



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE 2688 OF 2007**

**IN THE MATTER OF THE ESTATE OF SIMON PETER KARUU ALIAS SIMON P. K. KARUU  
(DECEASED)**

**GLADYS NJERI MAINA KARUU.....APPLICANT**

**VS**

**MARGARET WANGARI NDERITU.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

The deceased Simon Peter Karuu *alias* Simon P. Karuu died on 15<sup>th</sup> August, 2007.

The deceased had two (2) families; Gladys Njeri Maina 1<sup>st</sup> wife of the deceased and four (4) children; Beatrice Wanjiru Karuu, Phyllis Wairimu Kiarie, Valentine Elizabeth Waceera Kiarie and Paul Victor Theceri Kiarie.

The deceased had a 2<sup>nd</sup> family by 2<sup>nd</sup> wife Margaret Wangari Nderitu and 2 children; Millicent Muthoni Kiarie and Phyllis Wairimu Kiarie.

**PLEADINGS**

Both wives of the deceased obtained grant of letters of administration on 25<sup>th</sup> February, 2008. The family of Gladys Njeri Maina 1<sup>st</sup> wife filed an application on 3<sup>rd</sup> December, 2008 in a form of summons for revocation or annulment of grant on the grounds;

- a. The administrators did not provide for the 1<sup>st</sup> family from the estate of the deceased.
- b. One of the administrators; Margaret Wangari Nderitu was enjoying all the rents and in some of the estate assets alone.
- c. No inventory or proposed distribution of accounts has not been made to date.

On 18<sup>th</sup> December, 2008, the Applicant; Grace Njeri filed an application that the Respondent Margaret Wangari Nderitu be restrained from administering, interfering or dealing with the estate of the deceased to the exclusion of other beneficiaries and to render a full and accurate account of all rents, dealings, and income in respect of the estate.

The Respondent Margaret Wangari Nderitu filed a replying Affidavit on 16<sup>th</sup> January, 2009 and deponed

she was married to the deceased on 20<sup>th</sup> June, 2001. She outlined in paragraphs 5, 6 and 7 of the affidavit properties she and her late husband bought and those they developed together as follows;

They bought these properties;

- I. L.R. Kabare /Nyagati/8184 -4 acres
- II. Shares in Standard bank
- III. Shares in Kenya Airways
- IV. Motor vehicles KAG 378Z & KAC 305 P

During the marriage they developed;

- I. Plots V693 & V694 Embakasi Ranching Company
- II. Umoja House Number H26 constructed 7 extensions of 2 -1 bedrooms & 2 extra floors

She deponed she could not trace the rest of the properties as belonging to the deceased as listed in paragraph 7 of the affidavit.

On 25<sup>th</sup> February, 2009 Justice Gacheche ordered as follows;

- a. That the parties to provide to Court the inventory of assets of the estate accompanied by copies of title documents;
- b. That Margaret Wangari Nderitu to give an account of all monies she collected from the date of 1<sup>st</sup> August, 2008 to date within the next 30 days;
- c. The parties/advocates to open an estate account at Equity Bank, Harambee Avenue Nairobi and all rental income to be banked and banking slips to be sent to the advocate for records.
- d. Each widow to receive Ksh.30,000/= every month while retaining the balance with effect from 1<sup>st</sup> March, 2009.
- e. Margaret Wangari Nderitu to collect rent and promptly bank it in the estate account.

On 29<sup>th</sup> May, 2013 the 2<sup>nd</sup> administrator, Margaret Wangari Nderitu filed the application for confirmation of grant and listed the two (2) families of the deceased and the proposed mode of distribution of property of the deceased. The consents of the beneficiaries were not obtained save for the administrator's daughter Millicent Muthoni Kiarie.

The 1<sup>st</sup> administrator of the estate, Gladys Maina Kiarie filed a Replying Affidavit on 9<sup>th</sup> July, 2010 annexed to the Notice of objection to the summons for confirmation of grant of 1<sup>st</sup> July, 2010 and also enumerated the grounds of objection of the proposed distribution.

### **ORAL HEARING**

On 15<sup>th</sup> October, 2014 the parties through their respective Counsel Ms. Ndungu for the administrator Margaret Wangari and Mr. Gichanga for other administrator, Gladys Maina Kiarie informed the Court that efforts to resolve and agree on the distribution of the deceased's estate between the two (2) families were not fruitful. The matter proceeded for hearing of oral evidence.

Margaret Wangari Nderitu the 2<sup>nd</sup> wife to the deceased and one of the administrators to the estate of the deceased, told the Court she and the deceased were married at the District Commissioner's Office in 1999 and she had a marriage certificate (not produced) her late husband told her he parted with his first wife 5 years ago. She told the Court that there was property she found but they also bought and developed properties as listed above.

She proposed the mode of distribution as stipulated in the confirmation of grant application as follows;

<b><u>NAME</u></b>	<b><u>PROPERTIES</u></b>	<b><u>SHARE</u></b>
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Gladys Maina Kiarie, The 1<sup>st</sup> wife to the deceased and the other administrator to the deceased's estate, told the Court that she and the deceased were married in 1980. She suffered domestic violence from the deceased during her marriage that in April 1996 she left the matrimonial home to save her life and that of the children of the marriage; Beatrice Wanjiru, Phyllis Wairimu, Valentine Elizabeth Waceera Kiarie and Paul Victor Theeri Kiarie.

Gladys Njeri Maina stated that they both with Margaret Wangare Nderitu obtained the grant of letters of Administration 25<sup>th</sup> February, 2008. Later they filed in Court the list of assets of the deceased's estate; a copy attached to the affidavit of 9<sup>th</sup> July, 2013. Of the list of assets the traceable properties are numbers, 1, 2, 3, 5, 6, 16, 19, and 29. With regard to the proposed mode of distribution by the other administrator of 29<sup>th</sup> May, 2013, she objected to the mode of distribution of the application for confirmation of grant on the following grounds;

That the proposed distribution of the estate did not involve all the beneficiaries but only the administrators and that is not proper and legally their consents are required.

She informed the Court she studied with the deceased in the same class as the deceased. After graduating they worked at the same level and rank in the Ministry. She worked and still does with the Ministry of Agriculture from 1979 – 1982, undertook Masters' Program from 1982 – 1983 and rose through the ranks.

Therefore, during the marriage she contributed directly and indirectly to the investments they had purchased during their marriage. They purchased the Umoja Estate H26. They conducted a wholesale and retail business centre whose proceeds they used to purchase Zimmermann property; Nairobi/Block 116/1165. They bought Ruai V693 & V 694 and she left the matrimonial home when they had developed the properties they purchased in Umoja, Zimmermann and Ruai. She requested to have one of the homes as she lives in a rented home and Margaret the other administrator came and lived in the home they purchased in Ruai. She indicated that in her affidavit of 16<sup>th</sup> July, 2013 she attached documents to show the various loans she obtained to develop the properties in question.

Gladys Njeri Maina told the Court that the fair and equitable distribution is to have the property divided equally between the two (2) homes and taking into account her involvement and contribution to the property.

She informed the Court that pursuant to the Court order of Justice Gacheche of 25<sup>th</sup> February, 2009, Margaret Njeri Nderitu declined to pay her the monthly Ksh. 30,000/=. She proposed the mode of distribution of the estate as pleaded in paragraph nine (9) of the Replying affidavit attached to the Notice of objection of 1<sup>st</sup> July, 2013.

She proposed the following distribution of deceased's estate;

1. Gladys Njeri Maina - Plot No. 26 ( Umoja 1- whole)
2. Gladys Njeri Maina - M/V KAG 378 Z- (whole)
3. Margaret Wangare Nderitu - Embakasi V 693- (whole)
4. Margaret Wangare Nderitu - M/V KAL 305 P -( whole)
  
5. a) Beatrice Karuu - Embakasi V 694 (jointly and severally)
- b) Phyllis Wairimu Kiarie - “
- c) Valentine Elizabeth Waceera Kiarie - “
- d) Paul Victor Theceri Kiarie - “
  
6. a) Beatrice Karuu - Nairobi/Block/116/1165

- b) Phyllis Wairimu Kiarie - (Zimmermann)
- c) Valentine Elizabeth Waceera Kiarie - (jointly and severally)
- d) Paul Victor Theceri Kiarie - “
- 7. Millicent Muthoni Kiarie - Plot 20
- 8. All beneficiaries - Nyandarua Kipipiri 1160
- 9. Assets as items 8-14 in the list of assets to be shared equally amongst beneficiaries

The Counsel for the respective parties; Mr. Njeru Gichanga for Gladys Njeri Maina and Ms. Ndungu for Margaret Wangare Nderitu filed their respective submissions which the Court has gone through and considered with the evidence on record.

### **ISSUES**

The Court combined the issues raised in the submissions as follows;

- a. Who are the beneficiaries/dependants of the deceased estate?
- b. What is the mode of distribution of the estate of the deceased that is fair and equitable to all the beneficiaries/dependants? (Is it Margaret Wangare Nderitu’s proposal or Gladys Maina Kiarie’s, or should it be by each home or each beneficiary?)
- c. Should the distribution be with regard to identifiable assets or all assets as per the list of assets presented and filed in Court?
- d. Should the rental income be considered in arriving at a fair distribution?
- e. Should the share of Ksh. 30,000/= a month awarded to be released to the 2<sup>nd</sup> administrator Gladys Njeri Maina from 25<sup>th</sup> February, 2009 to date by Margaret Wangare Nderitu’s share be adjudged against Margaret Wangare Nderitu be deducted or be deemed distributed in advance.

### **LAW**

#### **1. Section 3(5)**

***“Notwithstanding the provisions of any other written Law, a woman married under a system of 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 Section 29 and 40 thereof, and her children are accordingly children within the meaning of this Act”***

- 1. **Section 3 Law of Succession Act Cap 160; “wife” includes a wife who is separated from her husband.....and the terms “husband”, “spouse” “widow” and “widower” shall have corresponding meaning.**
- 2. **Section 26 Law of Succession Act Cap 160** make provisions for dependants not adequately provided for by Will or on intestacy.
- 3. **Section 27 Law of Succession Act Cap 160** gives the Court discretion to order a specific share of the estate to be given to the dependant or to make such other provisions for him by way of periodical payments or a lump sum and to impose such conditions as it thinks fit.
- 4. **Section 28 Law of Succession Act Cap 160** the circumstances to be taken into account by the Court in considering whether any order should be made and if so what order, with regards to provision for dependants; are;
  - a. The nature and amount of the deceased’s property;
  - b. Any past, present or future capital or income from any source of the

dependant;

- c. The existing and future means and needs of the dependant;
- d. Whether the deceased had made any advancement or other gift to the dependant during his lifetime;
- e. The conduct of the dependant in relation to the deceased;
- f. The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
- g. The general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

5. **Section 40 of Law of Succession Act Cap 160** on division/distribution of deceased's estate where the intestate was polygamous is as follows;

- a. His personal and household effects and 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.
- b. The distribution of personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in **Sections 35 to 38**.

6. **Section 71 of Law of Succession Act Cap 160**

The Law of Succession requires all beneficiaries to the deceased's estate shall consent to confirmation of grant and the proposed mode of distribution of the estate.

In the instant case the consents were not obtained as the application of 29<sup>th</sup> May, 2013 by Margaret Wangare Nderitu has been contested by the Notice of Objection to the summons for confirmation of 9<sup>th</sup> July, 2013 by Gladys Njeri Maina and all the beneficiaries did not consent.

With regard to the 1<sup>st</sup> issue, the 1<sup>st</sup> administrator Gladys Njeri Maina stated she was married to the deceased in 1980 and left in 1996. In 2001 the deceased married the 2<sup>nd</sup> administrator Margaret Wangare Nderitu. Although she produced the marriage certificate attached to the submissions; the issue is whether the deceased had capacity of marriage if he had not divorced the other wife. **Section 3(5) of Law of Succession Act Cap 160** absolves Margaret Wangare Nderitu with regard to capacity of the deceased to marry her and the fact that there is no dispute there was a marriage and she lived with deceased for 7 years. The Law recognises her as a wife for purposes of succession and her children are beneficiaries.

The other administrator Gladys Maina Kiarie is also a wife, though she did not produce her marriage certificate in court; it is not in dispute she was the 1st wife of the deceased and they separated but not divorced. The Court recognized them as wives of the deceased at least at different times. With regard to the children of each home there has been no contest as to paternity and parental responsibility, they are all beneficiaries of the estate. Therefore, four (4) children of Grace Njeri Maina and the two (2) Children of Margaret Wangare widow confirm six (6) children of the deceased and the 2 wives to make 8 units. Therefore under **Section 29(a) of Law of Succession Act** they are dependants of the deceased and beneficiaries of the estate.

This Court is called upon to determine the most just and equitable distribution of the deceased estate. The Court has considered the list of assets attached to

Gladys Njeri Maina Replying Affidavit of 9<sup>th</sup> July, 2013.

From the pleadings and annexure or record shows the following properties are identified;

1. L.R. NO. Kabare/Nyangata/1818 – 1.62 hectares

(Title Deed attached to Margaret Wangare Nderitu's submissions)

2. Plot No. V693 Embakasi, Ranching Company

(a copy of certificate 003962 attached to the submissions and this is where Margaret Wangare Nderitu resides)

3. Plot No.V694 Embakasi Ranching Company (copy of certificate 003963 attached to the submissions and in adjacent to the home of Margaret Wangare Nderitu).
4. L.R Nyandarua/Kipipiri/666 (5acres) (attached Certificate/Title Deed to submissions)
5. Nairobi/Block 116/1165 Zimmermann (rental income from the rental houses)
6. Standard Chartered 350 ordinary shares (certificate attached)
7. Deceased Pension/University of Nairobi and Co-operative shares from Chuma Sacco Ltd (the list of disbursement attached to submissions and shared among the two (2) families as beneficiaries).
8. Umoja House No Plot Nol. 26
9. Motor Vehicle KAT 378G - Log book not attached.
- 10.Motor Vehicle KAL 305 P – Log book not attached

**The following are listed properties but not traced.**

1. Plot No R. 547 Share certificate 948
2. Loc 3/Mukangu/921
3. Shares in Kenya Airways
4. Embakasi Ranching Certificate No. 13784
5. Shares with Community Housing Co-operative Society Limited
6. Life Assurance AKI – British American Insurance (Britak) Policy No. 124 - 643
7. Proceeds in Account Number 8674246 Barclays Bank Queensway House
8. Shares with Samuru Gitito Farmers Co-operative Society Ltd
9. Roysambu Estate Phase II Plot No.170
- 10.L.R No. Mbeti/Kiamuringa/549

The Court will distribute existing confirmed properties common to all beneficiaries and those that are not verified yet, may be confirmed later the Court will make appropriate orders.

The Court has considered the proposals for the mode of distribution proposed by both families in the application for confirmation of grant of 29<sup>th</sup> May, 2013 by Margaret Wangare Nderitu and the one of Gladys Maina Kiarie in the affidavit annexed to the Notice of Objection of 9<sup>TH</sup> July, 2013 and the oral evidence and submissions filed.

The Court has taken into account the following factors; for Gladys Maina Kiarie, she was married to the deceased and they lived together for 16 years in which time they had four (4) children of the marriage.

She worked as Civil Servant in the Ministry of Agriculture and rose through the ranks. Her earnings contributed directly to the purchase and development of the property of Umoja H26, Nairobi/Block 116/1165 Zimmermann and Ruai V 693 and V 694.

Her contribution is evidenced by the annexures to her submissions ‘‘GMMI’’ which show that she obtained loans from Ukulima Co-operative Savings & Credit Society Ltd during the period she lived with the deceased as follows;

1. 21/11991	-	20,000/=	-	To buy a plot
2. 10/11/1983	-	40,000/=	-	To buy a house
3. 28/12/1984	-	3,000/=	-	Emergency
4. 1/9/1986	-	61,000/=	-	House Construction
5. 4/10/1989	-	82,000/=	-	Purchase Komorock Scheme
6. 24/12/1992	-	15,000/=	-	Car Insurance
7. 16/4/1993	-	100,000/=	-	To finish Building
8. 6/9/1993	-	35,000/=	-	Refinancing Building

9. 7/1/1994	-	25,000/=	-	School Fees
10. 6/1/1995	-	28,000/=	-	School Fees

All these loans were obtained while she was with the deceased and the annexed copies of loan application forms confirm to this Court that she contributed directly to the above mentioned properties.

Margaret Wangare Nderitu contested the fact that Gladys Njeri Maina contributed to the purchase of these properties, as the titles of the properties are in the name of the deceased. The Court noted that all properties even those the Margaret Wangare Nderitu claims they bought together were also registered in the deceased's name only.

The third issue is that the Court has taken into account is that Gladys Njeri Maina on leaving the matrimonial home, undertook the custody and care of the four (4) children alone/single handedly. The deceased did not participate or contribute at all in spite of Gladys Njeri Maina's contribution to the investments they made during their marriage and which she left behind when she left the matrimonial home.

The fourth issue is the four (4) children of the 1<sup>st</sup> wife were deprived of the financial support of their father the deceased from 1996 to his death and even after the death of the deceased in 2007 the first family;

- a. Was entitled to part of the personal and husband effects of the deceased
- b. Part of the bank balances in the bank in the bank accounts of the deceased.
- c. Shared access and use of all the property of the deceased to date.
- d. Specifically share in rent payments from 2007 – 2009 before they jointly obtained grant of letters of administration and
- e. The 30,000/= due from 2009 when the Court order was made to date.
- f. **Section 8(a) and (b) of the Matrimonial Property Act of 2014**, the properties purchased during the subsistence of the 1<sup>st</sup> marriage were not subjected to division of matrimonial property between Gladys Njeri Maina and the deceased. The law requires this property to be divided between the deceased and the 1<sup>st</sup> wife and is not intermingled with the deceased's estate. Therefore, the 1<sup>st</sup> family is entitled to the said property.
- g. The 1<sup>st</sup> family is made up of 5 units (4 children and 1<sup>st</sup> wife) while the 2<sup>nd</sup> family is made up of 3 units (2 children and 2<sup>nd</sup> wife).

With regard to Margaret Wangare Nderitu, the Court considered that she was married to the deceased for seven (7) years and she participated and contributed to the purchase and development of property of the deceased. She engaged in farming with the deceased. She facilitated fair distribution of the pension and cooperative share proceeds of the deceased to both families. She disclosed to the Court as regards the list of assets and the relevant documents of the property in question. She has a minor child who requires substantial financial support.

The sum total of these factors, the most fair and equitable distribution of the property of the deceased by the 2 families is as follows;

### **HOUSES**

1. Margaret Wangare Nderitu - Plot V 693 Embakasi – Absolutely
2. Gladys Njeru Maina - Plot No. 26 Umoja – Absolutely

### **PLOTS**

1. Gladys Njeri Maina - Plot V694 (jointly and equally)

Beatrice Wanjiru Kamau

Phyllis Wairimu Kiarie

Valentine Elizabeth Waceera Kiarie

Paul Victor Theceri Kiarie

2. Gladys Njeri Maina -

Beatrice Wanjiru Kamau

Phyllis Wairimu Kiarie

Valentine Elizabeth Waceera Kiarie - Nairobi Block 116/1165

Paul Victor Theceri Kiarie (jointly and equally)

Margaret Wangare Nderitu

Milicent Muthoni Kiarie

Phyllis Wairimu Kiarie

## 2. MOTOR VEHICLES

1. Margaret Wangare Nderitu - Motor Vehicle KAL 305P (whole)
2. Gladys Njeri Maina - Motor Vehicle KAG 378 Z (whole)

## 3. FARMS

4. Gladys Njeri Maina - Nyandarua Kipipiri 1660
  5. Beatrice Wanjiru Kamau (jointly and equally)
  6. Phyllis Wairimu Kiarie
  7. Valentine Elizabeth Waceera Kiarie
  8. Paul Victor Theceri Kiarie
  9. Margaret Wangari Nderitu - L. R. Kabare/Nyagata/1818
- Millicent Muthoni Kiarie - (jointly and equally)

Phyllis Wairimu Kiarie

## 1. PLOTS

1. Millicent Muthoni Kiarie - Plot 20 Njiru
2. Phyllis Wairimu Kiarie - Plot 21 Njiru

## SHARES

Phyllis Wairimu Kiarie - Standard Chartered -350 Shares

## BENEFITS

All beneficiaries received the benefits of the late Simon Peter Karuu as follows;

1. Gladys Njeri Maina - 5%
2. Margaret Wangare Nderitu - 5%
3. Beatrice Wanjiru Kiarie - 5%

4. Phyllis Wairimu Kiarie - 15%
5. Valentine Elizabeth Wacera - 15%
6. Paul Victor Theceri - 10%
7. Millicent Muthoni Kiarie - 5%
8. Phyllis Wairimu Kiarie - 40%

as per the attached list to the submissions. The minor (Phyllis Wairimu Kiarie) has also been substantially catered for in the pension list as she obtained the lion's share of Ksh.1,365,728/= as per the attached list to the submissions.

Gladys Njeri Maina and Margaret Wangare Nderitu jointly obtained letters of administration intestate and from 2009. Justice Gacheche ordered from 25<sup>th</sup> February 2009, the 1<sup>st</sup> family through Gladys Njeri Maina was to receive Ksh. 30,000/= every month from the rent collected and banked by the 2<sup>nd</sup> wife, Margaret Wangare Nderitu. This order was not effected; and to date she has never been paid. The Zimmerman Plot Nairobi Block 116/1165 was bought during the 1<sup>st</sup> marriage and developed during the 2<sup>nd</sup> marriage. Ideally, it should be equitably distributed alongside other properties to both families and exclusively to the 2<sup>nd</sup> family. However, this can only be effected after payment of the arrears due and owing to the 1<sup>st</sup> family from the 2<sup>nd</sup> family. The order by Justice Gacheche was not reviewed or appealed against it was ignored.

Margaret Wangare Nderitu filed an Income and Expenditure Account which showed the rents record from 2007 to 2009 from the 3 properties of Ksh. 1,316,000/=. The expenses for repair and maintenance was Ksh.348, 413/=. The listed expenses were not supported by any proof of the incurred expenses. It is not clear if repairs were continuous over a period or at once. What is clear is that the 2<sup>nd</sup> family's upkeep and maintenance took up the Ksh. 1 million of the whole amount and to the exclusion of the 1<sup>st</sup> wife's family.

If Margaret Wangare Nderitu paid Ksh.30,000/= a month from when the Court ordered 7 years ago to date, then the 2<sup>nd</sup> family have the same property exclusively. In default of payment of arrears of the proceeds from the plot from 2007 – 2009 to date, the Court will consider the amount an advancement to their share. The Court awards the Plot Nairobi Block 116/1165 to 1<sup>st</sup> family and 2<sup>nd</sup> family at 50%/50% .

In the proposal of the confirmation of grant application Margaret Wangare Nderitu proposed Gladys Njeri Maina to be allotted Plot No. R 547, share certificate 948, L.R. LOC 3/Mukanyaru /549 and L.R. Mbeti/Kiamuringa/549 which the 1<sup>st</sup> wife stated in her Objection they were not traced. In the Replying Affidavit of Margaret Wangare Nderitu of 16<sup>th</sup> January, 2009 at paragraph 7 she listed the three (3) properties among others as not traceable as property of the deceased yet in the application of confirmation of grant she allocated them to the 1<sup>st</sup> wife knowing very well these properties were subject to proof of ownership. Until ownership is verified these properties are excluded from the proposed distribution. When they are verified, they can be shared equally between the 2 families.

The Court therefore orders that in terms of **Section 71 of the Law of Succession Act Cap 160;**

- a. The grant is confirmed in terms of the distribution by the Court.
- b. The identified and distributed property as listed above.
- c. The remaining listed assets but not traced upon identification be shared by all beneficiaries in equal shares.
- d. This being a family matter, there are no order as to costs.

**READ AND SIGNED AT NAIROBI THIS DAY 29<sup>TH</sup> OF JANUARY, 2015**

**M. MUIGAI**

**JUDGE**

*In the presence of*

*Mr. Mohammed holding brief for Mr. Gicheru.*