



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

(FAMILY DIVISION)

SUCCESSION CAUSE NO 720 OF 2014

IN THE MATTER OF THE ESTATE OF PETER NGUGI WA KAMAU (DECEASED)

MARY WAITHERA WAMBUI.....APPLICANT/OBJECTOR

VERUS

PATRICIA MUTHONI NGUGIRESPONDENT/PETITIONER

JUDGMENT

1. This matter revolves around the estate of **Peter Ngugi Wa Kamau** (deceased) who died on the 29th of August, 2012.
2. By consent of both parties herein **Patricia Muthoni Ngugi** and **Mary Waithera Wambui** the two were recognised as widows of the deceased and both appointed as administrators of the estate.
3. In the course of these proceedings the parties were referred to mediation and on the 16th of May 2018 the parties entered into a partial consent on distribution, several properties and money in the bank were shared.
4. Patricia Muthoni Ngugi was married to the deceased in 1985 and lived together with him for a period of 28 years. She has two sons all adults namely Brian Kamarley Kamau 28 years, and Martin Wang'ondy 22 years.
5. Mary Waithera was married to the deceased in 2010 and lived with the deceased for 2 years before his death. They had one child a daughter VWN 8 years.
6. In the partial distribution properties were shared as follows:

a. Patricia Muthoni Ngugi:

- i. Title No. Nairobi/105/5309
- ii. Plot No. 2 Webbs Unity Sacco
- iii. Motor vehicle KBB 631 Toyota Vitz.
- iv. 16,000 shares in Safaricom Ltd.
- v. Plot No. 599 Kamulu Housing Matungulu
- vi. Plot No. 690 Kamulu Housing Matungulu
- vii. Plot No.1426 Kamulu Housing Matungulu

b. Mary Waithera Wambui

- i. Plot No. P2868 Ruai Embakasi Ranching Co. Ltd.

ii. Plot No. 14 Webbs Unity Sacco.

iii. 600 shares in Mumias Sugar Company

iv. 8,500 shares in Safaricom

v. Plot No. 1427 Kamulu Housing Company Limited

c. **Brian Kamarley Kamau** two rooms in the properties described as Chareb Enterprises Ltd and Mawawa Estate.

d. Motor vehicle Registration Number KAS 404T Mitsubishi was to be sold and proceeds shared at 60-40%.

e. Cash in the bank was also shared at 60-40%.

f. Property at East Brook similarly was to be sold and shared at 60-40 and;

g. Proceeds from Ruai Welfare Group was to be pursued and shared at the same ratio.

7. Left for consideration by the court is the mode of distribution of ;

i. L.R. No. Mavoko Town/Block 12/1975.

ii. Properties registered as Chareb Enterprises and Mawawa.

iii. Mpesa and gas business.

8. Patricia Muthoni stated in evidence that she is now 53 years old. She got married to the deceased in 1986. She has been working at the University of Nairobi since 1989. The two bought their first property in 1994 and commenced construction in 1996. The construction took time as both took loans to finance the same which was completed in 2001 and they moved in. In 2003 they decided to buy more land and put up rental units to supplement their income and they bought the following:

a. Plot No. 105/5938-107- Chareb Enterprise, certificate 304

b. Plot No. 105/5938-108 Chareb Enterprise Ltd Certificate No. 308.

c. Plot No.105/5938-109 Chareb Enterprises Ltd, certificate No. 307

d. Plot No. 105/5938-110 Chareb Enterprises certificate No. 301

e. Plot No.105/5938 111 Chareb Enterprises Ltd – certificate No. 302

f. Plot No. 105/5938-112 Chareb Enterprises Ltd – certificate No. 303

g. Plot No. NBI/Block 105/5902/111 Mawawa.

h. Plot No. NBI/Block 105/5902/097 Mawawa.

i. Plot No. NRB/Block 105/5902/112 Mawawa

j. Plot No. NRB/Block 105/5902/98 Mawawa.

9. It was her further testimony that through joint effort between herself and the deceased they developed the said properties to the exclusion of the respondent and she should therefore not share the same with her co-wife as the properties were purchased and developed before the co-wife was married.

10. On her part Mary Waithera Wambui in her evidence offered to give up her share for Mavoko Town 12/1975 to compensate for the sale of Plot No.2 Block 126/593 Webbs Unity Company. As regards Chareb Enterprises Ltd and Mawawa, she proposed that since there are two separate properties she should get one and her co-wife the other. As regards the gas business she stated that her co-wife closed the same and kept the gas cylinders and has failed to account. She admitted closing down the Mpesa business and utilizing the funds.

11. In evidence are ownership documents in the names of the deceased and the first widow as follows;

-Certificate No. 303 for Plot No. 105/5938 -112 dated 24th January, 2003,

-Certificate No. 301 for Plot No. 105/5939-110 dated 24th January 2003,

- Certificate No. 302 for Plot No. 105/5938-111 dated 24th January, 2003,
- Certificate No.304 for Plot No. 105/5938-107 dated 24th January 2003,
- Certificate No. 307 plot No. 105/5938/109 dated 27th March, 2003,
- Certificate No. 308 for Plot No. 105/5938-108 dated 27th March 2003
- Certificates number 172 for plot No. 105/5902-097 dated 13th November 2006,
- Certificate No. 171 and NBI/Block 105/5902/11 dated 10/13/207, -Certificate No. 125 for NRB/Block 105/5902/98 dated 9th January 2007.
- Certificate No. 173 for NRB/Block/105/5902/112 dated 13th November, 2006

12. In his submission the 1st widow's counsel submitted that the properties that were acquired by the joint effort of the 1st widow and the deceased before the 2nd widow came into the picture and which are registered jointly in the names of the two should not be subject to distribution, and as the widow and the deceased are the joint owners the principle of survivorship applied upon demise of the other holder. Secondly, that the same are matrimonial properties of the 1st widow and ought not to be shared with a subsequent wife. Counsel relied on the following cases.

- i. Re-Estate of Stephen Kiburi Muciarua (2018) eKLR.**
- ii. Estate of Mwangi Giture 2004 eKLR.**
- iii. Estate of Ephantus Githatu Waithaka (2016) eKLR.**
- iv. Scholastica Ndululu Suva v Agnes Nthenya Suva (2019) eKLR.**

13. Counsel for the 2nd widow submitted that even though properties are in names of the 1st widow and the deceased, that portion that belonged to the deceased should be shared between the two widows.

14. The issue of costs was also canvassed with the 1st widow seeking to have each party meet its costs and the second widow seeking for the estate to meet the costs.

15. The 1st widow in her assertion that she contributed in the purchase and development of properties produced in evidence a letter from Chania Co-operative Society to prove that on diverse dates between 30th April 1996 to 12th March, 2015 she borrowed money to buy property, development etc..

16. In reaching a verdict the court is mindful of the fact that the estate has partially been shared with each widow keeping her matrimonial home, monies shared at the ratio of 60/40 and the widows having each sold some assets.

17. The set of plots subject matter of this judgment were bought and mainly developed by the joint effort of the deceased and his first wife. Indeed the documents of ownership are in joint names. To be precise they were bought between 2003 and 2007. The 1st widow was married in 1985 and at the time of deceased death in 2012 had lived with him for 27 years. The 2nd widow was married in 2010 and at the time of death had lived with the deceased for only 2 years.

18. The courts have taken the position that a widow who has lived with a deceased person and toiled for decades with him cannot be treated in equal measure with one married just a few years before the demise of a husband when it comes to distribution of assets especially ones acquired before the subsequent wife came into the scene.

In **Scholastica Ndululu Suva vs Agnes Nthenya Suva** the **Court of Appeal** stated:

“It is therefore evident, that, although section 40 of the Law of Succession Act provides a general provision for the distribution of the estate of a polygamously deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”

On the issue of financial contribution the court held that:

“On our own evaluation of the evidence, we are entirely in agreement with the conclusion that the trial judge arrived at that the respondent contributed financially to the acquisition of the two properties. We are alive to the fact that what was before the learned judge was a succession cause and not a matrimonial dispute.

However, the succession cause was anchored on the matrimonial circumstances of the deceased. The fact that the deceased acquired the two (2) properties during the subsistence of his marriage to the respondent, before the appellant came into the scene, and the fact that the respondent was employed, clearly, supported her allegation that she contributed to the acquisition of the two (2) properties. It would not therefore be fair nor just to treat the appellant and the respondent equally in the distribution of the estate.”

19. In addition to the above the deceased and the 1st widow were joint owners, and the principle of survivorship becomes operational.

In **Re-Estate of Johnson Njogu Gichohi (2018) eKLR** the court was of the view that when one spouse dies automatically the property passes to the surviving joint owner.

20. I align my thoughts with the two cases quoted above and am of the view that since Chareb and Mawawa properties were acquired jointly by the deceased and the 1st widow; the 1st widow having been in employment, having shown in evidence that she contributed to the acquisition and development of the same, the 2nd widow should not expect to rip where she did not sow. Secondly in the way the properties were registered there is no room for her. There are two owners; so that in the event one is no more the entire property reverts to the other.

21. It would be totally unreasonable, in any event, for a wife of two years to expect to share with one of 27 for years on each and every property, even what was long acquired when she was not a wife.

22. As for **Mavoko Town 12/1975** I will in the interest of the minor daughter of the deceased direct that the same goes to the 2nd widow.

23. One widow sold the mpesa business and another the gas business. None of the two has accounted. I will treat the same as share each getting what they sold.

24. The first widow has been collecting rent for Chareb and Mawawa for the reasons above she will not be required to account and to be fair to the 2nd widow I will treat the property No. 2 Block 126/593 as her share of the estate and she therefore need not refund proceeds thereof.

25. As for the issue of costs I will direct that each party meets their own costs.

Dated and Delivered in Nairobi on this 21ST day of NOVEMBER 2019.

ALI-ARONI

JUDGE