



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**HCCA NO. 3 OF 2017**

**JULIUS MBUBA KANGA.....1<sup>ST</sup> APPELLANT**

**DAMARIS CIAKUTHII KANGA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**M'NAIROBI NJERU.....RESPONDENT**

***(An Appeal from the Judgment of Hon. A.G. Kibiru - Senior Principal Magistrate in Chuka Succ. Cause No. 376 of 2011 delivered on 11/1/2017)***

\*\*\*\*\*

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

1. The appellants herein **JULIUS MBUBA KANGA & DAMARIS CIAKUTHI KANGA** respectively are both beneficiaries/ dependants of the estate of the late Kanga Muranga (deceased) who died intestate on 16<sup>th</sup> May, 2000 at Chuka Hospital resident at Kamuci. The record shows that the deceased had 2 wives namely;-

a) Damaris Ciakuthi Kanga (the 2<sup>nd</sup> appellant)

b) Jennifer Muiru

2. Damaris Ciakuthi Kanga listed the following as her children and dependants to the estate;

(i) Julius Mbuba Kanga (1<sup>st</sup> appellant herein)

(ii) Hellen Kaari Kanga

(iii) Jedidah Kawira (daughter in law)

(iv) Keziah Karimi

Liz Makena            Grand children

3. From the 2<sup>nd</sup> house, the following children were listed:

(i) Dorothy Muthoni Kanga

(ii) Genesisio Mugambi Kanga

(iii) Elijoy Wanja Kanga

(iv) Sena Kaari Nkoroi.

4. The estate of the deceased composed the following properties namely:-

- a) Karingani/Gitarene/162
- b) Karingani/Gitarene/1067 and
- c) Karingani/Gitarene/1726

5. The petitioner, M'Nairobi Njeru was appointed the administrator of the estate of the deceased on 6<sup>th</sup> February, 2012. He later applied for confirmation of grant and gave the following proposition on the mode of distribution of the estate;

**(A) Karingani/Gitarene/162**

- (i) Jedidah Kawira Njuki - 2 acres
- (ii) Ciakuthi Kanga - 0.25 acres

**(B) Karingani/Gitarene/1067**

- (i) Margaret Ciandeki Mutegi - 1.875 acres
- (ii) Sena Kaari Nkoroi - 1.875 acres

**(C) Karingani/Gitarene/1032**

- (ii) Sena Kaari Nkoroi - 1 acre
- (iii) Julius Mbuba Kanga - 1 acre
- (iv) Jedidah Kawira Njuki - 1.25 acres

6. Julius Mbuba Kanga, protested against the above proposal claiming that parcel No. Karingani Gitarene/1032 did not belong to the deceased. He insisted that the estate comprised the following properties;

- a) Karingani/Gitarene/162
- b) Karingani/Gitarene/1067
- c) Karingani/Gitarene/1726

7. The protestor's other ground for protest is that he had redeemed parcel No Karingani/Gitarene/162 and 1067 by paying Kshs.30,000/-. He on that basis asked to be considered with a bigger share. He therefore made the following proposal.

**a) Karingani/Gitarene/162**

- (i) Genesio Mugambi - 1 acre
- (ii) Damaris Ciakuthi Kanga - 1 acre
- (iii) Jedidah Kawira- 1 acre  
(to hold in trust for Irene Kambura and Raymod Munene)
- (iv) Julius Mbuba Kanga - 1.25 acres

**b) Karingani/Gitarene/1067**

- (i) Margaret Ciandeki-2 acres to hold for herself and in trust for Linus Mwititi, Samuel Munene, Jackline Kirimi, Peninah Kinya Morris Mubore and Peter Murithi.
- (ii) Kesia Karimi  
Liz Makena 1.75 acres jointly

**c) Karingani/Gitarene/1726**

(i) Damaris Ciakuthi Kanga

Hellen Kaari Kanga

Dorothy Muthoni 1 acre jointly

Elijoy Wanja

(ii) Margaret Ciandeke - 1 acre to hold for herself and in trust for;

- Linus Mwiti

- Samuel Munene

- Jackline Karimi

- Peninah Kainyu

- Morris Muboreri and

- Peter Murithi

(iii) Julius Mbuba Kanga - 0.66 acres

(iv) Jedidah Kawira - 0.66 acres

8. The trial court upon trial determined that the estate comprised the following properties:-

a) Karingani/Gitarene/162 - (4.25 acres)

b) Karingani/Gitarene/1067 - (3.75 acres) and

c) Karingani/Gitarene/1726 - 4.465 acres)

9. The trial court further found that the protestor did not establish his claims that he redeemed some 2 properties forming the estate as the deceased was still alive at the time and the estate then had not crystallized. The trial court also held that the protests could not be favoured if he helped his father during financial distress holding that the deceased could have favoured him with a parcel during his lifetime. The trial court also found that the deceased died intestate as there was no will tendered in evidence.

The learned magistrate then confirmed the grant and distributed the estate as follows giving each beneficiary about 2 acres;

(A) **Karingani/Gitarene/162**

(i) Jedidah Kawira - 1.42 acres

(ii) Genesio Mugambi - 1.42 acres

(iii) Damaris Ciakuthi Kanga - 1.42 acres to hold in trust for her married daughters.

(B) **Karingani/Gitarene/1067**

(i) Margaret Ciandeke - 2 acres

(ii) Sena Kaari - 1.75 acres

(C) **Karingani/Gitarene/1726**

(i) Julius Mbuba-2 acres

(ii) Jedidah Kawira - 0.7 acres

(iii) Genesio Mugambi - 0.7 acres

(iv) Damaris Ciakuthi Kanga - 0.7 acres

(v) Sena Kaari - 0.3 acres

The trial court also held that Margaret Ciandeke, Sena Kaari and Jedidah Kawira would hold the parcels allocated to them in trust of their children. The trial court found that Kellen Kaari and Dorothy Muthoni had not expressed any interest in a share of the estate.

10. The appellants felt dissatisfied with the above decision and preferred this appeal raising the following grounds namely:-

*(i) That the judgment was discriminatory to the 1<sup>st</sup> appellant as others were getting more than 2 acres.*

*(ii) That the 2<sup>nd</sup> appellant being a widow was only given 0.7 acres.*

*(iii) That married daughters were given 1.40 acres in parcel No. Karingani/Gitarene/162 despite the finding by the trial court that they were not interested.*

*(iv) That the learned magistrate erred in law by giving the 2<sup>nd</sup> appellant 1.42 acres out of Karingani/Gitarene/162 to hold for daughters who were not interested on the estate.*

*(v) That the trial magistrate erred by giving the 1<sup>st</sup> appellant 2 acres in Karingani/Gitarene/1726 despite the fact that the 1<sup>st</sup> appellant had been in occupation of Karingani/Gitarene/162 where he had extensively developed.*

*(vi) That the learned magistrate erred in law by holding that the 1<sup>st</sup> appellant was not entitled to compensation for redeeming Karingani/Gitarene/162 and Karingani/Gitarene/1726.*

*(vii) That the learned trial magistrate failed to take into consideration the authorities cited by the appellants.*

11. In his written submissions done through IC Mugo & Co. Advocate the appellants have contended that their main ground of appeal is the 9<sup>th</sup> ground which relates to the failure by the trial court to be guided by the authorities cited. The appellants contend that **Section 35 of Law of Succession Act** provide that where there is a surviving spouse and children, unless the surviving spouse remarries, the estate of a deceased person shall rest on the surviving spouse to hold it in trust for other beneficiaries. The appellants have cited a Court of Appeal decision in the case of *Justus Thiora Kiugu & 4 others -vs- Joyce Nkatha Kiugu & Another [2015] eKLR* where the Court of Appeal held that where an estate of a deceased person who dies intestate leaving one spouse and children can only be distributed in either the following ways:-

i) By consent of parties where parties consent to a mode of distribution, a court would adopt the mode agreed by parties,

ii As provided **Section 35 of Law of Succession Act**.

The appellant have submitted that in this cause the deceased was survived by one spouse who is still alive and therefore they contend that the estate should have devolved to her to hold the property in trust for herself and the children in their view the children will be able to share the estate equally upon the demise of the 2<sup>nd</sup> appellant.

12. The appellants have also cited the decision in *Re Estate of John Gakunga Njoroge (deceased) [2015] eKLR* to support their contention that the estate should vest to the surviving spouse to hold it in trust for herself and children. The appellants have faulted the trial court for vesting only 0.7 acre of the estate to the 2<sup>nd</sup> appellant absolutely and to hold 1.42 acres in trust for married daughters. The appellants submits that the 2<sup>nd</sup> appellant should have gotten more by virtue of being a surviving spouse and having participated in the acquisition of the estate. They also submit that the 1<sup>st</sup> appellant has been discriminated as all the other children except him are getting 2 acres. The appellants have also asked that the respondent be condemned to pay costs as he is not a dependant or a son of the deceased and that he hijacked the succession cause in cahoots with Jedidah Kawira and Genesio Mugambi thereby forcing the appellants to incur costs in the succession cause and this appeal.

13 The respondent on his part has submitted that the deceased was polygamous and died intestate. He has also contended that the son of the deceased who died left behind children who should also be catered for. The respondent contends that where a deceased dies intestate and was polygamous, the provisions of **Section 40 of the Law of Succession Act** applies. He has faulted the appellants for contending that the married daughters should not have been considered. The respondents contends that leaving out the infringes on the constitutional rights as the law outlaws discrimination as provided under **Article 27** of the Constitution. The respondent has submitted that the trial court was fair and equitable in its distribution as it took care of married daughters and every dependant in a reasonable and equitable way. The respondent has cited an authority in *Kemfro African Ltd -vs- Lubia & Another* and urged this court not to disturb the judgment of the lower court.

14. This court has considered the appeal and both the written submissions by both parties. I have also perused through the authorities cited. With due respect to the respondent's counsel, the authority cited in the case of *Kemfro Africa Ltd -vs- Lubia & Another* (correct citation *Civil Appeal No. 21 of 1984 Kemfro Africa Ltd T/A Meru Express Services and Gathogo Kanini - vs- Aziri Kamu Mudika Lubia & Another*) is irrelevant because in the cited decision the court was dealing with assessment of damages in a running down matter and whether an appellate court could interfere with the discretion of the trial court in assessment of quantum of damages payable in a running down case. In this appeal the issues before me are totally unrelated to the issues that were pending in that appellate court. The cited decision is therefore not useful to this court because we are not dealing with the question of any damages here. This court is dealing with probate and

issues to do with distribution of an estate of a person dying intestate leaving behind a surviving widow and children/dependants.

15. The main issue in this appeal is whether the trial court properly applied the law when distributing the estate of the Kanga Muranga (deceased) and whether the applicable provision is **Section 35 of Law of Succession Act** or **Section 40** of the same Act.

16. The other question of whether or not married daughters are entitled to the estate is now well settled. The **Law of Succession Act** under **Section 29** does not discriminate children of a deceased person based on gender. A dependant is a dependant within the meaning ascribed in that Section and they are treated as such as provided in that cited section. Furthermore under the provisions of **Article 27** of the Constitution of Kenya 2010 discrimination on the basis of inter alia gender or marital status is outlawed.

The cited provision of constitution provides as follows:-

**"Every person is equal before the law and has the right to equal protection and equal benefit of the law."** Subsection 4 is more elaborate as it states: **"The state shall not discriminate directly or indirectly against any person or any ground, including race, sex, pregnancy, marital status, culture ..... etc "**

The constitution commands all of us to treat people equally. So where the law provides that dependants of a deceased person (read children) are to be provided in the manner provided, they should all be provided equally. However exceptions do exist like where a dependant states expressly by way of renunciation or consent under **Rule 26 (2)** of Probate and Administration rules that he or she is not interested in the estate, then only then can they be excluded in the distribution of the estate. It is therefore incumbent upon an administrator or a petitioner in a succession cause to obtain such consent before he/she can justify exclusion of any dependant/child of a deceased person whether married or not.

17. The trial court though he appears to have erroneously pronounced himself that 2 married daughters to wit Hellen Kaari and Dorothy Muthoni were not entitled to a share because they seemed **"not to be interested in the estate."** However it made up for the error by providing that Damaris Ciakuthi as the 2<sup>nd</sup> appellant herein would hold 1.42 acres in trust for **"her married daughters"**. Of course her married daughters include Hellen Kaari and Dorothy Muthoni. This court for purposes of clarity hereby hold that the 2<sup>nd</sup> appellant Damaris Ciakuthi Kanga shall hold the shares going to her for her own benefit (life interest) and in trust for;

(i) Hellen Kaari Kanga

(ii) Dorothy Muthoni Kanga and

(iii) Elyjoy Wanja Kanga.

The three shall have equal share upon the end of the life interest of Damaria Ciakuthi Kanga.

In the premises this court does not find any merit on ground 2 & 3 of the Memorandum of Appeal because as I have observed above the married daughters are also entitled to a share and the trial court gave them a share which in my view is equitable and none of those named daughters have complained about the share given to them.

18. The law under **Section 35 of Law of Succession Act** gives a widow who remains unmarried life interest on the estate and the trial court having given her life interest on about 2 acres of the estate in my view does not disclose that the trial court was unfair or discriminatory against the 2<sup>nd</sup> appellant.

All the beneficiaries were given a share of approximately 2 acres and though the 1<sup>st</sup> appellant complains that others got more than 2 acres which to some extent is true, the difference is small because the other beneficiaries got more by 0.12 acres only. This court shall reduce the shares of Jedidah Kawira and Jenesio Mugambi in Karingani/Gitarene/1726 to 0.65 acres each and the share of Julius Mbuba the 1<sup>st</sup> appellant is increased to approximately 2.07 acres. The remaining acreage will cater for access or feeder roads.

19. The appellant has raised the ground the learned trial magistrate erred by not applying the provisions of **Section 35** of the **Law of Succession Act** in regard to the interest of the 2<sup>nd</sup> appellant. This court finds that the 2<sup>nd</sup> appellant appears mixed up in her grievances against the Judgment of the lower court because on one hand she says she was only given 0.7 acres and to her she was entitled to more than that as a widow but on the other hand she contends that she is only entitled to the life interest net estate of the deceased as per the provisions of **Section 35 of Law of Succession Act**. In my view what belies this apparent inconsistent contention is the interests of the first appellant which appears irreconcilable with the dictates of the law and the interest of the 2<sup>nd</sup> appellant. The underlying fact in this appeal is the fact that the 1<sup>st</sup> appellant appears to have felt more entitlement to the estate than the other children because of his allegations of having redeemed part of the estate when the deceased faced financial challenges at some point in his life. The trial court in my view correctly found no basis for the 1<sup>st</sup> appellant claims because apart from lacking documentary proof, the trial court correctly found that if the 1<sup>st</sup> appellant felt he needed to be compensated, he should have addressed that issue with the deceased in his lifetime and the deceased could have dealt in any way he felt or deemed fit. No one would have questioned that. But turning up with such claim after the demise of the deceased is in my unfounded and belated at best.

20. This court also finds that the deceased in the cause giving rise to this appeal was polygamous though by the time of the hearing of the protest only the 2<sup>nd</sup> appellant was the surviving spouse who had not remarried. I have perused the affidavit of the 1<sup>st</sup> appellant sworn on 2<sup>nd</sup> April 2014 at the lower court giving the following details.

a) 1<sup>st</sup> house- Damaris Ciakuthi Kanga

- (i) Julius Mbuba Kanga
  - (ii) Mutegi Kanga (deceased) - survived by Kesiah Karimi and Liz Makena.
  - (iii) Hellen Kaari Kanga
- b) 2<sup>nd</sup> house - Jennifer Muiru (who is said to have been re married)
- (i) Dorothy Muthoni Kanga (deceased)
  - (ii) Genesio Mugambi Kanga &
  - (iii) Ellyjoy Wanja Kanga.

Interestingly in his proposal on the distribution of the estate, the 1<sup>st</sup> appellant did not invoke the provisions of **Section 35 of Law of Succession Act** which he now wishes to be invoked. He had suggested that he should get commutately 2.25 acres while the other beneficiaries including the 2<sup>nd</sup> appellant should get less than 2 acres. His proposal for good reasons found no favour with the trial court because the law obviously could not be bent to suit his perceived entitlement to a bigger share. More important however is the fact that even if the trial court was to apply the provisions of **Section 40 of the Law of Succession Act** the appellants' share would not have been any different significantly because the number of children in each house are coincidentally equal so with the addition of the 2<sup>nd</sup> appellant as an additional unit as per the provisions of **Section 40 of Law of Succession Act** the distribution of the estate adopted by the trial court largely reflects the number of units and the share per unit which is approximately 2 acres each.

In view of the foregoing save as I have observed above this court finds merit only to the extent observed above which for purposes of clarity is reiterated below. The estate of the late Kanga Murang'a (deceased) shall be distributed as follows:-

**(A) L.R. Karingani/Gitarene/162**

- (i) Jedidah Kawira - 1.42 acres -to hold in trust for herself and Irene Kambura and Raymond Munene.
- (ii) Jenesio Mugambi - 1.42 acres
- (iii) Damaris Ciakuthi Kanga - 1.42 acres -to hold it for own benefit (life interest) and in trust for Hellen Kaari Kanga, Dorothy Muthoni Kanga and Ellyjoy Wanja Kanga.

**(B) L.R. Karingani/Gitarene/1067**

- i) Margaret Ciandeke - 2 acres - to hold it in trust for herself and for Linus Mwiti, Samuel Munene, Jackin Kirimi, Peninah Kainyu. Morris Muboreri and Peter Murithi.
- (ii) Sena Kaari - 1.75 acres - to hold it for herself and in trust for Keziah Karimi & Liz Makena.

**(C) L.R. Karingani/Gitarene/1726**

- (i) Julius Mbuba Kanga - 2.07 acres
- (ii) Jedidah Kawira - 0.65 acres - to hold in trust for Irene Kambura and Raymond Munene.
- (iii) Jenesio Mugambi - 0.65 acres
- (iv) Damaris Ciakuti Kanga - 0.7 acres
- (v) Sena Kaari - 0.3 acres to hold it in trust for Keziah Karimi and Liz Makena.

This is a family matter and I do not find it just to condemn any party to pay costs. The appellants have blamed the respondents for the long time this matter has taken to resolve but I do not find any fault on the part of M'Nairobi Njeru because despite the fact that he is not a beneficiary, the entire family of the deceased agreed to choose him as an administratrix of the estate of the deceased and none of the beneficiary including the appellants herein raised a finger against him at the trial court during succession proceedings. They certainly cannot blame him at this stage of appeal. So each party shall bear own costs.

**Dated, signed and delivered at Chuka this 18<sup>th</sup> day of December, 2018.**

**R.K. LIMO**

**JUDGE**

**18/12/2018**

Judgment signed, dated and delivered in open court in presence of Mugo for appellant and in the absence of Kijaru for respondent.

**R.K. LIMO**

**JUDGE**

**18/12/2018**