



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**SUCCESSION CAUSE NUMBER 446 OF 2005**  
**IN THE MATTER OF THE ESTATE OF**  
**KAGORI GACHUNJU.....DECEASED**  
**TERESIAH WANJA KAGORI**  
**JOSEPH NG'ANG'A KAGORI.....PETITIONERS**  
**-VERSUS-**  
**JANE WAMBUI.....OBJECTOR**  
**RULING**

1. The deceased James Kagori Gachunju died on 4th June, 2004.
2. Teresia Wanja Kagori and Joseph Ng'ang'a Kagori took out a petition for letters of administration intestate on 22nd August, 2005.
3. A grant of letters of administration in respect of the said estate was made on 22nd June, 2010.
4. A summons for confirming of grant was taken out and filed on 13th April, 2012.
5. This summons elicited opposition vide an affidavit of protest sworn by Jane Wambui on the 28th day of April 2012 and filed on 2nd May, 2012. A further affidavit is sworn on 13th August, 2012 and filed on 14th August 2012. Yet a further affidavit is sworn by her on 6/7/2012.

**THE PETITIONERS' CASE**

6. The Petitioners list the survivors of the deceased as;
  - a) TERESIAH WANJA KAGORI - WIDOW - ADULT
  - b) LUCY NJERI - DAUGHTER - ADULT
  - c) PETER MWANGI - SON - ADULT
  - d) SUSAN MUTHONI - DAUGHTER - ADULT

- e) JANE WAMBUI - DAUGHTER - ADULT
- f) EUNICE WAIRIMU - DAUGHTER - ADULT
- g) SALOME MUTHONI - DAUGHTER - ADULT
- h) JOSEPH NG'ANG'A - SON - ADULT
- I) HANNAH NJERI - DAUGHTER - ADULT
- j) LUCY WAMBUI - DAUGHTER - ADULT
- k) SIMON NJOROGE - SON - ADULT
- l) MW - DAUGHTER - MINOR
- m) ZM - DAUGHTER - MINOR
- n) JG - SON - MINOR

7. The identification of the shares of all persons beneficially entitled to the estate are ascertained as follows;

- a) L.R. NO. RONGAI/LENGENET BLOCK 5/405 – 1.320 Hectares to Teresia Wanja Kagori.
- b) Terminal benefits from JAYKAY enterprises to Teresia Wanja Kagori.

### **THE PROTESTOR'S CASE**

8. The protestor's case is that the deceased was polygamous having married the protestor's mother earlier before Teresia Wanja Kagori. She opines then, that the distribution should be as between the 2 houses.

9. In addition to the listed assets, she avers that deceased had an account with NSSF. She has managed to get the number of the account but she cannot access the same since she is not the administrator.

10. She indicates that Kshs. 155,000/= was paid in compensation to the administrators but the 1st administrator used the funds for herself and her children. The 2nd house got nothing. She asks that the share of her house be factored in in the distribution, sort of, a set off.

### **ANALYSIS AND DETERMINATION**

11. On the material before me, the following facts are true.

- a) The Respondent, Teresia Wanja Kagori is a widow to James Kagori Gachunju (deceased). She is a co-administrator of the estate of the deceased together with Joseph Ng'ang'a Kagori.
- b) She has sought confirmation of grant and included herself and all children of the deceased as survivors of the deceased.
- c) The protestor Jane Wambui is a daughter of Hannah Nyambura a wife of the deceased and who predeceased him.
- d) The deceased and Hannah Nyambura had 5 children namely Lucy Njeri, Peter Mwangi, Susan Muthoni, Eunice Wairimu and Jane Wambui.
- e) According to the protestor the deceased married Teresia after the demise of Hannah.

f) The known assets of the deceased are L.R. NO. RONGAI/LENGENET BLOCK 5/405, terminal benefits from Jaykay enterprises (amount not stated) and a sum of Kshs. 155,000/= obtained in a judgment in favour of the estate (a sum Teresia admits having spent on fees for her children and to cater for her medical expenses). The protestor indicates there are some monies in a NSSF Account but particulars are not known.

12. It emerges from the foregoing that the only issue for determination is the respective share(s) of the beneficiaries.

13. The protestor opines that the law applicable is the one relevant to distribution where a deceased man was polygamous.

14. According to the petitioners, this is one house in which case it is proposed that Teresia Wanja Kagori is to hold the entire share of the estate (presumably for herself and for the benefit of her children).

15. So which way the distribution? The answer to this will be determined by establishing whether the deceased was in a polygamous union in which case Section 40 of the Law of Succession Act would be applicable or whether the deceased had one wife in which case Section 35 of the Law of Succession Act becomes applicable.

16. In paragraph 5 of the affidavit of protest, Jane Wambui indicates that the deceased was married to her (Njeri's) mother Hannah Nyambura under Kikuyu Customary Law.

17. In paragraph 6 of the said affidavit she states that upon the demise of her mother, Hannah Nyambura, the deceased married Teresia Wanja.

18. Of course, going by the above, the deceased had capacity to contract another marriage during the subsistence of the marriage with Hannah Nyambura in which case he would "have married more than once under any system of law permitting polygamy" within the meaning of Section 40 of the Law of Succession Act.

19. The Applicant states in paragraph 6 of her affidavit that Teresiah Wanja was married after the demise of Hannah Nyambura.

20. The deceased died intestate. He had married 2 wives, one deceased. He thus was survived by 2 houses. **Section 3** of the **Law of Succession Act** defines house thus;

**"house" a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife."**

21. It follows then that the applicable law in the distribution of the estate of the deceased herein is in accordance to **Section 40** of the **Law of Succession Act**. That Section provides;

**"40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects intestate 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."**

22. The Court of appeal affirms this position in its decision in **Catherine Nyaguthii Mbauni – vs – Gregory Maina Mbauni [2009] eKLR**, where the first wife died and 7 years after, the deceased married another wife. The Court went ahead to conclude that the deceased had 2 houses and applied Section 40 in

the distribution of the estate.

23. As alluded earlier, the known assets of the deceased are L.R. No.. Rongai/Lengenet Block 5/405 and terminal benefits for Jaykay enterprises of an unstated amount and a sum of Kshs. 155,000/= obtained in a judgment in favour of the estate which sum is admitted by the Respondent as already spent on children fees and medical expenses.

24. Going by the above, I make a finding that the distribution of the estate herein shall be as follows;

a) Parcel of Land No. Rongai/Lengenet Block 5/405 shall be divided in the ratio 9:5 as between the 2 houses taking each child as a unit with the surviving wife also being an additional unit to the children.

b) The terminal benefits from Jaykay enterprises shall be shared out in the ratio 9:5 as in (a) above.

c) On the sum of Kshs. 155,000/= paid and acknowledged as spent, I have considered the explanation of the use of the money as seen in the affidavit sworn on 25/5/2010. I am satisfied this money was used for the benefit of the education of the minors left behind by the deceased and for the general upkeep of the large family and medical expenses. Equity would demand that Teresiah Wanja should not be penalised for use of this money. That asset is treated as depleted and having been lawfully spent.

d) Should any money be found in the NSSF account mentioned by the Applicant, the proceeds therefrom be shared out as in (a) above.

25. This being a family matter, each party to bear its costs.

**Dated and Signed at Kisii this 10th day of January, 2018.**

**A. K. NDUNG'U**

**JUDGE**