



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 422 OF 2011

In the Matter of the Estate of M' Ramare Nkunga Alias Ramare Nkunga (Deceased)

M' MARETE M' RAMARE.....PETITIONER

-VERSUS-

ESTHER MPINDA RUKARIA.....APPLICANT

JUDGMENT.

[1] These proceedings relate to the estate of M' Ramare Nkunga (deceased). The estate property is **L.R NO. NTIMA/NTAKIRA/1129 measuring approximately 0.77Ha**. The petitioner has sought in the Summons for Confirmation of Grant brought pursuant to Section 71 of the Law of Succession Act, to distribute the estate property as follows:

- a). M' Marete M' Ramare.....0.85 Acres**
- b). Joyce Kamba, Patrick Mwenda, Peter Kimathi and Stephen Munene.....1 Acre jointly in equal shares**
- c). M' Rukaria M' Ramare.....0.75 Acres**

[2] The Protestors herein namely; M' Rukaria M' Ramare and Esther Mpinda opposed the above mode of distribution proposed by the Petitioner. They contended that the proposed distribution was totally inequitable and unfair. They were perturbed that the Petitioner had given himself 0.77 ha, M' Mungania M' Ramare 0.41 ha and M' Rukaria M' Ramare 0.20 ha without any basis at all. Instead, they proposed the estate property to be distributed equally among all beneficiaries.

ANALYSIS AND DETERMINATION

[3] Upon careful evaluation of the distribution proposed by the Petitioner and protestors, I say these: The distribution proposed by the Petitioner is clearly skewed in favour of the Petitioner; he awarded himself a larger share than the rest of beneficiaries. Second, he has not given any or any reasonable reason for the disparity in the distribution set out in paragraph 5 of the affidavit in support to the Summons for Confirmation of Grant. As such, not legal or factual basis was laid for the proposal. In this case, the deceased was polygamous. Therefore, Section 40 of the Law of Succession Act guides distribution where the deceased was polygamous. It provides as follows;

40. Where intestate was polygamous

- (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***

Emerging jurisprudence

[6] I have heard quite plausible debate now emerging within legal, judicial as well as other eminent disciplines on section 40 of the Law of Succession Act, especially that it pays little or no regard to the constitutional reality that a surviving spouse has vested property rights in the property they acquire or improve during their marriage. It is now being asked whether it is in order to abrogate the rights of the living spouse in family property acquired during their marriage in the brutal manner done by section 40 of the Law of Succession Act. Does it mean that when one spouse dies the property rights of the surviving spouse die also or are diminished to the level of becoming merely a unit in the family in equality with- and sometimes lower (especially in case of a widow) than the children of the marriage? Kimondo J answered some

of these questions in **ELD HC SUCC CAUSE NO 241 OF 2002 ESTATE OF EPANTUS GITHATU WAITHAKA**. My view is this. Section 40 of the Law of Succession Act is existing law which must be read with such alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. See section 7 of the Transitional and Consequential Provisions, Sixth Schedule of the Constitution. That is for jurisprudence as no issue has arisen on the rights of the living spouse in these proceedings.

[7] Coming back to the main. **In Re Estate of John Musambayi Katumanga – (Deceased) [2014] eKLR** Musyoka J stated as follows;

“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. Section 40 was not designed for the circumstances of the instant estate, but it would appear more appealing for the purpose of distribution of the said estate than Section 35. 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.”

[8] In the instant case, although the deceased was polygamous, there was no surviving spouse but children. Accordingly, section 40 should be tempered with the principle of equality in section 38 of the Law of Succession Act which provides as follows:

38. Where intestate has left a surviving child or children but no spouse Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

Applying the law, the estate of the deceased namely; **L.R NO.NTIMA/NTAKIRA/1129**, shall be divided equally among all the children of the deceased in the two houses.

[8] This being a succession matter, there will be no order as to costs.

Dated, signed and delivered in open court at Meru this 30th day of May of 2018

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F. GIKONYO

JUDGE

In the presence of:

Mr. Kaimenyi advocate for Petitioner

Mr. Mutumu advocate for Protestor

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F. GIKONYO

JUDGE