



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**SUCCESSION CAUSE NO. 460 OF 2012**

**IN THE MATTER OF THE ESTATE OF ROSEMARY MUKWANJERU KIRIA-DECEASED**

**JUDGEMENT**

**Rosemary Mukwanjeru Kria** (herein after referred to as the deceased) died intestate in 21<sup>st</sup> September 2011 leaving the petitioner herein **George Washington Kariuki Mwangi**, her husband and her daughter **Rhoda Kathambi Kariuki** (hereinafter referred to as the protestor).

The petitioner stated that at the time he married the deceased, the protestor was aged 12 years or thereabouts, but in her evidence in court, the protestor insisted that in 2008 when her mother was married by the petitioner, she was **18** years. The petitioner is not the biological father of the protestor.

The crux of the dispute is the mode of distribution of the deceased's estate which is said to include benefits/gratuity payable by the Ministry of Health amounting to **Ksh. 612,427.30** and Shares at **Afya Sacco Savings Society Ltd** worth **Ksh. 484,200/=**.

In his application for the confirmation of the grant issued to both the petitioner and the protestor, the petitioner proposed that the shares at **Afya Sacco Savings Society Ltd** be inherited by the protestor while he proposed that he inherits the death gratuity and terminal pension from the Ministry of Health. The petitioners evidence in court reiterated the above position.

The protestor in her affidavit of protest proposed that the shares at **Afya Sacco Savings Society Ltd** be inherited by herself which was her late mother's wishes and that the death gratuity be shared equally between the two. The protestor also stated that the other assets of the deceased among them motor vehicle KAN 623L and household goods benefited the petitioner. The protestor stated in her aforesaid affidavit that it was her late mother's wishes that the said shares be used for her education. She stated that she is still a student and requires the funds to finance her education. Her evidence in court reiterated the above position. She insisted that her mother used to pay school fees for her even after the petitioner married her and presently she gets financial help from her auntie and the petitioner does not help her financially in any way.

Sections **35** and **37** of the Law of Succession Act<sup>[1]</sup> deals with situations where an intestate leaves a spouse and a child or children.<sup>[2]</sup> In such situations, the surviving spouse is entitled to the personal and household effects of the deceased absolutely and a life interest on the whole of the residue of the net intestate estate. Personal and household effects are defined in Section **3 (1)** of the Act to mean clothing, articles of personal use, furniture, utensils, appliances, pictures, ornaments, food, drinks and all other articles of household use and decoration normally associated with a matrimonial home but it does not include anything connected with the business or profession of the deceased. It has been alleged that the petitioner benefited from the deceased's and household effects. I find that to be in accordance with the above section. As for the vehicle, there was no clear evidence whether it belonged to the deceased or the petitioner, or whether it was matrimonial property, and this is complicated by absence of registration

documents to confirm the position, hence this court cannot make a determination regarding the vehicle.

Under the above provisions, the surviving spouse only gets the chattels absolutely, and is only entitled to a life interest on the rest. The ultimate destination of the property the subject of the life interest is to the children in the event of the demise of the surviving spouse as provided in Section 35(5) of the Law of Succession Act[3] and also as was held in *the Matter of the Estate of Gathima Chege (deceased)*[4]

Section 37 of the Act allows the surviving spouse during life interest, subject to the consent of all the co-trustees and all the adult children or the consent of the court, to sell any of the property the subject of the life interest for their own maintenance. Where the subject property is immovable, the consent of the court is mandatory.

The surviving spouse holds the property during life interest as a trustee and stands in a fiduciary position with relation to the property. The property does not pass to the surviving spouse absolutely. Where the property in issue is land, it cannot be registered in the name of the surviving spouse absolutely since she/he only enjoys a life interest and holds the same in trust for the children and other heirs. This was the holding in *the Matter of the Estate of Basen Chepkwony (deceased)*[5]

On the rights of Children, the children of the deceased are the next category of next of kin of an intestate to benefit from an estate after any surviving spouse. Where the intestate leaves a surviving spouse, the children are not entitled absolutely to property, but the surviving spouse holds the estate in trust for the children. Section 35(5) deals with what should happen in the event of the death of the surviving spouse or the re-marriage of the widow. The whole residue of the net intestate estate, that is the portion subject to the life interest, devolves upon the surviving child, or if more than one, to the children.

Reference to children does not distinguish between sons and daughters, neither is there distinction between married and unmarried daughters. In *Peter Kiiru Gathemba and others vs. Margaret Wanjiku and another*,[6] **Amin J** stated that the Law of Succession Act[7] does not make a distinction between married and unmarried children in matters of intestate succession. **Rawal J** (as she then was) *In the Matter of the Estate of Mwaura Gathari (deceased)*[8] pointed out that the Act does not discriminate between male and female children. **Waki JA** stated similarly in *Mary Rono vs. Jane Rono and another*, [9] where he said that there is no discrimination of such children on account of their sex.

The division of property of an intestate who dies leaving spouse and children should be in accordance with Section 35.[10] The deceased in this case was survived by her husband and daughter and therefore the relevant provision is Section 35 of the Law of Succession Act.[11]

Life interest confers a limited right to the surviving spouse over the state. He or she does not enjoy absolute ownership over the property. They cannot deal with it as if it was their own. By virtue of Section 37 of the Act, a surviving spouse cannot during life interests dispose of any property subject to that life interest without the consent of all the adult children, co-trustees and the court. This is meant to safe guard the interest of the children who are the ultimate beneficiaries of the property the subject of the life interest. It is in this respect that the life interest operates as a trust over the property the subject thereof, a trust held by the surviving spouse for the benefit of the surviving children.

In the present case it is important to note that in the only asset is cash as stated above and that both the petitioner and protestor have proposed their preferred mode of distribution. Also, it is not in dispute that both the petitioner and the protestor are entitled to the estate. What is disputed is the mode of distribution.

I think, the circumstances of this case justify that the estate be distributed since its only cash and it may not make sense insisting that the petitioner gets only a life interest. The justice of this case demands that the money be shared among the two, but even in doing so, the court needs to bear in mind the peculiar circumstances of this case, that is, the protestor is still in college, she is unemployed and that she has no means of financing her education and that the petitioner does not help her financially in her upkeep or in paying her fees. Her evidence was that the deceased was paying her fees and supporting her financially and that she lost the said support after her death and risks dropping out of college.

Considering the peculiar facts of this case and the interests of justice and fairness, I hold the view that it would be reasonable and fair in the circumstances for the protestor to get a larger share of the cash to enable her finance her education. Accordingly, I hereby allow the protest and order distribution as follows:-

- i. ***That*** the grant of letters of administration made on **3<sup>rd</sup>October 2012** to **George Washington Kariuki Mwangi and Rhoda Kathambi Kariuki** be and is hereby confirmed.
- ii. ***That*** the deceased's savings at **Afya Sacco Savings Society Ltd** amounting to **Ksh. 484,200/=** be and is hereby wholly bequeathed to **George Washington Kariuki Mwangi**.
- iii. ***That*** the deceased's death gratuity and other benefits at the **Ministry of Health** amounting to **Ksh. 612,427/=** be and is hereby wholly bequeathed to **Rhoda Kathambi Kariuki**.
- iv. *No orders as to costs.*

Right of appeal 30 days

Signed, Delivered and Dated at **Nyeri** this **25<sup>th</sup>** day **May** of 2016

**John M. Mativo**

**Judge**

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[1] Cap 160, Laws of Kenya

[2] See in the matter of the estate of Aggrey Makanga Wamira, Mombasa High Court Succession Cause No. 89 of 1996 (Waki J)

[3] Supra

[4] Nairobi HCSC No. 1955 of 1996

[5] Nairobi HCSC No. 842 of 1991 (Koome J).

[6] Nairobi HCCA No. 167 of 1994

[7] Supra

[8] Nairobi HCSC No. 1678 of 1999

[9] Eldoret CACA No. 66 of 2002

[10] See W. M. Musyoka, Law of Succession, LawAfrica, page 98

[11] Ibid