



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 69 OF 2015

CORAM: D.S. MAJANJA J.

**IN THE MATTER OF THE ESTATE OF
STEPHEN MUNGORI ANAMPIU (DECEASED)
AND IN THE MATTER OF AN APPLICATION**

BETWEEN

RUTH GAKII ANAMPIU APPLICANT

AND

PENINAH KIMYA MUNGANIA PROTESTOR/ RESPONDENT

RULING

1. This matter relates to the estate of Stephen Mungori Anampiu (“deceased”) of Municipality Location, Imenti North, Meru County who died on 4th August 2014. There is no dispute that the deceased was survived by his two wives, Ruth Gakii Anampiu (“Gakii”) and Peninah Kimya Mungania (“Kimya”). After his death the parties filed the petition for grant of letters of administration in which they named the following as surviving him:

- a. Ruth Gakii Anampiu - Widow
- b. Peninah Kimya Mungania - Widow
- c. Glory Karambu Mungori – Daughter
- d. Purity Nkirote Mungori – Daughter
- e. Emmanuel Kirimi Mungori – Son
- f. IGM – Son (child)

2. According to the schedule of assets (Form P & A 5), the deceased left behind the following assets:

- a. NTIMA /IGOKI/6923, 6924 and 6925.
- b. NYAMBENE/URINGU III/1673, 1674, 1675 and 1676.
- c. RUIRI/RWARERA/1886, 1140 and 1403.
- d. National Bank, Kenya Airways and Safaricom shares
- e. Maua Methodist Sacco Account
- f. Motor Vehicles Registration Nos. KAL 132D and KQU 913.

3. Gakii moved the court by summons for confirmation dated 2nd February, 2016 to confirm the grant. In response thereto Kimya filed a protest making her own proposals for distribution. I heard oral evidence from Kimya (PW 1) and Gakii (DW 1) and two witnesses who were the deceased's brothers, Daniel Anampiu (PW 2) and Joseph Anampiu (DW 2).

4. The main issue that emerged concerns three parcels of land NTIMA/IGOKI/ 6923, 6924 and 6925 (Plots 6923, 6924 and 6925) and how they should be shared amongst beneficiaries. It is not in dispute that these plots were originally part of NTIMA/IGOKI/2521 owned by the deceased. According to the evidence, the land was given to the deceased as a gift by his father. The deceased married Gakii on 20th December 1978 under the now repealed **Marriage Act**. Thereafter the couple started constructing a matrimonial house on the land.

5. The marriage between Gakii and the deceased did not survive and the witnesses agree that in 2006 they stopped cohabiting. There is conflicting evidence on who was to blame but this is not relevant for this application. What is clear is that Gakii left the matrimonial home and the deceased met Kimya. They started cohabiting and in 2008, the deceased and Kimya underwent a Kimeru customary marriage which PW 2 and DW 2 witnessed. I would point out that under **section 3(5)** of the **Law of Succession Act (Chapter 80 of the Laws of Kenya)**, Kimya is considered a wife notwithstanding that Gakii had been married to the deceased under the **Marriage Act**.

6. Back to the issue at hand, the deceased decided to make provision for Gakii and her children. He called a family meeting which was attended by PW 2, Gakii and her three children: Glory Karambu, Purity Nkirote and Emmanuel Karimi. At the meeting it was agreed that the children would build a house for their mother and he would set aside land. He decided that Plot 2521 would be divided into three portions. He gave one part to the daughters, another part to the son while he remained with the part comprising the matrimonial home. Gakii confirmed that there was indeed such a meeting. Her testimony and that of Kimya and PW 2 corroborated what the deceased recorded in his diary entry of 4th March 2012 where he acknowledged that he had set aside land for his son and daughters and that his daughters would build a house for Gakii. All the witnesses agree that Gakii lives in the house her son built and that the deceased's daughters have built rental houses on their portion.

7. Before I turn to consider distribution, it is important to recall some guiding principles. The deceased was polygamous thus the starting point for distribution of his property is **section 40** of the **Law of Succession Act** which provides:

40 (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 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 within each house shall be in accordance with the rules set out in section 35 to 38.

8. **Section 40** aforesaid does not however take away the discretion of the court to distribute the estate fairly. **Sections 27, 28** and **35** of the **Act** provide the court with wide discretion to provide for dependents or beneficiaries. As Omollo JA, stated in **Rono v Rono & Another [2008] 1 KLR (G&F), [2005] 1 KLR 538, 553** there is no, "requirement [in the Act] that heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a judge has no discretion but to apply the principle of equality".

9. Also relevant to this case is that fact that it is now accepted that within the rubric of fairness and equity the court may take into account the contributions of the first wife to acquisition or contribution to the matrimonial home (see **Esther Wanjiru Kiarie v Mary Wanjiru Githatu ELD HC Succ. 244 of 2002 [2016]eKLR** and **Re Estate of George Cheriro Chepkosiom KRC HC Succ. No. 16 of 2010 [2017]eKLR**). In addition, I have taken into account the gifts of land given to the children of the first house as required by **section 42** of the **Law of Succession Act** and the needs of the minor child who requires upkeep and maintenance which the deceased would have provided.

10. The first aspect of this dispute is whether Gakii is entitled to the matrimonial home. She gave evidence that she contributed to construction of the matrimonial house by taking out loans with the deceased while they were both working at Meru General Hospital. She also cared for the children and her in-laws. I have no doubt and I indeed find that Gakii made contributions to the matrimonial home and is entitled to a share of it.

11. On the other hand, Kimya is also the deceased's wife. She lived with the deceased for 9 or so years prior to his death. As a housewife, she took care of his household and gave birth to a son and together with him she made substantial contribution on the property in the form of rental houses they built on the matrimonial property. Her claim too cannot be discarded or wished away. I also note that while the deceased was alive, Gakii did not make a legal claim to the house or seek for the deceased to be evicted.

12. It is in this light of the facts I have outlined that I intend to decide the distribution. I accept and it is not disputed that the deceased had given specific gifts of Plot 6923 and 6924 to his son and daughters. They took possession and have constructed houses on the respective plots. On the other hand, Plot 6925 was the matrimonial home for both Gakii and Kimya and both have made substantial contributions on it. Since Kimya has been living in the house with the deceased's minor child, I cannot take the drastic step of evicting her. On the other hand, Gakii must be compensated for her labours and contribution. I accordingly award Gakii half or 0.07 Ha of Plot 6925 for the reason that Kimya admitted in evidence that the said plot can still be subdivided in a manner that excludes the developments made with the deceased. In order to compensate Gakii for her contribution to the matrimonial house, I also award her RUIRI/RWARERA/1886 absolutely.

13. All parties agree that prior to his death, the deceased sold NYAMBENE/URINGU III/1673 to one Reuben Mwenda hence it shall be given to him.

14. NYAMBENE/URINGU III/1674 and 1675 shall be shared between Ruth Gakii Anampiu, Purity Nkirote Mungori, Glory Karambu Mungori and Emmanuel Kirimi Mungori in equal shares and while NYAMBENE/URINGU III/1676 to Isaiah Guantai Mungori.

15. RUIRI/RWARERA/1140 shall be divided equally between Ruth Gakii, Emmanuel Kirimi Mungori, Purity Nkirote Mungori, Glory

Nkatha Mungori and Isaiah Guantai Mungori while RUIRI/RWARERA/1403 to Isaiah Guantai Mungori.

16. Since the deceased left behind a child who shall require education I grant all the shares in Kenya Airways, National Bank, Safaricom and the Maua Methodist Sacco Account to Isaiah Anampiu.

17. The two motor vehicles registration number KAL 132D and KQU 913 shall be given to Emmanuel Kirimi Mungori.

18. That leaves the issue of Derrick Mutwiri. Both parties admit that he is not the biological son of the deceased. When the parties applied for the Chief's letter to commence these proceedings and thereafter filed the petition, they both agreed by consent that he is not a survivor of the deceased. The protestor therefore ought to have made an application under **Part III** of the **Law of Succession Act** for such provision to be made. I therefore decline to make such provision in the absence of this application.

19. I G M is a child hence and in accordance with **section 51** of the **Law of Succession Act**, his share of the estate shall be held in his trust by Penina Kimya and Daniel Anampiu as trustees.

20. I now confirm the grant on the following terms:

- NTIMA/IGOKI/6923 to Purity Nkirote Mungori and Glory Karambu Mungori in equal shares.
- NTIMA/IGOKI/6924 to Emmanuel Kirimi Mungori.
- NTIMA/IGOKI/6925 equal shares to Ruth Gakii Anampiu on one part and Penina Kimya Mungania on her own behalf and on behalf of IGM.
- NYAMBENE/URINGU III/1673 to Reuben Mwenda Murugu
- NYAMBENE/URINGU III/1674 to Ruth Gakii Anampiu, Purity Nkirote Mungori, Glory Karambu Mungori and Emmanuel Kirimi Mungori in equal shares.
- NYAMBENE/URINGU III/1675 to Ruth Gakii Anampiu, Purity Nkirote Mungori, Glory Karambu Mungori and Emmanuel Kirimi Mungori in equal shares
- NYAMBENE/URINGU III/1676 to Isaiah Guantai Mungori
- RUIRI/RWARERA/1886 to Ruth Gakii Anampiu
- RUIRI/RWARERA/1140 to Ruth Gakii, Emmanuel Kirimi Mungori, Purity Nkirote Mungori, Glory Nkatha and Isaiah Guantai.
- RUIRI/RWARERA/1403 to Penina Kimya Mungania
- National Bank Shares, Kenya Airways Shares, Safaricom shares, Maua Methodist Sacco Account to be held in trust for IG.
- Motor Vehicles Registration Nos. KAL 132D and KQU 913 Ford Cortina to Emmanuel Kirimi Mungori.

21. As this is a family matter, I will not award costs.

DATED and DELIVERED at MERU this 23rd day of October 2018.

D. S. MAJANJA

JUDGE

Mr Kithinji instructed by Gichunge Muthuri and Company Advocates for the applicant.

Ms Akech instructed by F. K. Gitonga and Company Advocates for the protestor/respondent.