REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESSION CAUSE NO.16 OF 2010

IN THE MATTER OF THE ESTATE OF THE LATE GEORGE CHERIRO CHEPKOSIOM (DECEASED)

JOSPHINA CHEPTONUI CHEPKOSIOM…..1ST PETITIONER

MARIA C. CHEPKOSIOM……..…….....2ND PETITIONER

JUDGMENT

1. This matter relates to the estate of **George Cheriro Chepkosiom** who died on 22nd February 2008 at the age of 81. He was survived by two widows, Josphina Cheptonui Chepkosiom and Maria C. Chepkosiom, and 12 children. The beneficiaries of his estate are as follows:

1st House

a) Josphina Cheptonui Chepkosiom widow 77 years

b) Peter K. Mibei son 61 years

c) Alice Chebet daughter 59 years

d) Stephen K. Mibey son 57 years

e) Evaline Chepngeno daughter 55 years

f) David Mibei son 53 years

g) Erick Mibey son 49 years

h) Reuben Mibei son 49 years

i) Nelson Mibei son 47 years

j) Lily Chemutai daughter 47 years

k) Linet Chepngetich daughter 45 years

l) Joyce Chelangat daughter 43 years

2nd House

a) Maria Chepkosion- widow 55 years

b) Weldon Mibei son 30 years

c) Caroline Chepkorir daughter 28 years

d) Geoffrey Mibe son 26 years

e) Janeth Chepkemoi daughter 24 years

f) Anderson Mibei son 22 years

g) Sandrah Chelangat daughter 20 years

h) Patrick Mibei son 18 years

2. The estate of the deceased comprised a parcel of land known as L.R. No.Kericho/Kipsonoi S. S./83 measuring approximately 56 acres (23 hectares). A grant of letters of administration intestate was made to the two widows on 17th April 2013.

3. On 29th January 2014, an application for confirmation of grant was filed on behalf of the petitioners. It was supported by an affidavit sworn by the 2nd petitioner, Maria C. Chepkosiom, sworn on 29th January 2014. In the said affidavit, the 2nd petitioner proposed that the estate of the deceased be distributed as follows:

a. Josphina Cheptanui Chepkosiom widow 4 acres

b. Peter K Mibey son 4 acres

c. Stephen K. Mibey son 4 acres

d. David K. Mibey son 4 acres

e. Reuben Kipkorir Mibey son 4 acres

f. Erick Mibey son 4 acres

g. Nelson Mibey son 4 acres

h. Lily Chemutai daughter 2 acres

i. Maria Chepkosiom widow 4.8 acres

j. Janet Chepkemoi daughter 2 acres

k. Weldon Mibey son 4.8 acres

l. Geoffrey Mibey son 4.8 acres

m. Anderson Mibey son 4.8 acres

n. Patrick Mibey son 4.8 acres

4. However, in an affidavit of protest sworn on 11th March 2014, the 1st petitioner, Josphina Cheptonui Chepkosiom, protested at the mode of distribution of the estate proposed by her co-petitioner. It was her

averment that she had no objection to the grant being confirmed as six months had elapsed since it was issued. However, she averred that her co-petitioner's affidavit was composed of grave omissions and misrepresentation of facts in that the 2nd petitioner had not given the full disclosure of all the surviving dependants of the deceased, which the 1st petitioner then sets out.

5. She further avers that the estate of the deceased comprised **L.R. No. Kericho/Kipsonoi S.S./83** measuring approximately 56 acres (23 hectares) which she had acquired jointly with the deceased on 29th September, 1964. She contends that she substantially contributed towards the payment of the loan until completion in 1976 when the land was registered in the name of the deceased.

6. According to the 1st petitioner, the 2nd petitioner got married to the deceased in 1976, and she therefore came to the picture long after the land had been acquired and the loan fully paid off. It is therefore her averment that she ought to get at least 10 acres of the land in recognition of her substantial contribution towards the acquisition of the land. The remaining 46 acres can then be shared equally amongst all the beneficiaries in accordance with section 40 (1) of the Law of Succession Act. In the proposed mode of distribution set out in her affidavit, she gets 12.3 acres while the other beneficiaries, including all the daughters of the deceased, five of whom had been left out, and the 2nd petitioner, get 2.3 acres each.

7. In submissions filed on her behalf dated 6th October 2014, the 1st petitioner reiterates the averments in her affidavit. She refers to the provisions of section 40 of the Law of Succession Act in which it is provided that the estate of a deceased person should be divided between the houses, taking into account the number of children in each house. She submits, however, that the courts should consider the unfairness of the provision to widows who are treated the same as children. Her submission is that this unfairness is particularly glaring where the first wife participated in the acquisition of part of the estate but in the end has to take a share equal to that of the younger wife who is married many years after the acquisition of the bulk of the estate, and who has contributed very little, or not at all, as in the case of the 2nd petitioner, to the acquisition of the estate. She submits that what she is seeking is for the toil, efforts and sweat that she put to the acquisition of the estate be recognized and rewarded.

8. The 1st petitioner also complains that the 2nd petitioner left out the married daughters of the deceased. She observes that the law does not discriminate between married and unmarried daughters. She relies on, *inter alia,* the decisions of the court in **Rono vs Rono CACA No.66 of 2002; Peter Kiiru Gathemba & 6 Others vs Margaret Wanjiku & Another Nairobi HCCA No.167 of 1994** and Estate of **Mariko Murumbi Kiiru (deceased) HCSC No.2011 of 1997.**

9. In her replying affidavit sworn on 5th August 2014, the 2nd petitioner concedes that she did leave out Alice Chebet, Evaline Chepngeno, Joyce Chelangat Linet Kipngetich and Caroline Chepkorir. She avers, however, that these daughters of the deceased are married and have no interest in the estate.

10. With respect to the averment by the 1st petitioner that she contributed to the payment of the loan for the land, the 2nd petitioner avers that it is untrue that there was a contribution made towards payment of the loan. She further takes the position that the 1st petitioner's claim to a large proportion of the estate is unjustifiable. In her view, the mode of distribution that she had proposed is fair as it gives each of the beneficiaries a larger share.

11. In submissions made on her behalf, it is argued, first, that the deceased was a civil servant and purchased the land from his salary. As the 1st petitioner had not tendered proof of her contribution, her claim to a larger share should be disregarded.

12. Further, it is the 2nd petitioner's submission that the applicable law in respect of the estate where the deceased was polygamous is section 40 of the Law of Succession Act, and the court has no discretion in the matter. She relies in support on the decision of Koome J (as she then was) in **Estate of Mwangi Giture (Deceased) 2004 eKLR** and Makau J's decision in **Succession Cause No. 110 of 2010-In the Matter of the Estate of Samwel Miriti (Deceased) M M M'M vs A I M (2014) eKLR**. In her view, the

estate of the deceased must be distributed in accordance with the provisions of section 40.

Analysis and Determination

13. I have considered the averments of the parties, and the mode of distribution of the deceased's estate that each proposes. I have also considered the authorities relied on, and the relevant provisions of the law cited. In my view, three main issues arise for determination:

i. Whether married daughters have a right to inherit;

ii. Whether the proposed mode of distribution of the estate between the houses is fair;

iii. Whether the 1st petitioner should get a larger share of the estate.

Inheritance Rights of Daughters

14. I will begin by considering the mode of distribution proposed by the 2nd petitioner in the affidavit sworn in support of the application for confirmation of grant with respect to the married daughters of the deceased. The law is that there is no distinction between female and male children of a deceased person, regardless of their marital status. Unless they expressly renounce their interest in the estate, daughters of the deceased cannot be disinherited simply on the basis that they are married. This contravenes not only the provisions of section 38 of the Law of Succession Act, but also the express non-discrimination provisions of Article 27 of the Constitution. See in this regard the decision of the Court of Appeal in **Rono vs Rono** (supra).

15. In so far, therefore, as the mode of distribution proposed by the 2nd petitioner purports to leave out five children of the deceased on the basis that they are married daughters, without their having renounced an interest in the estate, the mode of distribution that she proposes is unacceptable.

Distribution between houses

16. Secondly, the mode of distribution proposed by the 2nd petitioner discriminates against the 1st house. It allocates to the 2nd petitioner and her sons 4.8 acres each, while the 1st petitioner and her sons are allocated 4 acres each. The two daughters of the deceased who are allocated land under the 2nd petitioner's mode of distribution are allocated 2 acres each. Given that the 2nd petitioner argues strongly in favour of a distribution of the deceased's property on the basis of the Law of Succession Act, it is hard to understand the basis on which she allocates herself and her male children a higher share than the 1st petitioner and her male children, and the daughters of the deceased. The mode of distribution proposed by the 2nd petitioner is therefore unacceptable and in contravention of the law on two levels: It discriminates against daughters on the basis of their marital status, and it gives a larger share to the 2nd petitioner and her sons, with no legal basis.

Whether the 1st Petitioner should get a larger share of the estate

17. A more complex problem is raised by the mode of distribution proposed by the 1st petitioner. She claims a larger share of the estate on the basis that she contributed to the acquisition of the land forming the deceased's estate. The land, according to the 1st petitioner, was purchased in 1964 by way of a loan. The loan had been paid off by 1976, when the deceased married the 2nd petitioner. She relies on a letter dated 4th December 2013 from the Ministry of Lands, Housing and Urban Development, signed by the District Land Adjudication and Settlement Officer, Kericho/Bomet. The letter, which is addressed to her Advocates on record, is in the following terms:

KIPKORIR TELE & KITUR ADVOCATES

P. O. BOX 2080-20200

KERICHO

RE: KERICHO/KIPSONOI SETTLEMENT SCHEME PLOT NO.83 ESTATE OF GEORGE CHERIRO CHEPKOSIOM

This is in reference to your letter Ref:KK/099/13 dated 11th November 2013 over the above land matter.

This is to confirm to you that the late George C. Chepkosiom was allocated parcel No.83 situated in Kipsonoi settlement scheme on 29th September 1964 as per the letter available in our records.

According to report held in this office George C. Chepkosiom was supposed to pay a land loan and other fee amount to Kshs.6,680/- and a development loan of Kshs.3,000/-.

This payment was to be done in installments as per the conditions of settlement fund trustee.

Upon fulfilment of SFT condition, SFT discharged parcel no.83 under the name of George C. Chepkosiom and the discharge of charge and transfer documents is awaiting collection from this office upon presentation of grants of letters of administration intestate and certificate of confirmation from the court of law in the Republic of Kenya.

Thank you.

Yours faithfully,

ALI H. CHEMASUET

DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER

KERICHO/BOMET

18. As noted earlier, the 2nd petitioner disputes this. She argues that the deceased was a civil servant and purchased the land from his salary; that the property was not purchased by way of a loan; and thirdly, that the 1st petitioner was a housewife and could not therefore have contributed to the payment of the loan for the land. She further asserts, citing section 106 and 107 of the Evidence Act, that the 1st petitioner has not tendered proof that she contributed to the purchase of the land.

19. I begin by considering the mode of purchase of the land. From the letter annexed to the 1st petitioner's affidavit, which is not challenged by the 2nd petitioner in her affidavit in reply sworn on 5th August 2014, it is evident that the land comprising the estate was bought by way of a loan. It was bought in 1964, and, according to the deposition of the 1st petitioner, which is not challenged, paid off by 1976. That was the period before the 2nd petitioner was married to the deceased, the evidence before the court being that she was married in 1976. That being the case, she has no basis for asserting that the land was not bought by way of a loan, or that the 1st petitioner did not contribute to the purchase of the land.

20. Having so found, two other issues arise: the first is whether, as the 2nd petitioner argues, the court has no discretion but to apply the provisions of section 40 of the Law of Succession Act; and the second and related question is whether, in circumstances such as this, the court can grant the 1st petitioner a larger share of the estate of the deceased.

21. 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.

22. In **Succession Cause No. 1033 of 1996- In The Matter of the Estate of Mwangi Giture (Deceased**) **(supra),** Koome J (as she then was) was called upon to consider the question. The first widow in the case had been married in 1939, while the second was married in 1960, 21 years later. The court noted that the major properties of the estate were purchased before the second widow was married.

23. The court found that the law applicable to the estate of the deceased was the Law of Succession Act, section 40 of which dealt with the distribution of the estate of a person who had been polygamous. While acknowledging the unfairness of the mode of distribution provided under the section, the court observed as follows:

> ***"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 notarily (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 protester 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."***

24. Makau J expressed similar sentiments in his decision in **Succession Cause No. 110 of 2010- In The Matter of The Estate of Samwel Miriti (Deceased) M M M'M vs A I M** which Counsel for the 2nd petitioner has referred this court to. The question before the court was whether the estate of the deceased should be distributed in accordance with section 40 of the Law of Succession Act, or whether the first widow should get a larger share. The court expressed the following view:

> ***16. "In the instant application the 1st petitioner is opposed to equal distribution while the interested party/2nd petitioner seeks and favours distribution according to Section 40 of the Law of Succession Act. This court is bound by Section 40 of the Law of Succession Act and has no discretion. The section clearly provides that the estate be divided between the houses taking into account the number of children in each house. It is fortunate that the two houses have equal number of children. <u>However this court shall not shut its eyes to unfairness meted on a deceased's widows who are not allowed to take an extra share and whose efforts in acquisition of the properties are ignored and treated merely like children of the deceased not withstanding having been equal partners with the deceased. It is further unfortunate when the first wife who sacrificed a lot of her energy and who participated in the acquisition of the greater part of the deceased estate and even in situation where the properties are solely acquired by the first wife</u>***

but registered in husbands have ended up being shared equally among all the wives not taking into account of less contribution by the younger wife who is married after acquisition of the bulk of the properties if not all the estate and who has contributed very little or nothing towards the acquisition of the estate. It is the court's hope that the unfairness to widows, and discrimination on first wife as reflected under Section 40 of the Law of Succession Act will soon be corrected so that the distribution of the deceased estate takes into account the contribution of the first wife and that of the 2nd wife or any other wife and the shares of the wife or wives is calculated differently from that of children who are treated as the same as their mother. (Emphasis added)

25. A different approach to this issue was taken by Kimondo J sitting at the High Court in Eldoret in **Probate and Administration Cause No. 244 of 2002-Re Estate of Ephantus Githatu Waithaka (Deceased) Esther Wanjiru Kiarie vs Mary Wanjiru Githatu** (Hereafter **"Estate of Githatu Waithaka case"**). The case pitted the petitioner, whom both the High Court and Court of Appeal had found to be a wife of the deceased for purposes of succession, against the objector, the first wife of the deceased. The objector had married the deceased in 1968, and her contention was that the majority of the assets comprised in the estate had been acquired between 1968 and 1984, before the petitioner married the deceased in 1986. She claimed that the assets were acquired jointly with the deceased, and consequently, a resultant trust evolved in her favour. Her case therefore was that she was entitled to half of the estate acquired prior to 1984. She proposed that she should be allocated half of those properties, and that the balance of the estate be shared equally between the two houses.

26. Her position was challenged by the petitioner, whose case was that both the petitioner and objector were unemployed housewives and all the assets were purchased by the deceased. Her proposal, therefore, was that the estate of the deceased should be distributed in accordance with the provisions of section 40 of the Law of Succession Act.

27. In his Further Judgment dated 8th March 2016, Kimondo J posed the question that Koome and Makau JJ had been called upon to determine, and which is now before me, in the following terms:

"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."

28. Kimondo J considered as the starting point the provisions of section 40 of the law of Succession Act, which deals with the distribution of the estate of a polygamous intestate person. He also considered the view expressed by Koome J that she had no option in light of section 40 of the Law of Succession Act. In his view, however, in reliance on the decision of the Court of Appeal in **Rono vs Rono** (supra), section 40 does not take away the discretion of the court to distribute the estate of a deceased person fairly. In the court's view, sections 27, 28 and 35 of the Act clothe the court with wide discretion to provide for dependents or beneficiaries. In the words of Omollo J A in **Rono vs Rono**:

"I had the advantage of reading in draft form the judgment prepared by Waki, JA, and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned judge to be laying down any principle of law that the Law of Succession Act, Cap 160 of the Laws of Kenya, lays down as a requirement 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 as was submitted before us by Mr. Gicheru. I can find no such provision in the Act". (Emphasis added)

29. Kimondo J took oral evidence from the parties. On the basis of that evidence, he found that the majority of the landed properties registered in the name of the deceased were acquired between 1968 and 1984, during the marriage of the deceased and the first widow, and only one property, three motor vehicles and shares in three companies were acquired after the 2nd widow came on the scene. He also found that the first widow was assisting the deceased in running his businesses, and thus made non-financial contribution to the acquisition of the properties. He dismissed the argument by the petitioner that the first widow did not contribute to the purchase of the properties on the grounds, first, that she was

not there during the acquisition of the properties and secondly, she did not contribute to their purchase or development in any manner. His conclusion was that:

> ***"27. <u>Granted that evidence, it would lead to serious injustice to apply section 40 blindly in this case. The section does not completely tie the hands of the court.</u> See Rono v Rono & another [2005] 1 KLR 538, Rael Vulekani Musi v Rachael Edagaye Akola, Eldoret, High Court P&A 5 of 2013 [2016] eKLR. I am also fortified by the decision of Koome J (as she then was) in Re Mwangi Giture (Deceased) High Court at Nairobi, Succession Cause 1033 of 1996 [2004] eKLR cited by Mr. Momanyi, learned counsel for the petitioner. The learned judge lamented that section 40 of the Act led to inequality by relegating the 1st widow to the same position as the youngest child of the subsequent widows…."*** (Emphasis added)

30. After setting out the sentiments of Koome J which I have set out earlier in this judgment, Kimondo J proceeded to opine as follows:

> ***"28. I agree with those sentiments. The judge however felt her hands were tied by the Act and called for law reform. But Rawal J (as she then was) in Dorcas Wangari Macharia v KCB & 2 others, Nairobi, High Court, Civil Case 18 of 2003 (O.S) (unreported) had a more progressive approach. She held as follows-***
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> > ***"If a widow is an owner as a tenant in common with the deceased or a joint tenant along with the deceased in respect of a property, her rights and liabilities in law over the said property shall survive even after the demise of her husband. This position should be recognized and cannot be ignored as per the law and principles of equity".***

31. The Learned Judge proceeded to hold that the objector was entitled to half of the properties acquired prior to 1984. It was his finding that the objector in that case had been able to prove that the deceased held the property, which was registered in his name, in trust for her, and she had therefore discharged the burden to prove the trust as required under section 107 and 109 of the Evidence Act.

32. I agree in substance with the reasoning and final decision of my brother Kimondo J in the **Estate of Githatu Waithaka** decision. I am of the view that the unfairness and discrimination that their Ladyship and Lordship, Justices Koome and Makau J decried in their respective judgments, can only be properly addressed by considering the contribution of the widow to the acquisition of property, and taking this contribution into account when determining what she is entitled to in a succession cause to the estate of a polygamous deceased person who dies intestate.

33. To equate the widow to children, or the first widow to widows who enter the home decades later, who may be the age of the first widow's children and made no contribution to the acquisition of the estate registered in the name of the deceased, is to perpetrate an injustice against women that cannot be justified under any circumstances. For the courts to perpetuate the perpetration of the injustice on the basis of section 40 of the Law of Succession Act is to abdicate their constitutional responsibility to do justice. The principle of equality and non-discrimination is at the core of the sovereign law of this land, the Constitution. For a court, therefore, to apply any law in a manner that is discriminatory on the basis of sex, or any of the prohibited grounds of discrimination, or to apply a provision of the law that is discriminatory, as section 40 admittedly is, or to consider itself bound by such discriminatory law, is to fail to meet the constitutional demands imposed on it.

34. However, there is yet another injustice that is manifest in the way the law treats women, and which is demonstrated in the decision of Kimondo J in the **Estate of Githatu Waithaka** case: The first widow had to jump through hoops, as it were, to prove her entitlement to a share of the estate on the basis that she contributed to its acquisition. She had to file an application by way of originating summons in the succession cause, and tender evidence, in order to prove that she had contributed to the purchase of the property that was acquired between 1968 and 1984, and was therefore entitled to half of it.

35. She had to do this because the petitioner, who came to the picture in 1986, alleged that she had not

contributed to the purchase of the properties. She had, in other words to, as it were, contend with the second wife, who came into her marriage almost twenty years after she was married, and two years after all but a few of the properties comprising the estate had been acquired, on whether or not she had made a contribution to the acquisition of the properties. A person who, as Kimondo J reiterated, simply was not there during the acquisition of the property and therefore had no basis for challenging the objector's claim.

36. The road to justice for women in relation to family properties has been fraught with many difficulties. In the hopeful years of the 1990s, the decision of the Court of Appeal in **Kivuitu v. Kivuitu [1990-1994] E.A. 27** recognized the role of women in the acquisition of property within the family, even where the women were not formally employed. In his decision, Masime, J.A. stated as follows:

> ***"And, even where only the husband is in the income earning sector the wife is not relegated to total dependence on him without an ability to make some reasonable contribution towards the economic management of their family. It is no longer right to assume, as was done under customary law that the wife was totally dependent on the husband and not capable of contributing at all or substantially to the development of the household and increase in the family wealth."***

37. In the same decision, Omolo, Ag. J.A (as he then was) expressed the following view:

> ***"For my part I have not the slightest doubt that the two women I have used as examples have contributed to the acquisition of property even though that contribution cannot be quantified in monetary terms. In the case of the urban housewife, if she were not there to assist in the running of the house, the husband would be compelled to employ someone to do the house chores for him; the wife accordingly saves him that kind of expense. In the case of the wife left in the rural home, she makes even bigger contribution to the family welfare by tilling the family land and producing either cash or food crops. Both of them however, make a contribution to the family welfare and assets.... Where, however such property is registered in the name of the husband alone then the wife would be, in my view, perfectly entitled to apply to the court under Section 17 of the Married Women's Property Act of 1882, so that the court can determine her interest in the property, and in that case, the court would have to assess the value to be put on the wife's non-monetary contribution."***

38. The view of Kwach, JA in **Nderitu v. Nderitu [1995-1998] E.A. 235**, was that the view expressed in the Kivuitu case :

> "***Settles what the law is in Kenya on the point of indirect contribution. A wife's contribution and more particularly a Kenyan African wife will more often than not take the form of a backup service on the domestic front rather than a direct financial contribution."***

39. These decisions, however, predated the decision in **Echaria vs Echaria [2007] 2 EA. 139** in which the court held that a wife had to prove direct or indirect financial contribution to the acquisition of property during marriage.

40. What these cases show is that ***in a dispute between a husband and wife***, where the wife claims a share in property registered in the name of her husband upon the dissolution of marriage, she has to prove a financial contribution, direct or indirect, towards the acquisition of the property.

41. The 2nd petitioner in the case before me submits that the objector did not prove that she contributed to the acquisition of the property comprising the estate. In the **Estate of Githatu Waithaka** case, the objector had to prove that she contributed financially to the acquisition of the property acquired when her marriage to the deceased was monogamous. In other words, ***she had to prove in a succession cause against a co-wife what she would have had to prove in a dispute over matrimonial property with her spouse upon dissolution of her marriage through divorce*.** Since her spouse had died, she was now having to prove her contribution in a dispute with a person who came into the picture after the property

had been acquired, and who had no knowledge of the relations and dealings between the deceased and his first wife.

42. The 1st petitioner in this case has referred the court to the provisions of section 106 and 107 of the Evidence Act. I believe that, as between a husband and wife in a suit for division of matrimonial property, that is perhaps, a reasonable burden to impose on a woman. However, as between a widow, such as the 2nd petitioner/protestor in this case, or the objector in the **Estate of Githatu Waithaka** case, against a co-wife married decades later, it is a patently unfair requirement.

43. It appears to me that section 119 of the Evidence Act best serves the interests of justice in circumstances such as are before me. Titled "**Presumption of likely facts**", it provides as follows:

> ***"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."***

44. It seems to me that when a man and woman have been married for a period of time, in this case over ten years, and they have acquired property in that period, it is a safe presumption to make that they both contributed directly or indirectly, to the acquisition of the property. Where the dispute is between the husband and wife over distribution of matrimonial property at the dissolution of marriage, it is fair and reasonable to demand that a wife discharges the burden imposed by section 107 of the Evidence Act that:

> ***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

45. In a succession matter, it is an unfair imposition to demand it of a widow as against a person who is a stranger to the events and circumstances relating to the acquisition of the property, that person not having been there at the time of its purchase.

46. In the present case, the 2nd petitioner was not there at the time the property was purchased in 1964. She was not there in the ten year period during which the loan for the property was paid. She came to the scene after the property had been acquired. In my view, it is unjust to demand that the 1st petitioner proves her contribution to the acquisition of the property. She may have been a housewife in the period the deceased paid for the property, but it is safe to presume that she contributed in other ways, including bearing her ten children with the deceased, looking after them and the deceased, as well as looking after the home, perhaps tilling the land and producing food and cash crops, and her contribution cannot be disregarded, or questioned by or at the behest of someone who arrives twelve years later.

47. I note that the 1st petitioner proposes that she be given 10 acres out of the 56 acres comprising the estate in recognition of her contribution to the acquisition of the land. This represents about a quarter of the property that she and the deceased acquired before the deceased married the 2nd petitioner.

48. I believe that this is a fair and reasonable demand in the circumstances of the case, and it leaves the bulk of the estate, comprising 46 acres, which shall be considered to constitute the free estate of the deceased, to be distributed in accordance with section 40 of the Law of Succession Act. Accordingly, it is my finding therefore, and I so hold, that the 1st petitioner/objector is entitled to 10 acres out of the 56 acres of the land comprising the estate of the deceased.

49. I might add that this accords with the direction that the law on matrimonial property has taken in relation to polygamous marriages, as exemplified in the **Matrimonial Properties Act, Act No. 49 of 2013**, section 8 of which provides that:

> ***(1) If the parties in a polygamous marriage divorce or a polygamous marriage is <u>otherwise dissolved</u>, the—***

(a) matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife; and

(b) matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives."

50. The 2nd petitioner deposes in her affidavit in reply to the protest by the 1st petitioner that she had not included some of the daughters of the deceased in the distribution as they did not have an interest in the estate. However, as there is no evidence before me in this regard, it is necessary that any beneficiary not interested in the estate of the deceased files an affidavit renouncing such interest, such affidavit to be filed within the next (30) days of today to enable the court issue final orders with respect to the distribution of the estate.

Dated, Delivered and Signed at Kericho this 28th day of February 2017.

MUMBI NGUGI

JUDGE