



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 583 OF 2010**

**IN THE MATTER OF THE ESTATE OF STEPHEN KIBURI MUCIARIA (DECEASED)**

**ZIPPORAH GACHEKE.....1<sup>ST</sup> PETITIONER**

**MARGARET GACHERI.....2<sup>ND</sup> PETITIONER**

**-VS-**

**NAOMI NKOYAI KIBURI.....PROTESTOR**

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

1. **Stephen Kiburi Muciaria (deceased)**, died intestate on 23<sup>rd</sup> April 1999. On 12<sup>th</sup> May 2015, a Grant of Letters Administration of intestate was made to Zipporah Gacheke and Naomi Nkoyai Kiburi. From the record, the deceased was polygamous and was survived by 3 widows and 19 children. The widows were, **Naomi Nkoyai Kiburi, Zipporah Gacheke and Margaret Gacheri**.

2. On 11<sup>th</sup> August, 2017, **Zipporah Gacheke**, proposed to distribute the estate of the deceased as follows:-

**1<sup>st</sup> HOUSE NAOMI NKOYAI KIBURI & CHILDREN**

**KIGUCHWA ADJUDICATION SECTION**

**LR NO.1742.....3.0 Acres**

**LR. NO. 3682.....0.40 Acres**

**LR. NO. 2063.....1.0 Acres**

**LR. NO. 2127.....0.05 Acres**

**LR. NO. 2817.....1.06 Acres**

**AKAGIA ADJUDICATION SECTION**

**LR. NO. 4028.....0.96 Acres**

**LR. NO. 5117.....1.50 Acres**

**LR. NO. 5118.....3.00 Acres**

**LR. NO. 5120.....1.00 Acres**

**2<sup>nd</sup> HOUSE ZIPPORAH GACHEKE & CHILDREN**

**KIGUCHWA ADJUDICATION SECTION**

LR. NO. 1835.....0.40 acres  
LR. NO. 1742.....2.0 Acres  
LR. NO. 2430.....0.20 Acres  
LR. NO. 2785.....0.10 Acres  
LR. NO. 3676.....0.60 Acres  
LR. NO. 1914.....1.5 Acres  
LR. NO. 2063.....2.5 Acres  
LR. NO. 2470.....0.6 Acres  
LR. NO. 3685.....0.35 Acres

**AKAIGIA ADJUDICATION SECTION**

LR. NO. 5118.....3.37 Acres  
LR. NO. 5119.....1.00 Acres

**3<sup>rd</sup> HOUSE MARGARET GACHEKE & CHILDREN)**

**KIGUCHWA ADJUDICATION SECTION**

LR. NO. 1835.....0.10 Acres  
LR. NO. 1914.....1.5 Acres  
LR. NO. 2355.....0.70 Acres  
LR. NO. 3685.....0.10 Acres

**AKAIGIA ADJUDICATION SECTION**

LR. NO. 5118.....1.00 Acres

**Money in Barclays Bank Meru A/C NO. 4889209 to be shared equally amongst the 3 widows.**

3. On 9<sup>th</sup> January 2017, **Naomi Nkoyai Kiburi** filed a protest to the proposed mode of distribution. She contended, *inter alia*, that her co-administratrix would not know the property acquired by the deceased and herself as she was not a wife of the deceased as alleged but a concubine of the deceased's brother one Johnson Mwongera Muciara. That she and the deceased had worked so hard and acquired several properties some of which the deceased had sold before he died.

4. On 8<sup>th</sup> May 2017, the court directed that the protest be canvassed by way of *viva voce* evidence. At the hearing of the protestor's case, contrary to her earlier contentions that the petitioners were not married to the deceased, the protestor admitted that they were her co-wives and the deceased had sired children with them. In view of that admission by the protestor, the court directed the parties to attempt mediation failing which the court directed that they appear on 15<sup>th</sup> October 2018, for submissions. The parties failed to settle the matter.

5. It was submitted for the petitioners that although the protestor was married under the African Christian Marriage and Divorce Act, that did not make her the only wife of the deceased. That the petitioners were also wives of the deceased under the Ameru Customary Laws and Practices and should inherit from his estate by virtue of **section 3 (5)** as read with **section 40 of the Law of Succession Act**. The case of ***Loise Selenkia v Grace Naneu Andrew & Another [2017] eklr*** was cited in support of that proposition. The petitioners urged the court to distribute the estate of the deceased in accordance with **section 40 of the Law of Succession Act**.

6. On the other hand, Ms. Rimita relied on an affidavit by the protestor filed on 2<sup>nd</sup> October 2018 as her submissions. In that affidavit, the protestor set out the following as the properties that constitute the estate and also gave her own proposal on distribution.

**KIGUCHWA ADJUDICATION SECTION**

(a) Land Parcel No. 1742 - 5 Acres

- (b) Land Parcel No. 3685 - 0.40 Acres
- (c) Land Parcel No. 2785 - 0.10 Acres
- (d) Land Parcel No. 2430 - 0.20 Acres
- (e) Land Parcel No. 2470 - 0.60 Acres
- (f) Land Parcel No. 1914 - 3 Acres
- (g) Land Parcel No. 2063 - 3.5 Acres
- (h) Land Parcel No. 2355 - 0.70 Acres
- (i) Land Parcel No. 2127 - 0.30 Acres
- (j) Land Parcel No. 1835 - 0.40 Acres
- (k) Land Parcel No. 2817(case pending) ....1.06 Acres

**BARCLAYS BANK ACCOUNT NO. xxxxxxx held jointly with Naomi Nkoyai**

7. I have carefully considered the proposed mode of distribution by the 1<sup>st</sup> petitioner and the protestor, respectively. Though the protestor had initially contended that she was the only wife of the deceased, she did admit later that the petitioners were also wives of the deceased with whom he had sired children

8. At paragraph 7 of her affidavit of protest as well as her testimony in court, the protestor contended that she and the deceased had worked hard to acquire the properties which the deceased owned some of which he sold in his lifetime. This assertion remained uncontroverted.

9. All through, the protestor's contention was that the petitioners came late to the life of the deceased when she had the deceased had already acquired whatever property the deceased owned. Indeed, one of the petitioners was her house help whom the deceased got a child with then ended up keeping her as a wife.

10. It is not in dispute that the deceased and the protestor were married in 1972 when they were 20 and 17 years, respectively with nothing of their own. It is also not in dispute that when the petitioners came to the life of the deceased, he had already acquired the properties that form the estate. That property was acquired by his effort and that of the protestor.

11. The deceased was polygamous. He left behind 3 widows and 19 children. In this regard, his estate ought to distribute according to the number of houses and children in accordance with the provisions of **section 40 of the Law of Succession Act CAP 160 of the Laws of Kenya** which provides: -

*“(1) Where an interstate 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”.*

12. This section has been the subject of debate in a number of decisions. **In Re The Estate of The Late George Cheriro Chepkosiom (deceased) [2017] e KLR**, Mumbi J stated: -

*“The provisions of section 40 of the Law of Succession Act and their implication for the first wife of a deceased person have been considered in various decisions of the High Court in Kenya. What has been the consensus is that they are unfair to a wife, married decades or more before a second or third wife, yet she is required to share the estate of the deceased equally with subsequent wives, as well as the children of the deceased. This is regardless of whether or not she had contributed to the acquisition of the property comprising the estate”.*

13. In **Estate of Mwangi Giture (Deceased) 2004 eKLR Koome J.** as she then was, held: -

*“Perhaps it is the high time, the commission charged with the responsibility of law reform addressed the issue of the inequality raised under Section 40 of Cap 160. The 1st widow's entitlement vis vis the 2nd widow or subsequent widow who perhaps come into a marriage much later to find that the 1st widow has worked tirelessly and sometimes denying herself tremendous comfort to enable her husband create and accumulate wealth. The 1st widow is then relegated by virtue of Section 40 of the Law of Succession to the same position as the last born child of the 2nd or subsequent widows. The widow is supposed to be considered as a unit alongside the children.*

*In this regard the last born child of the subsequent widow who will have contributed nothing is elevated in law because he will have notariy (sic) absolute rights but will be entitled to an equal share with the 1st widow. The 1st widow is only entitled to a life interest and after the life interest the property devolves to her children in equal shares absolutely. I agree with counsel for the protestor 1st widow that this state of affairs bleeds inequalities and inequities in our law and ought to be addressed urgently to enable our courts dispense justice that meets the provisions of the Constitution of Kenya and give due regard to the principles of nondiscrimination on the basis of sex which are also the principles of nondiscrimination provided for under the International Conventions especially the Convention Against all forms of Discrimination against women (C.E.D.A.W.) which Kenya has signed and ratified. If the principles laid down in the International conventions were to be applied, the 1st widow would get a share of the property acquired during her marriage to the deceased, leaving the other half share to be shared by all the deceased heirs. If the distribution is of a polygamous intestate, each widow would get a share of what she contributed to”.*

14. **In RE ESTATE OF EPHANTUS GITHATU WAITHAKA (DECEASED) [2016] eKLR**, Kimondo J stated as follows;

*“The elephant in the room is whether the objector should first get half of the estate acquired prior to 1984; or, whether the entire estate should be distributed in terms of section 40 of the Law of Succession Act. The deceased was polygamous. The starting point is section 40 of the Law of Succession Act which provides-.....”*

15. Section 40 does not however take away the discretion of the court to distribute the estate fairly. By dint of sections 27, 28 and 35 of the Act, the court has been clothed with wide discretion to provide adequately for dependants or beneficiaries.

16. In the present case, there was clear evidence that the deceased married the protestor in the year 1972, when they were aged 20 and 17 years, respectively. On the other hand, the 1<sup>st</sup> petitioner and Margaret Gacheri married the deceased in 1989 and 1996, respectively. Further, the protestor’s evidence that the properties were acquired through her effort and that of the deceased remained unchallenged. The 1<sup>st</sup> petitioner therefore urged the court to uphold her mode of distribution arguing that it was the fairest. She stated that her proposed distribution took into consideration the fact of the role she had played as the first wife in the acquisition of the properties of the estate.

17. As expressed by Koome J (as she then was) in the **Estate of Mwangi Giture (supra)** and Mumbi J in **Re The Estate of the Late George Cheriro Chepkosiom (supra)**, the strict application of **section 40 of the Act** would greatly disadvantage first wives vis a vis those who come late in the lives of polygamous men. To place a wife who has lived and gathered property with a deceased for 20 or 40 years in the same level as a late comer’s child who lives with the man for say 5 or so years will not only be unfair but extremely unjust.

18. It will be discriminative of such woman on the basis of her being a woman who decided to come first in the life of such a man. This is so having in mind that under the **Matrimonial Property Act, 2013**, a wife is recognized as a joint owner of the property acquired with her husband during marriage. To allow such ownership or joint tenancy or privileged position vis a vis property acquired jointly to dissipate or evaporate by the mere death of the husband is extremely unjust. It must have not been the intention of the legislature to discriminate and relegate a woman in that position, i.e. one who has been married and has toiled throughout her lifetime with her husband, to the position of that man’s child of the last wife.

19. I am in agreement with **Kimondo J in Re Estate of Ephantus Githatu Waitheka (Supra)** that where such a widow files a requisite application under the Matrimonial Property Act, 2013 against the estate of her deceased husband, even in a pending succession matter, she will be entitled to favourable consideration on that property she participated in acquiring with a deceased.

20. While there was no dispute as to who the beneficiaries of the estate of the deceased were, the two proposals did not agree as to what the estate of the deceased constituted. While the 1<sup>st</sup> petitioner proposal had a total of 18 properties, the protestors proposal contained only 11 properties. It is therefore not clear whether the following properties belong to the deceased or not. These are: -

#### **A. Kiguchwa Adjudication Section**

i) LR NO. 3682

ii) LR NO. 3676

#### **B. Akaigia Adjudication Section**

i) LR NO. 4028

ii) LR NO. 5117

iii) LR NO. 5118

iv) LR NO. 5119

v) LR NO. 5120

21. It will be unfair to attempt to distribute the estate before confirming whether the above properties belong to the deceased or not. In this regard, in order to make a fair determination in this matter, I direct the parties to get confirmation from the department of adjudication in whose name the aforesaid properties are recorded and the sizes of each property.

22. The confirmation of the said details be obtained within 30 days by the parties whereafter the court will give its determination on distribution. The case is to be mentioned on 5<sup>th</sup> December, 2018 for confirmation.

23. This being a succession matter there will be no order as to costs.

SIGNED at Meru

**A. MABEYA**

**JUDGE**

**DATED** and **DELIVERED** at Meru this 25<sup>th</sup> day of October, 2018

**A. ONGI'NJO**

**JUDGE**