



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2054 OF 2003

AND

SUCCESSION CAUSE NO. 2080 OF 2001

IN THE MATTER OF THE ESTATE OF CATHERINE MWIHAKI MUNUHE (DECEASED)

JUDGMENT

1. When the deceased died on 8th August 2001 a burial dispute erupted between Christopher Nderi Gathambo (herein referred to as Mr. Gathambo), who claimed to be husband to the deceased, and Samwel Muthui Munene, a brother of the deceased. The dispute was over who between them had a right to bury the remains of the deceased. The whole matter turned on whether Mr. Gathambo was husband to the deceased.
2. The matter ended up in court in **Nairobi HCCC No. 1372 of 2001** in a suit filed by Mr. Gathambo against the brother of the deceased. The dispute was heard by Hayanga J., who took oral evidence and eventually declared that Mr. Gathambo was husband to the deceased, and directed that the body of the deceased be delivered to him for burial at the Lang'ata Cemetery in Nairobi.
3. Thereafter, two succession causes were opened at the registry in Nairobi in respect of the estate of the deceased. **HCSC No. 2080 of 2001** was the first in time. It was lodged at the instance of Mr. Gathambo, in his capacity as widower of the deceased, and in which he named himself and Caroline Njeri Nderi (hereinafter referred to as Ms. Nderi), his daughter with the deceased, as survivors of the deceased. A grant was accordingly made to him on 1st December 2004.
4. **HCSC No. 2054 of 2003** was the second cause in time. It was lodged in court at the instance of Ms. Nderi, jointly with three (3) others, being her maternal uncles and aunt. A grant of letters of administration intestate was accordingly made to Ms. Nderi and the uncles on 27th February 2004. In both causes, applications were filed for revocation of the grants.
5. The two causes were consolidated. On 6th May 2013, I revoked the grants issued to Mr. Gathambo and Ms. Nderi as stated above, and I appointed Mr. Gathambo and Ms. Nderi administrators of the estate of the deceased. A grant of letters of administration intestate accordingly issued to them on 6th May 2013.
6. On 30th August 2013, I directed that distribution of the estate be founded on the Summons dated 8th June 2005, to be disposed of based on affidavit and oral evidence, and directed the parties to file and exchange witness statements and other relevant documents.
7. The parties did not follow the said directions, instead they each filed a Summons for confirmation

of grant, dated 21st October 2014 and 12th July 2015, respectively. I directed on 21st January 2015 that the two applications be disposed of simultaneously. I shall treat that the directions given on 30th August 2013 to have been overtaken to the latter directions of 21st January 2015.

8. The application dated 21st October 2014 was at the instance of Ms. Nderi. Her assertion is that she is the sole survivor of the deceased as Mr. Gathambo was never married to the deceased and was presumed to be her husband for the sole purpose of the burial. She proposes that the whole estate devolve upon her. Mr. Gathambo's application is dated 12th January 2015. He proposes that the estate be shared equally between Ms. Nderi and himself.
9. The applications were disposed of orally. Mr. Gathambo and Ms. Nderi testified on 21st January 2015. Ms. Nderi called a single witness, her aunt, Purity Njau.
10. The key considerations in an application for confirmation are the assets available for distribution, the persons to whom the assets are to be distributed and the manner in which the said assets are to be distributed.
11. On the assets, I have noted that the estate comprises of several immovable property, shares in limited liability companies and money in the bank. There are also terminal benefits from the deceased's employer, the Teachers Service Commission. Both sides are in agreement on the assets that make up the estate of the deceased, save that Mr. Gathambo has added two assets that are not in Ms. Nderi's list.
12. On the persons who are entitled to a share in the estate of the deceased, there are divergent views. Mr. Gathambo holds the position that the deceased was survived by himself as widower and Ms. Nderi as child. Ms. Nderi takes the position that she is the sole survivor of the deceased as the latter was never married to Mr. Gathambo.
13. Was there marriage between the deceased and Mr. Gathambo? That matter was the subject of proceedings before Hayanga J. in *Christopher Nderi Gathambo –vs- Samuel Muthui Munene HCCC No. 1372 of 2001*. These are the burial proceedings that I referred to in paragraph 2 above. After taking oral evidence from witnesses presented by both sides, the court, on 4th July 2003 pronounced that Mr. Gathambo was the husband of the deceased by virtue of the principle of presumption of marriage founded on prolonged cohabitation. That finding has not been reviewed nor set aside on appeal, it therefore stands to date.
14. Ms. Nderi argues that the said presumption only recognized Mr. Gathambo as husband of the deceased for the limited purpose of burial. That cannot be, and the judgment dated 4th July 2003 does not state so. He was pronounced as husband and widower of the deceased for all purposes, including succession. Consequently, he is a survivor of the deceased, and a person entitled to a share in the estate.
15. So how is the estate to be distributed as between Mr. Gathambo and Ms. Nderi? As the deceased was survived by a spouse and a child, Section 35(1) of the Law of Succession Act, Cap 160, Laws of Kenya, shall apply. According to that provision, the surviving spouse is entitled absolutely to all the personal and household goods, and a life interest over the rest of the property, the net intestate estate, for the deceased died intestate. The estate should devolve upon the surviving child ultimately upon the demise of the surviving spouse.
16. Ideally, I should order devolution of the personal and household effects on Mr. Gathambo and he should enjoy life interest over the rest of the assets. Ms. Nderi should only access the property in the event of the death of the former.
17. I have noted, however, that the two do not live together. Ms. Nderi was born in 1982 at a time when her mother, the deceased, and Mr. Gathambo were not living together. He is said to have

joined them in 1992, when she was finally introduced to him as her father, and he was on and off the Umoja residence until 2001, when the deceased died. He is said to have left the Umoja house in 2001 to file **HCCC No. 1372 of 2001**. The parties have been apart since then, each leading their own separate lives.

18. The deceased had amassed considerable property. Mr. Gathambo did not claim any of the property at the time of the hearing of **HCCC No. 1372 of 2001**, and indeed the trial Judge in that matter noted that he did not acknowledge the property. There is no evidence that he contributed in any way in the acquisition of the assets.

19. As the two survivors of the deceased do not appear to get along, I believe it would be imprudent to have the two tied up together through Mr. Gathambo enjoying the life interest allowed by Section 35(1) of the Law of Succession Act. It would be fairer if the estate is distributed as between the two of them, so that each can move on with their own life.

20. I have noted that Mr. Gathambo no longer lives in the Umoja house. It is also stated in the records in the file as well as in the oral testimony, that he did not play a significant role in the life of Ms. Nderi, particularly after the decease of her mother in 2001. I have also noted that although she was born in 1982, she was never introduced to her father until 1992 and he did not appear to have been seriously in her life thereafter. She is still quite young. Mr. Gathambo no doubt has property of his own. I note that there was an offer made to him to take the Dandora property, which he declined. The terminal dues have since been paid to Ms. Nderi. Those are some of the factors at play in my mind as I ponder on how to distribute the estate herein.

21. In the end, I order that the estate of the deceased shall devolve as follows:-

a. To Caroline Njeri Nderi

- i. Kajiado/Kisaju/261**
- ii. Kantafu Komarock Estate Phase VI Plot No. 2910**
- iii. Kantafu Komarock Estate Phase VIII Plot No. 224**
- iv. House No. L156 Umoja Phase 1 Estate**
- v. Proceeds in Barclays Bank of Kenya Ltd Account No. 4018569**
- vi. Terminal benefits from Teachers Service Commission**
- vii. Tenna Sacco Membership**
- viii. Kariobangi Gikomba Co. Ltd shares**
- ix. Housing Finance Co. of Kenya Ltd shares**

b. To Christopher Kester Nderi Gathambo

- i. Dandora Phase 1 plot**
- ii. Kenya Airways Shares**
- iii. National Industrial Credit shares**
- iv. Wazee Makadara Self Help Group shares**
- v. Ranjos Company shares**
- vi. Barclays Bank of Kenya Ltd shares**

22. Each party shall bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 30TH DAY OF OCTOBER, 2015.

W. MUSYOKA

JUDGE