> house who felt that the distribution was eschewed in favour of the second house.

5. The court ordered the parties to file rival affidavits and to state their preferred mode of distribution. They complied and the court further directed that the matter be disposed by way of viva voce evidence.

When the same came up for hearing the parties each adopted their affidavits on record and opted not to call any witnesses save oral testimony by the two Administrators. The court further directed them to file written submissions.

6. Essentially all that **JAMES KABII MIRITI** and **LOICE MUTHONI GITONGA** in their oral evidence was to reiterate what was contained in their affidavits. The Respondent James Kabii Miriiti, stated that although their house remained in Meru since the deceased moved to Kitale and Lodwar the properties left behind remained the deceased and ought to be shared equally between the two houses.

7. He went on to state that his siblings were supported and schooled by the deceased and he did not show any discrimination or at all. He said that some of them stayed with their step mother at Kitale and Lodwar when the deceased was alive. He contended that the properties in Lodwar were fully developed and were of a higher value than those in Meru and the more reason why the same should be shared equally.

8. The Applicant on her part conceded that the deceased was polygamous and she was the 2<sup>nd</sup> wife. She said that she married him in the year 1978 and they have stayed together in Lodwar and carried out extensive developments. She said that it was the wishes of her husband that each family stayed where they have been and that the estate should be divided so.

9. She stated that part of the development in the Lodwar properties were directly developed through her own initiative by taking and servicing loans. He produced some receipts to that effect. She also produced an affidavit which showed that she was married to the deceased.

### **ANALYSIS AND DETERMINATION**

10. The court has perused the entire pleadings herein as well as the submissions by the counsels on record. What is not disputed is that the deceased was a polygamous man having married the first wife under the Act and subsequently under the customary law in regard to the second wife. For the purposes of the Succession Act both are considered to be his wives and there is no use of splitting hairs over the same.

11. Equally the identification of the beneficiaries as well as the assets is not disputed. There are children of the first house who basically remained in Meru and those of the second house who seemed to have stayed in Lodwar. The deceased as from the evidence on record began his early life in Meru and later moved to Kitale and Lodwar.

12. It appears that he concentrated much of his effort in developing his home in Lodwar. There is no evidence to suggest that he abandoned completely his Meru home. During the hearing there was no doubt that he at times went to Meru at least for some ceremonies. There was no evidence that he divorced or separated with his first wife, now deceased too.

13. Both the children though not all of them from the 1<sup>st</sup> house were educated by the deceased at Kitale and Lodwar. He paid for their fees and it is admitted that they have settled in some of the assets. The deceased was buried at Meru farm in Kitale.

14. With this kind of history can it be said that the estate be shared out as proposed by the applicant, namely that the first house do take out the Meru properties and the 1<sup>st</sup> house the Lodwar estate?

15. It is admitted of course that indeed the value of the Lodwar estate is high for the simple reason that the same are developed and that the said development was undertaken by both the deceased and the applicant. This in my view poses twin challenges. The first issue is that there was no valuation to all the properties in Lodwar and Meru. That assertion is therefore an assumption and without any empirical or scientific proof.

16. It cannot be assumed that simply a property is developed and bringing in income raises its value. It is common knowledge that at times some undeveloped properties depending on their situations could even be of a higher value than those developed. There was need therefore to have had some valuation

undertaken.

17. Secondly, although it was stated that the applicant participated in the development of some of them, there was no mention at all of the first widow who unfortunately has since died. It was admitted that the applicant got married 17 years or thereabouts after the first marriage. In my considered view the first widow must have contributed to the acquisition and development of some of the assets.

18. More importantly, there was no evidence that the deceased neglected or failed the first house. Although he was domiciled at Lodwar I have not been furnished with any evidence that he desired each family to remain where they were at. In fact one can assume correctly that part of the income that came from Meru may have been used to acquire the Lodwar properties.

19. The fact that the deceased did not discriminate on his children speaks a lot. He educated them and left them to roam freely between Meru and Lodwar homes. If he intended that they each stay in their respective homes then he would not have allowed some of them especially those from the first house to settle both in Lodwar and Kitale as was stated during the hearing.

20. What then is the way forward? The efforts of both widows cannot be underestimated. Although there was no evidence of the 1<sup>st</sup> widows contribution the years spent with the deceased before the marriage to the applicant cannot be wished away. The properties in Meru were not neglected and as stated earlier there was nothing to suggest that the deceased neglected the same.

21. In my considered view therefore the best route to take is that provided under section 40 of the Succession Act. The same states that:

***“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 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”.***

22. **Section 29 of the Succession Act** defines who the wives are and for the purpose of this cause the Applicant remains a legitimate wife of the deceased although in essence the deceased ought to have remained monogamous as the first marriage demanded so.

23. Having stated so the estate will be shared out equally between the two houses. The properties in Meru, Kitale and Lodwar shall be shared out between the two houses. The children from both houses are almost equal in number and that is the spirit of Section 40 quoted above.

24. There was plot number 54 at Lodwar which it was admitted the applicant stays there and she contributed to its development. The same should remain in her name and does not form part of the estate.

25. The beneficiaries seemed to have settled in different portions during the life of their father and perhaps thereafter. During the subdivision care should be taken so that where an individual has settled he or she should remain as proximate as possible on that portion. Nothing precludes the parties from “trading ” their respective portions as the case may be.

26. The parties have the liberty of valuing individual property and selling it and thereafter share out the proceeds. In undertaking such exercise the first priority of purchase should be to the beneficiaries to buy and thereafter to the whole world.

27. For the above reasons let the grant issued herein be confirmed in that order namely that the estate be distributed equally between the two houses except property No. 54 at Lodwar which should go directly to the Applicant the surviving widow.

28. The Applicant, Loice Gitonga should also have Motor Vehicle Reg. No. KQQ 510 Land Rover, the cash at Cooperative Bank Account. No. [xxxx] if any and the Kenya Commercial Bank shares.

29. Being a family matter each party shall meet their respective costs.

**Dated, signed and delivered this 28<sup>th</sup> day of May, 2019 .**

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**H .K . CHEMITEI**

**JUDGE**

**28/05/19**

**In the presence of;-**

**Wafula for Barongo for the 2<sup>nd</sup> Petitioner**

**Abari holding brief for Samba for the 1<sup>st</sup> Administrator**

**Court Assistant – Kirong**

**Judgement read in open court.**