

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HCC SUCC. NO. 51 OF 2015

(Formerly Naivasha Succ No. 60 of 2008)

IN THE MATTER OF THE ESTATE OF KAMUNGE GICHIRI (DECEASED)

STEPHEN KARIUKI KAMUNGE.....1ST PETITIONER/OBJECTOR

VERSUS

JOSEPH MWAURA KAMUNGE.....2ND PETITIONER/RESPONDENT

RULING

1. The deceased, **Kamunge Gichiri**, died on 1st May 1973 but it was not until late 2008 that this succession case was filed. At the time, the 2nd wife of the deceased, **Wangui Kamunge** had died on 7th October, 1992. She is the mother of **Stephen Kariuki Kamunge**, the 1st Petitioner. Her estate comprising of a parcel of **land No. 1126 Kiambogo Settlement Scheme** devolved upon her only surviving son **Stephen Kariuki Kamunge** pursuant to a grant issued and confirmed in Nakuru High Court Succession Cause No. 239 of 1998.
 2. The said sole heir is the 1st Petitioner herein together with a step brother and son of the 3rd wife of the deceased herein, known as **Joseph Mwaura Kamunge** (2nd petitioner). The 2nd Petitioner's mother was **(Naomi) Nyambura Kamunge** who died in 2002. She had four sons and five daughters who survived her. The sons are the second Petitioner, **Evans Kinyanjui (Deceased)**, **Samuel Njuguna (Deceased)**, and **John Njoroge**. The daughters are allegedly married but are not named. The deceased brothers are represented in the Petition by their widows, namely **Milka Wangui Kinyanjui** and **Mary Njoki Njuguna** respectively.
 3. The deceased herein was also survived by dependants namely, **Tabitha Wangui Wanjiru**, a daughter of **Wanjiru Kamunge** the deceased sister of the 1st Petitioner, **Johnstone Kamunge Ndungu**, the son of the 1st Petitioner's brother, now deceased, while **Reuben Kamunge Njoroge** is the son of **Waithera Kamunge**, now deceased, and sister to the 2nd Petitioner.
 4. The dependants are named in the petition along side two alleged purchasers namely **Esther Wangui Thuku** and **Stanley Mburu**. It is alleged that the said buyers bought land from the 2nd Petitioner and the widow **Milka Wangui Kinyanjui** (Respectively).
- I will be commenting on the alleged sale later on, but suffice to say that the 2nd Petitioner vehemently denies the allegation against him.
5. As is usually the case, the cause has generated rival camps within the family. While **John Njoroge Kamunge**, **Mary Njoki Njuguna**, **Milka Kinyanjui**, **Tabitha Wangui** and **Reuben Kamunge Njoroge** took sides with the 1st Petitioner, one **Johnstone Kamunge Ndungu**, a great grandson of the deceased herein, and son of one of the daughters of the deceased's son **David Ndungu Kamunge** named **Jane Wangui** supports the 2nd Petitioner. He asserts to be a beneficiary and supports the 2nd Petitioner against the 1st Petitioner.
 6. What appears to have caused the split in the family was the Summons for confirmation of the grant issued to the two Petitioners on 24th November, 2008.

The confirmation application however was brought by the 2nd Petitioner without involving the 1st Petitioner, and purported that the Applicant was the sole grantee of the grant sought to be confirmed. Besides, the 1st Petitioner was not included in the distribution proposed in the said summons.

7. This prompted the 1st Petitioner to file an Affidavit of protest against confirmation of grant on 21/4/2009 Under Rule 40 (6) of the Probate and Administration Rules. The said affidavit, in addition to emphasizing the identities of the beneficiaries and dependents also proposed a different mode of distribution. The foregoing are matters that are collated from a reading of the various filings of the parties and affidavits on record. After the matter was referred to this court on 6/8/14 the court gave directions to proceed by way of affidavits.
8. I have considered all the material related to the protest. At the heart of the dispute are two questions, namely, whether the 1st Petitioner is entitled to benefit from the distribution of the estate of his late father comprising of land parcel No. **NYANDARUA/NJABINI/22 measuring 10.3 acres.**

Related to the question is the undisputed fact that the 1st Petitioner is the beneficiary of the plot No. **1126 Kiambogo Settlement Scheme** which was allegedly purchased by his mother ten years after the death of the husband (deceased herein).

9. Evidently, the two Petitioners have serious disagreements on how the property of the deceased's estate is to be shared. On one hand the 1st Petitioner and those members of the family allied to him assert that the mode of distribution had earlier been agreed by the family as proposed in the affidavit of protest, while the 2nd Petitioner proposes that the estate be shared as he proposed in paragraph 20 of his affidavit filed on 7th October, 2015.

10. This, he says, is because he participated in making the payments to the Settlement Fund Trustees, which the 1st Petitioner disputes and for his part claims to have equally participated in contributing towards the purchase. Hence the court must determine the basis upon which the estate is to be shared, by the identified beneficiaries.

11. In this regard, I have considered all the submissions made by the respective parties and the rival affidavits. Starting with the applicable law which determines the basis of distribution, it is clear that the deceased was a polygamous man. He had three wives the first of whom pre-deceased him. The only child of the first wife, **Wangui Kamunge** was **Mwihaki Chiira** and is deceased. The other wives were:

(a) Wangui Kamunge (2nd wife)

(b) Nyambura Kamunge (3rd wife)

12. The 2nd and 3rd wives apparently survived the deceased although they died before the succession cause herein was filed. Both were survived by children. Section 40 of the Law of Succession Act States:

“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.”

Hence, the estate of the deceased ought to be shared in accordance with the houses of the two surviving wives and their children. As noted both the widows of the deceased are now deceased.

13. Regarding the entitlement of the 1st Petitioner to share in his father's estate, there is no evidence that the land at **Kiambogo Settlement Scheme** was a settlement made to his mother's house or himself by the deceased in terms of **Section 42** of the Law of Succession Act which states:

“Where- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house: or
(b) the property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35,
that property shall be taken into account in determining the share of the net intestate finally accruing to the child, grandchild or house.”

14. I say this because no evidence was tendered to controvert the documents tendered by the 1st Petitioner, including receipts in

the name of his mother in respect of the plot, which are dated ten years since the death of the husband. Also tendered were the grants in respect of the estate of the 3rd wife in the Nakuru Succession Cause No. 239 of 998. I note however that the 1st Petitioner was reticent concerning the acreage of the said property.

15. It would seem that there was no objection raised by any of the persons surviving the said widow, including the parties herein.

It is too late in the day for the 2nd Petitioner to assert, while producing no solid evidence that the Kiambogo land was a settlement in favour of the second house made by the deceased before his death. Equally, this present cause cannot be turned into forum to correct any alleged injustice perpetrated against other alleged beneficiaries of the estate of the 2nd wife by the 1st Petitioner herein.

16. However the 1st Petitioner benefited alone from his mother's estate. The 1st and 2nd Petitioners assert that they are entitled to the deceased's property in light of the contributions they made towards the payment of charge monies owed to the Settlement Fund Trustees in respect of the Nyandarua land. For his part, **John Mwaura Kamunge** a brother of the 2nd Petitioner has stated at Paragraph 13 of his affidavit that all three houses contributed in the settlement of the charge over the said land. Seemingly the Nyandarua land was also acquired by the deceased through a loan from the Settlement Fund Trustees

17. The undisputed fact of the matter however is that the said land was registered in the name of their deceased father, and whether or not any child made contributions, they are entitled to benefit from his estate in their capacity as children of the deceased.

18. Nothing therefore turns on the question who contributed more than other siblings or didn't. Section 40 of the Law of Succession which applies in this case does not qualify a beneficiary's shares to the estate on the basis of contributions made.

Nor does Section 38 which determines how distribution is to be done where an intestate is survived by children and no spouse. Thus, the deceased herein had two houses at the time of death and the children are entitled to a share of his estate.

19. In the second house only the 1st Petitioner is alive at present, as other siblings are dead. Also surviving is **Tabitha Wangui Wanjiru** a grand daughter of the deceased by his daughter **Wanjiru Kamunge, Johnstone Kamunge Ndungu**, grand child or great grandchild of the deceased through the 1st petitioner's brother now deceased, **David Ndungu Kamunge**. Accommodation has been proposed by either camp for the latter two beneficiaries who are identified as dependants of the deceased.

20. In the 3rd house, there were several children. Those named are:

- (a) the second petitioner
- (b) John Njoroge
- (c) Widow of Samuel Njuguna Kamunge by the name of Mary Njoki Njuguna.
- (d) Widow of Evans Kinyanjui Kamunge, by the name Milka Wangui Kinyanjui

Included as an identified dependant of the deceased for whom provision is to be made is **Reuben Njoroge Kamunge** a son to the deceased daughter of the second house known as **Waithera Kamunge**.

21. Regarding the three identified dependants, the parties herein have agreed that each of them being grand children are to receive ¼ acre out of the estate. All the dependants except Johnston agree to the arrangement. The reasons given by **Johnstone** for disapproval relates to the Kiambogo property, which as I have found does not in any way affect the 1st Petitioner's entitlement to inherit from the estate of the deceased father.

22. However, it is not lost on the court that the 1st Petitioner took all the land at Kiambogo and seemingly made no provision whatsoever for the brother's house including **Johnstone Kamunge Ndungu**, or his sister's daughter **Tabitha Wangui Wanjiru**. Thus it is just that these dependants be given due consideration. Equally, the 2nd house appears to have fewer beneficiaries than the 3rd house. Thus, it would not be fair to split the ten odd acres of land between the two houses equally, but rather to consider the units within each individual house.

23. In my view, the children of the deceased's unwed daughters and the grandson of his deceased son **Ndung'u** do not qualify for equal shares to the children of the deceased. Nonetheless they are deserving dependants as admitted by the parties, but the portions proposed to be given to them appear to be very small, as the lion's shares was to go the sons and son's widows.

24. More likely than not, the dependants have siblings too as evidenced by the reference to **Tabitha Wangui** "and others".

At any rate, the court has a duty to satisfy itself that a reasonable provision has been made for the dependants of a deceased person.

It is quite absurd for the 2nd Petitioner to demand 3.7 acres out of the estate of the deceased that comprises only 10.3 acres of land.

I also think that the 1st Petitioner ought to have made due provision in the mother's succession cause for the dependants or children of his sister and brother.

25. All considered, it seems that the fairest apportionment would be as

follows:

	NAME OF HEIR	DESCRIPTION OF PROPERTY	DISTRIBUTION OF SHARES
2ND HOUSE			
1	1 st Petitioner Stephen	Nyandarua/Njabini/22	1.65 acres

	Kariuki Kamunge		
2	Johnstone Kamunge Ndungu (Dependant)	Nyandarua/Njabini/22	0.25 acres
3	Tabitha Wangui (Dependant)	Nyandarua/Njabini/22	0.5 acres on her behalf and surviving children of her deceased mother, Wanjiru Kamunge
3 RD HOUSE			
1	2 nd Petitioner Joseph Mwaura Kamunge	Nyandarua/Njabini/22	1.85 acres
2	Mary Njoki (Widow of Samuel Njuguna Kamunge)	Nyandarua/Njabini/22	1.85 acres for herself and the children of the deceased husband
3	Milka Wangui (Widow of Evans Kinyanjui Kamunge)	Nyandarua/Njabini/22	1.85 acres for herself and the children of the deceased husband
4	John Njoroge Kamunge	Nyandarua/Njabini/22	1.85 acres
5	Reuben Kamunge Njoroge (Dependant)	Nyandarua/Njabini/22	0.5 acres for himself and any of the surviving children of the deceased mother Waithera Kamunge.
TOTAL			10.ACRES

26. With regard to the alleged purchasers of the land that comprises the estate of the deceased it is purported that they purchased the land from the children of the deceased herein.

The position of the law is very clear. No person can transact in the property of a deceased person without first seeking a grant of letters of administration in respect of the estate. **Section 45** of the Law of Succession Act forbids such intermeddling by stating that:

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

27. This court cannot be called upon to give sanction to any transactions made between the alleged purchasers **Esther Wangui Thuku** and **Stanley Mburu** and some of the beneficiaries, before the conferment of the confirmed grant upon the alleged vendors. That is what the parties would have the court do by including such parties as beneficiaries. This court is only concerned with the distribution of the estate between the actual beneficiaries and making provision for the dependants herein.

28. In view of all the foregoing, I will confirm the grant issued to the 1st and 2nd petitioners in both their names and order that the estate of the deceased be distributed as indicated at paragraph 25 herein.

Every party in the cause will bear own costs.

Delivered and signed this **21st** day of **April ,2016** at **Naivasha**

In the presence of:-

For the 1st Petitioner/Protestor Mr. Gichuki

For the 2nd Petitioner/Respondent Mr. Obino

CC Barasa

C. MEOLI

JUDGE