REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 250 OF 2009

(IN THE MATTER OF THE ESTATE OF WASHINGTON MUGO KIGO (DECEASED))

SOPHIA WANGECHI MUGO.....…ADMINISTRATRIX/APPLICANT

VERSUS

GEOFFREY WAMBUGU MUGO…….....……1ST PROTESTOR

AGNES MUMBI MWANGI…..……2ND PROTESTOR

JUDGMENT

The deceased, Washington Mugo Kigo died intestate on 17th August, 2008. On 17th March, 2009, the applicant cited Prisca Muthoni Mugo (Prisca) to accept or refuse letters of administration intestate of the deceased's estate.

The applicant filed two affidavits alongside the citation; it is apparent from both of them that the deceased was survived by two widows of whom the citee was the first while the applicant herself was the second.

Apart from the citee and herself, the applicant named her children and those of the citee as having survived the deceased; these children were listed as follows:

First House:

1. Joseph Kigo Mugo
2. Mrs. Wamuyu Kabiri
3. Ibrahim Macharia
4. Geoffrey Wambugu Macharia
5. Mrs Agnes Mumbi Mwangi

Second House:

1. Anthony Mwangi Mugo
2. Winfred Mwangi Mugo

3. Faith Wamuyu Mugo

4. Samuel Kigo Mugo

The applicant also listed the following as assets comprising the deceased's estate:

1. Title No. NYERI/MUNICIPALITY BLOCK III/64(measuring 0.0297 ha) (herein the Nyeri town property)

2. Title No AGUTHI/GAKI/1298(measuring 0.69 ha)

3. Title No. EUASO NYIRO/SUGUROI/BLOCK VII/179 (measuring 17 ha)

Prisca responded to the citation and petitioned for grant of letters of administration intestate on 27th March, 2009; she filed this petition in her capacity as the wife of the deceased. In the affidavit in support of the petition, she named herself and her children listed in one of the applicant's affidavits in support of the citation together with a granddaughter identified as Prisca Muthoni Gicheru as the deceased's only survivors; no reference at all was made to the applicant or her children.

She listed the same assets as those listed by the applicant in her affidavit in support of the citation as comprising the deceased's estate; its net value was approximated at Kshs 100,000/=.

The applicant objected to the grant of letters of administration and also filed a petition by way of cross application for grant of letters of administration to the deceased's estate under rule 17 of the Probate and Administration Rules.

The objection to the making of grant was listed for directions before the judge on 2nd October, 2009; on the material date, counsel for the objector informed the court that the applicant herein and Prisca were co-wives and they should be appointed as joint administratrixes of their husband's estate. Prisca's counsel had no objection to this arrangement and therefore the court proceeded to appoint, Prisca and the applicant as joint administratrixes. The court directed further that any of the administratrixes could apply for confirmation of the grant upon expiry of six months.

Less than a week after the court made the grant and issued directions as to when either of the administratrixes could apply for confirmation of letters of grant, and precisely on 6th October, 2009 Prisca applied to have the grant confirmed. Just like in her petition for grant of letters of administration, and despite the fact that the applicant was her joint administratrix, Prisca never made any reference to her or her children in the summons for confirmation of grant. She asked this Court, in the affidavit in support of the summons, to have the entire estate transferred to her absolutely.

Prisca did not live long enough to prosecute her application for on 9th November, 2009 she died of a heart attack. Two of her children, the protesters herein, then applied to have the grant revoked primarily on the ground that it had become useless and inoperative owing to their mother's death. When their summons came up for hearing on 12th July, 2010, the applicant and the protesters consented to have the grant revoked and a fresh one issued in the joint names of the applicant and the protesters; that consent was adopted as the order of the court and afresh grant made accordingly; thus, as things stand now, the applicant and the protesters are joint administrator and administratrixes of the estate of the deceased.

On 14th July,2010 the applicant filed a summons for confirmation of the joint grant and proposed to have the deceased's estate shared equally between his two houses; she sought to have the second house's share transferred to her absolutely while that of the first house was proposed to be registered in the joint names of the children of that house.

By an affidavit of protest sworn on 9th August, 2010 and filed in court on 10th August, 2010, the protesters protested against the distribution of the deceased's estate in the manner proposed by the

applicant in her affidavit in support of the summons for confirmation of grant; they came up with their own scheme of distribution according to which they proposed that each of the properties listed as **Title No. AGUTHI/GAKI/1298** (measuring 0.69 ha) and **Title No. EUASO NYIRO/SUGUROI/BLOCK VII/179** (measuring 17 ha) should be shared equally between the two houses. The share for each of the houses, according to them, should be registered in the joint names of the children of that particular house except that the applicant should also be included as a joint owner together with her children of the share of the estate due to the second house. As for **Title No. NYERI MUNICIPALITY BLOCKIII/64**, it should be registered in the names of the children of the first house only in equal shares.

Although the protester's acknowledged in their proposed scheme that the applicant and her children were entitled to a share of the deceased's estate and thus were beneficiaries, they denied, in a further affidavit of protest they filed, that the applicant and her children are entitled to any share of **Title No NYERI MUNICIPALITY BLOCKIII/64** primarily on the ground that it was their deceased's mother's matrimonial home. In any event so they swore:

> "***The applicant/objector and her household had their matrimonial home established on plot number 13 Ruringu prison Area, Nyeri Municipality but sold it to one Lucy Mumbi Kibochi on 3rd April, 2001 and relocated to Nairobi".***

They also swore that their mother was married under the **African Christian Marriage and Divorce Act** cap 151 although, as they would later admit, it was not clear from the marriage certificate when this marriage was contracted.

Parties agreed to have the summons and the protest disposed of by way of oral evidence; they largely reiterated their depositions in their respective affidavits in their testimony. The first protester added that his mother's marriage to the deceased was solemnised on 23rd December, 1983 although this date was omitted from the marriage certificate; he produced the certificate in proof of the fact of this marriage. His mother's matrimonial home was on **Title No NYERI MUNICIPALITY BLOCKIII/64** where she also ran a shop on its frontage. This protester testified that the applicant initially settled in the same premises but due to hostility between her and the protester's mother they were both moved from the premises apparently by the deceased. In 1986 or 1987 the deceased constructed a house for the applicant in Ruringu; the applicant was moved there when his mother was brought back to the Nyeri town property.

Later, they discovered that the applicant and the deceased had disposed of the Ruringu property and moved to Nairobi; they then moved to Kitengela where they lived before they came back to Nyeri and settled at a place called Skuta. Meanwhile, in 2007 the protesters discovered that the land rates due to the Municipal Council of Nyeri in respect of **Title No. NYERI MUNICIPALITY BLOCKIII/64** were in arrears amounting to Kshs 286,017/=. They prevailed upon the town clerk who agreed to waive the arrears and allow them to pay the principal amount which was Kshs 72,318/=.

The protester acknowledged in his evidence that the applicant's children were also the deceased's and had no problem if they were given part of his estate, in particular **Title No. AGUTHI/GAKI/1298.** He, however, denied that the applicant was entitled to any part of the **Title No. NYERI MUNICIPALITY BLOCKIII/64** which, according to him was his late mother's matrimonial property and to which the applicant never made any contribution towards its acquisition or development. He confirmed having the original title document to this particular property though none of them resides there at the moment; part of the property has, however, been rented out.

Besides settling the rates on **Title No. NYERI MUNICIPALITY BLOCKIII/64,** the protester testified that he and his sister, the second protestor, also helped pay off a loan of Kshs 74,881/= due to Agricultural Finance Corporation, in respect of **Title No. EUASO NYIRO/SUGUROI/BLOCK VII/179.** He also had no objection in sharing out this particular land equally between his mother's house and that of the applicant's just like **Title No. AGUTHI/GAKI/1298.** He confirmed that it is on this latter parcel of land that his father and mother were buried; the applicant, according to his testimony, had also been given a portion of this particular land.

In cross-examination, the protester admitted that the applicant was his father's second wife and in fact she lived with them in the Nyeri town property except that she lived in a separate room from that of his mother. His father supported both of them. The Nyeri town property, according to him, had two shops on its frontage but there were rooms behind it in which her mother, the applicant and his father occupied as their residences. He also admitted that at one point his mother and the applicant were moved to Ruringu where they lived for some time but that the applicant sold the Ruringu property. The application for transfer of the property was, however, executed by the deceased meaning that he, and not the applicant, sold and transferred this particular property.

This protester also admitted that the charge on the Nyeri town property was discharged on 13th June, 2001 which was about two months after the Ruringu property had been sold; he, however, denied that the loan due to Standard Chartered bank in whose favour this property had been charged was settled out of the proceeds from the sale of Ruringu property.

Although he was vehemently opposed to the applicant having a share of the Nyeri town property partly because she did not contribute to its development, he admitted that he had no evidence that his own mother contributed to the development of this property.

The second protester adopted her brother's testimony but added that she was 11 years old when the applicant joined their family. She also reiterated that together with her brother, they put funds together and settled the loan for the acquisition of **Title No. EUASO NYIRO/SUGUROI/BLOCK VII/179.** As for the loan that was owing on the Nyeri town property, her uncle whom she identified as Stanley Wambugu paid the sum of Kshs 300,000/= on 18th October, 1999 to redeem it.

Like her brother, she agreed that the two parcels of land, that is, **Title No. EUASO NYIRO/SUGUROI/BLOCK VII/179** and **Title No. AGUTHI/GAKI/1298** should be shared equally between the two houses but **Title No. NYERI MUNICIPALITY BLOCKIII/64,** should devolve upon the first house only. She also confirmed that the applicant lived there for a few months but she was moved to her own property in Ruringu since she could not live in harmony with her late mother. She testified that her brother Ibrahim Macharia and her sister Gladys Wamuyu were living on the property. Her brother was operating one of the three shops while the other two have been let out; she admitted that they collect rent from the rented premises. She also agreed that the applicant got married to her father in 1985 and she shared the same premises where they lived.

On her part, the applicant testified that she married the deceased in 1981; she was then working with the Ministry of transport in Laikipia. She later resigned from Government employment and joined him in Nyeri where they lived in the Nyeri town property. As at that time, protester's mother was living in the property known as **Title No. AGUTHI/GAKI/1298** but she later joined them and together they lived in the town property. This property was partitioned in such a way that it could accommodate the two houses; that of the applicant and her co-wife's.

In 1983 both the applicant and the protesters' mother moved to another of the deceased's property known as Plot No. 13 in Ruringu. They both lived there for between 5 to 7 years. The property was however, sold in the year 2001 in order to settle the outstanding loan on the Nyeri town property. The applicant produced a discharge of charge showing that **Title No. NYERI MUNICIPALITY BLOCKIII/64,** was discharged from a charge in favour of Standard Chartered Bank on 13th June, 2001. Both the applicant and the deceased then moved to Nairobi where the deceased is said to have been undergoing treatment.

When they were living in the Nyeri town property, the applicant and the protester's mother were running separate businesses in that property; the applicant was running a café while her co-wife ran agricultural inputs shop. She produced a single business permit issued in 2008 by the Municipal Council of Nyeri showing that she was in her business together with the deceased. They later let out the hotel to one Benson Mukundi.

That is as far as the protracted dispute between the applicant and the protestors went.

Both the learned counsel for the applicant and the protesters filed written submissions in support of the position their respective clients had taken. In spite of the evidence from the protesters themselves on the status of the applicant in their family, their counsel dedicated a substantial part of his submissions to contesting the fact of marriage between the applicant and the deceased. He added that it was upon the applicant not only to prove her marriage to the deceased but also to prove her dependency and that of her children on the deceased. This, according to the learned counsel, she did not and therefore she couldn't be said to be the deceased's wife. Counsel cited the decision in **Irene Njeri Macharia versus Margaret Wairimu Njomo & Another (1996) eKLR** where the Court of Appeal found that it had not been established whether the first respondent in the appeal went through any ceremony of marriage with the deceased; the court was also unable to establish, in the circumstances of that case, whether the presumption of marriage could be applied. In the absence of such evidence the court was unable to say whether the respondent could qualify as a "wife" under the provisions of **section 3 (5)** of the **Law of Succession Act**. Counsel also relied on the High Court decision in **Nyeri High Court Succession Cause No. 324 of 2006, Teresa Wambui Kabuchi versus Mary Nyaguthi Kariuki** where Makhandia, J (as he then was) doubted that marriage could be presumed where a man had no capacity to contract any other marriage regardless of whether it was statutory or customary. The learned judge held in that case that any woman seeking cover in **section 3(5)** of the **Law of Succession Act** must avail evidence that she was indeed married to the deceased under any of the regimes recognised in law; in his view there was no such evidence. Finally, counsel cited the **High Court decision in Nyeri High Court Succession Cause No. 227 of 1996 Mary Nduta Runo versus Margaret Wangari Runo** where Okwengu J (as she then was) held that the objector who claimed to be the wife of the deceased could not be such a wife or even a dependant because she was incapable of being married to the deceased under any system which permitted polygamy and thus could not call **Section 3 (5**) of the **Law of Succession Act** to her aid.

With great respect to the learned counsel for the protesters, the line of argument he adopted appears to me to have deviated from the position which his own clients assumed as far as the status of the relationship between the applicant and the deceased is concerned. I have come to this conclusion because nowhere in their evidence did the protesters ever suggest that the applicant was not married to the deceased; the only evidence they produced that would perhaps have cast doubt on the applicant's status in the deceased's life and eventually his death was the production of a marriage certificate showing that the deceased was married to their mother under the **African Christian Marriage and Divorce Act.** However, as will be clear in due course, this piece of evidence was doubtful, as to whether there was such marriage and if there was, when it was celebrated as to slam the door against the deceased not to contract any other marriage.

In their own affidavit of protest, the protesters proposed to have the deceased's estate distributed between the applicant's house and their own house. Of the three assets which comprise this estate, they proposed to have two of them shared equally between the two houses; they sought to have one more property exclusively for the first house for the reason I understand to be that it was their late mother's matrimonial home and to which, in any event, the applicant made no contribution at all towards its development. Whether it is right to deny the applicant and her children a share of this particular property only because of non-contribution of one form or another is a question that deserves attention but what is worth noting at the moment is that they acknowledged the applicant and her children as rightful and legal beneficiaries of the deceased's estate. This acknowledgement could not have been based upon any other reason other than that the applicant was the deceased's wife and her children were the deceased's children. In fact, the first protester was categorical in his evidence, that he wanted the applicant's children to have a share of the deceased's estate because "*we want our father's children to have land.*" The second protester demonstrated a similar concern and insisted that the applicant's children should be included in the distribution of the estate because if the land was to be given to the applicant alone the deceased's children would be disinherited. She was specific that except for the Nyeri town property, the rest of the estate should be distributed equally between the two houses and thereby acknowledged that the applicant represented a "house" properly so called. Theirs, was in my view, a reasonable approach.

It suffices to say, that if there was any other reason why protestors could cede part of their father's estate to persons who would, in effect be strangers, if their counsel's argument is anything to go by, then such reason did not come out in evidence, least of all, the protestors' evidence.

For avoidance of doubt, the first protester testified that the applicant was brought by the deceased to the Nyeri town property between 1984 and 1985; in cross-examination, he was clear that the applicant was his father's second wife who settled in their mother's matrimonial home for some time before they were both moved out because of the hostility between them. Similarly, the second protester also acknowledged, also in cross-examination, that the applicant was brought to their home as their father's wife.

The protesters were also in agreement that the deceased constructed a house for the applicant in Ruringu area where he lived with her for some time before they sold the property sometimes in 2001 and moved to Nairobi; there was even the suggestion by the first protester that both the applicant and their mother lived at Ruringu for a while soon after they moved from the Nyeri town property.

The applicant herself testified that she got married to the deceased in 1981 while she was working in the Ministry of transport; she was then based in Laikipia but she later resigned and joined the deceased in the Nyeri town property. In fact, according to her, contrary to the protestors' assertions, it is actually the protestors' mother who joined the applicant and the deceased at the Nyeri town property; she had apparently been living on **Title No. AGUTHI/GAKI/1298** where she was ultimately buried upon her demise.

There is also some truth in her evidence that sometimes in 1983 she and the protesters' mother moved to the Ruringu property. I tend to believe her on this because the first protestor testified that both the applicant and their mother moved to Ruringu from the Nyeri town property.

One thing that comes out clearly from the evidence of the protesters and the applicant is that the applicant lived with the deceased continuously since either 1981 or 1984 until his demise in 2008. Their cohabitation was uninterrupted, at least from the evidence available, for at least 24 years. The protesters themselves appreciated the fact that the applicant lived with their father in no less capacity than that of a wife. But even if they were to contest the applicant's place in the deceased's life and death her relatively long cohabitation with the deceased must have led any reasonable person to believe that the two were husband and wife; in other words, there was a presumption of marriage between the deceased and the applicant.

Presumption of marriage is not a new phenomenon; it is a common law concept which has been acknowledged in a string of court decisions as one, among other systems of marriage, such as customary and statutory. **The Court of Appeal for East Africa sitting at Nairobi,** made reference to it in **Civil Appeal No. 13 of 1976, Hotensiah Wanjiru Yawe versus Public Trustee** (unreported) where the question was whether the appellant was married to the deceased under Kikuyu customs; the court held that the onus of proving that the appellant was married to the deceased was on her but went further to say that in assessing the evidence on that particular issue, the trial court ought to have considered the fact that long cohabitation as man and wife gave rise to a presumption of marriage in favour of the appellant and that only cogent evidence to the contrary could rebut such a presumption. In coming to this conclusion the court cited with approval the English case of **Taplin-Watson versus Tate (1937) 3 ALL ER 105**. The court held that although the judge was not satisfied that the appellant had not established on a balance of probabilities that the customary marriage was performed in accordance with all the necessary ceremonial rituals, he ought to have taken into account of the presumption of marriage in the appellant's favour. The court was emphatic that even if the proper ceremonial rituals were not carried out, that in itself would not invalidate the marriage because Kikuyu customary law was not opposed to the concept of presumption of marriage arising from long cohabitation.

This decision was followed by our own Court of Appeal sitting in **Eldoret in civil appeal number 20 of 2009, MWG versus EWK (2010) eKLR** where it said of this concept in the following terms:

> ***"It is a concept born from an appreciation of the needs of the realities of life when a man and woman, cohabit for a long period without solemnising their union by going through a recognised form of marriage, then a presumption of marriage arises. If the woman is left stranded either by being cast away by the "husband" or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestows the status of "wife" upon the woman to***

enable her to qualify for maintenance or a share in the estate of a deceased "husband".

I need not dig further into other decisions on this issue because the two I have cited are clear that once it was established that the applicant and the deceased cohabited for a long time, there was nothing else for the applicant to prove; if anything, the burden was on any person contesting her marriage to the deceased to rebut the presumption of marriage by repute.

Counsel for the protesters cited the Court of Appeal decision in **Nairobi Civil Appeal No. 207 of 1995, Esther Mbatha Ngumbi versus Mbithi Muloli (1997) eKLR** apparently in support of his argument that the burden was on the applicant to prove her marriage to the deceased. In that case the appellant remarried after divorcing her first husband. The question was whether the dowry paid by the first husband had been returned to him and therefore whether her remarriage to the deceased was valid. The court found for the appellant; it found as a fact that the deceased had returned the dowry that the appellant's first husband had paid. Her marriage to the first husband had been terminated and she was therefore capable of contracting the subsequent marriage to the deceased; accordingly, she was entitled to a share of the deceased's estate in her rightful capacity as one of his widows. I did not see how relevant this decision is to this case.

In **Teresa Wambui Kabuchi versus Mary Nyaguthii Kariuki** (supra) it was held that the presumption of marriage could not arise in a case where the husband had no capacity to contract another marriage. This was a decision of the High Court which is a court of coordinate jurisdiction and being so it is of persuasive authority only. More importantly, however, the decision appears to be contrary to the Court of Appeal decision in **Irene Njeri Macharia versus Margaret Wairimu Njomo & Another (supra)** where it was held that **section 3(5)** of the **Act** was meant to cater for women who contracted marriages with men who had previously contracted statutory marriages and which remained undissolved. Such women, according to the Court of Appeal, were wives for purposes of the **Law of Succession Act** and in particular **sections 29** and **40** of the Act.

Counsel for the protesters also referred the court to the High Court decision in **Mary Nduta Runo versus Margaret Wangari Runo;** here the objector claimed to be married to the deceased under Kikuyu customary law but she also admitted that she was previously married to another husband. The court found as a fact that the previous marriage had not been dissolved and therefore the objector could not purport to contract subsequent marriage. The circumstances in that case were clearly different from the present case and therefore I find this decision to be of little relevance as well.

Coming back to the certificate of marriage that was presented in proof of the fact that the protester's mother was married to the deceased under the **African Christian Marriage and Divorce Act**, and was thereby barred from contracting any other marriage, it was not clear from the face of the certificate when that marriage was conducted. Both the protesters agreed that the date when the alleged marriage was solemnised was omitted from the certificate. It is not clear how such an important detail could have been omitted from that document; whatever the reason, all I can draw from this omission is an inference adverse to the protesters' case; it is possible that if this date had been revealed it would probably have shown that the deceased was incapable of contracting marriage under the **African Christian Marriage and Divorce Act.** Suffice it to say, there was no evidence on a balance of probabilities to which the court would attach the date when the deceased converted his marriage to the protester's mother from customary marriage to a statutory one. In the absence of such material evidence it could not be concluded with any measure of certainty that the deceased was incapable of contracting a second marriage with the applicant.

Assuming that the applicant got married to the deceased after solemnising his marriage under the African Christian Marriage and Divorce Act, it still mattered less since she could still find refuge in **section 3(5)** of the Act which recognises her status as a wife for purposes of the Law of Succession Act more particularly in **sections 29** and **40** of the Act that respectively defines who a dependant is and prescribes the devolution of the deceased's estate if he was polygamous. That section provides as follows: -

> ***3(5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and***

in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

The Court of Appeal (Omolo, Tunoi, JJA and Bosire Ag JA) explained this provision in **Civil Appeal No. 139 of 1994, Irene Njeri Macharia versus Patrick Muriithi Harrison** and held that it was meant for the benefit of women marrying men who had previously contracted statutory marriages. If it was established that there was such a subsequent marriage, a woman in that union would be considered a wife for purposes of the Law of Succession Act.

The court made reference to **Nairobi High Court Succession Cause No. 843 of 1986,** in the **Matter of the Estate of Reuben Nzioka Mutua** where Aluoch, J (as she then was) interpreted the law differently. In that case the deceased contracted his first marriage under the African Christian Marriage and Divorce Act, in 1961. In 1980, while this marriage was still alive, he married again, this time under the Kamba customs. The learned judge held that the wife in the subsequent marriage was not entitled to receive anything from her deceased husband's estate; according to her, **section 3 (5)** of the **Law of Succession Act** was meant to protect a woman who was married under customary law but whose husband subsequently contracted a statutory marriage. In such a situation, so the learned judge opined, the woman who was customarily married would be considered a wife for purposes of inheritance under the Law of Succession Act irrespective of the fact that her deceased husband had contracted a statutory marriage subsequently.

The Court of Appeal overruled the learned judge and held that where one contracted marriage under customary law he thereby lost the capacity to contract a statutory marriage either under the Marriage Act, cap 150 or under the **African Christian Marriage and Divorce Act**; such a marriage, according to the Court, could not be said to invalidate an otherwise valid customary law marriage. If anything, so the court held, it is the subsequent purported statutory marriage that was invalid and crucially, a woman in such a marriage cannot call **section 3(5)** of the Act to her aid because the law under which she purported to marry is a system of law which does not permit polygamy.

Whichever way one looks at it, I am persuaded that the applicant was the deceased's wife, at least for purposes of the **Law of Succession Act**. Having come to that conclusion the next question for consideration is the acceptable scheme of distribution of the deceased's estate between the applicant's house and that of the protesters' mother. This question poses little difficulty for two reasons; first, the law prescribes how an intestate's estate should be distributed between or amongst his houses where he was married more than once and second, the applicant and the protesters themselves are in agreement of how part of the estate should be distributed. They agreed that **Title No. EUASO NYIRO/SUGUROI/BLOCK VII/179** and **Title No. AGUTHI/GAKI/1298** should be shared equally between the two houses; I have no reason to disturb this arrangement, not least, because it is largely consistent with the section 40 of the Act which governs the distribution of the deceased's intestate estate if he was polygamous; it states:

40. Where intestate was polygamous

(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 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.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

Subsection (1) is more pertinent to the question at hand; it was explained relatively extensively in **Eldoret Civil Appeal No. 66 of 2002, Mary Rono versus Jane Rono & William Rono (2005) eKLR.** In that appeal, **t**he learned counsel for the appellant urged that in a polygamous set up each house must

bear an equal measure of the liabilities as much as it should benefit from an equal share of the deceased's estate; in other words, the liabilities and assets of the deceased's estate must be distributed in such a way that they are shared out equally between or amongst the houses, depending on the number of the houses surviving the deceased. The respondents' learned counsel was of the contrary view; he was of the opinion that the first house should get a larger share of the estate considering, amongst other factors, that it contributed more to the acquisition of the estate.

The court addressed these competing arguments and in the leading judgment Waki, J.A., held: -

> ***"I think, in the circumstances of this case there is a considerable force in the argument by Mr Gicheru (for the appellant) that the estate of the deceased ought to have been distributed more equitably taking into account all relevant factors and the available legal provisions. I now take all that into account and come to the conclusion that the distribution of the land, which is the issue falling for determination must be set aside and substituted with an order that the net estate of 192 acres of land be shared out as follows…"***

Although the learned judge appeared to agree with the argument by the learned counsel for the appellant that the estate should be shared out ***equally,*** he nevertheless stated that the estate ***"ought to have been distributed more equitably…"*** and proceeded to do exactly that ***"taking into account all relevant factors and the available legal provisions."***

While agreeing with the leading judgment of Waki, J.A., Justice Omolo J.A. discounted any notion that the estate should have been distributed amongst the beneficiaries in equal shares because, in the learned judge's view, there is no such requirement under the Act. The learned judge said: -

> "***I had the advantage of reading in draft form the judgment prepared by Waki, J.A., 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 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."***

The learned judge proceeded to quote **section 40(1)** of the Act and held that: -

> ***"My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has discretion to take into account the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.***
>
> ***"Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in a case of young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality."***

In effect, the learned judges embraced the principal of *fairness* and *equity* in distribution of a deceased's estate between or amongst persons beneficially entitled thereto. While the number of children in a particular house is an important factor in the determination of the share to be allocated to each house, it is not the only factor; neither is it the controlling factor.

Just like in the present case where it was argued on behalf of the protesters that the applicant's house was not entitled to a share of **LR NO. NYERI MUNICIPALITY BLOCKIII/64,** because the applicant did not contribute towards its development it was argued by the respondents' learned counsel in the *Rono*

case that the first house should get a larger share of the estate considering, amongst other factors, that it contributed more to the acquisition of the estate. The court does not appear to have taken this factor into consideration though; it is simply not central in the distribution of an intestate estate under **section 40(1)** of the Act.

I would also think that for the same reason that the court ignored the fact of contribution towards acquisition or development of the estate as a factor in the sharing out of an intestate estate, the description of an asset as a matrimonial home does not count much as long as that property is registered in the name of the deceased; as far as the law of succession is concerned what may be considered as a matrimonial home is still available for distribution just like any other asset in the estate. In any event, from the available evidence both the applicant and the protesters' mother lived on **Title No. NYERI MUNICIPALITY BLOCKIII/64,** at least for a while and therefore, under the **Matrimonial Property Act, No. 49 of 2013** (see section 6 thereof) this property could be said to have been a matrimonial home for both of them and hence they had equal rights to the property.

There was evidence from the protesters that this property has been let out for commercial purposes; none of the protesters lives there; although the second protester testified that her siblings are currently living the property none of them testified to corroborate this fact.

As far as I gather, the deceased's surviving children are almost evenly distributed in each house and they are all adults. They are settled in life and therefore the question whether some are entitled to a larger share of the estate than others by virtue of their age does not arise; their station or status in life does not count.

Taking all these factors into account, I cannot find any reason why I should depart from the methodology adopted by the applicant and the protesters in sharing out **Title No. EUASO NYIRO/SUGUROI/BLOCK VII/179** and **Title No. AGUTHI/GAKI/1298** to distribute the remainder of the estate. Accordingly, **Title No. NYERI MUNICIPALITY BLOCKIII/64,** shall be shared out equally between the applicant's house and the protesters' mother's house. In conclusion, therefore, my final order is as follows: -

(a) The property comprising **Title No. Uasu Nyiro/Suguroi/Block VII/179** shall be divided into two equal parcels of 21 acres each of which shall be transferred to the two houses respectively and registered in the beneficiaries' names as follows:

First House:

i. Joseph Kigo Mugo

ii. Gladys Wamuyu Kabiri

iii. Ibrahim Macharia Mugo

iv. Geoffrey Wambugu Mugo

v. Agnes Mumbi Mwangi

vi. Prisca Muthoni

To be registered as proprietors in common in equal shares

Second House:

To be registered in the name of Sophia Wangechi Mugo subject to life interest

(b) The property known as **Title No. AGUTHI/GAKI/1298** shall be divided into two equal parcels of 1.7 acres each of which shall be transferred to the two houses respectively and registered in the beneficiaries'

names as follows:

First House:

i. Joseph Kigo Mugo

ii. Gladys Wamuyu Kabiri

iii. Ibrahim Macharia Mugo

iv. Geoffrey Wambugu Mugo

v. Agnes Mumbi Mwangi

vi. Prisca Muthoni

To be registered as proprietors in common in equal shares; their share shall, to the extent that is practicable, cover the gravesides of both their mother and father.

Second House:

To be registered in the name of Sophia Wangechi Mugo subject to life interest.

(c) The property comprising **Title No. NYERI MUNICIPALITY BLOCKIII/64** shall be sold and the proceeds thereof shared equally between the first house and the second house;

(d) Pending the disposal of **Title No. NYERI MUNICIPALITY BLOCKIII/64,** the applicant and the protestors shall, within fourteen (14) days of the date hereof, jointly open an interest earning account in a reputable banking institution in which all the revenue accruing from the premises shall be deposited; the net revenue shall be shared equally between the first house and the second house.

(e) In the alternative to disposal of the property comprising **Title No. NYERI MUNICIPALITY BLOCKIII/64,** the applicant on the one hand and the protestors on the other hand shall be registered as proprietors in common in equal shares of **Title No. NYERI MUNICIPALITY BLOCKIII/64.**

(f) In the event the applicant and the protestors choose not to dispose of **Title No. NYERI MUNICIPALITY BLOCKIII/64 the** protestors shall hold the first house's share for themselves and on behalf of each of the children or beneficiaries in the first house while the applicant will hold her share subject to life interest save that if she predeceases her children her share shall devolve upon her surviving child or children.

(g) This being a family dispute, parties will bear their own respective costs.

It is so ordered.

Dated, signed and delivered in open court at Nyeri this 25th day of November, 2016

Ngaah Jairus

JUDGE