



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE 1840 OF 2007**  
**IN THE ESTATE OF JAMES THUITA KARIUKI – DECEASED**  
**JUDGEMENT**

1. Under a consent order recorded on **25<sup>th</sup> October 2010**, MARYANNE NJOKI KARIUKI, MAXINE NJAMBI KARIUKI and FAITH NJERI MUNIU were appointed the joint administrators of the estate of JAMES THUITA KARIUKI who died intestate on 6<sup>th</sup> June 2007.
2. Maryanne Njoki (hereinafter referred to as Maryanne “A”) and Maxine Njambi (hereinafter referred to as Maxine) are the daughters of the deceased with his widow DAHLIA ALDORA KARIUKI (vide a marriage certificate NO. W565554 dated 13<sup>th</sup> November 1976 while FAITH NJERI MUNIU (hereinafter referred to as Faith) is the mother of MARYANNE NJOKI (hereinafter referred to as MARYANNE NJOKI “B”), sirred by the deceased.
3. The consent order was recorded in the Objection dated 7<sup>th</sup> July 2010 filed by Maryanne “A” and Maxine to the petition for a Grant of Letters of Administration intestate filed by Faith Muniu on 16<sup>th</sup> July 2007 claiming a widow’s entitlement and naming herself, her daughter Maryanne “B” Dahlia Aldora Kariuki (referred as former wife), Maryanne “A”, Maxine and David Kariuki (Aldora’s son) as the heirs of the deceased.
4. After the recording of the consent order, Faith proceeded to take out summons for the Confirmation of the Grant wherein she did not name Aldora as a surviving beneficiary and proposing a distribution of the estate as follows:-
  - (a) **Motor vehicle Registration Number KWQ 976 to be shared equally between Maryanne Njoki “A”, Maxine Njambi and David Kariuki.**
  - (b) **Motor vehicle Registration Number KAB 323Y to be shared equally between Maryanne Njoki “A”, Maxine Njambi and David Kariuki.**
  - (c) **L.R. No. 430 Dagoretti Ruthimitu to shared equally between between Maryanne Njoki “A”, Maxine Njambi , David Kariuki and Maryanne Njoki “B”.**
  - (d) **Title No. 62 Baxton RR Thorton Heath CR7.7HG Building UK to be shared equally between Maryanne Njoki “A”, Maxine Njambi and David Kariuki.**
  - (e) **Account No. 125141746 KCB, Kencom Branch Nairobi to be shared equally between between Maryanne Njoki “B”, Faith Njeri Muniu, Maryanne Njoki “A”, Maxine Njambi and David Kariuki.**

**(f) 1½ share of L.R. No. Dagoretti Uthiru T.78 (being the plot comprising 8 units of 2 bedroom each plus 1 three bedroom unit) to be shared jointly by Faith Njeri Muniu and Maryanne Njoki “B” until Maryanne Njoki “B” a minor attains majority.**

**(ii) ½ share of L.R. Dagoretti Uthiru T.78 (being the plot comprising 9 units of 1 bedroom plus 3 single room units each.) to be shared jointly by Maryanne Njoki “A”, Maxine Njambi and David Kariuki**

**(g) Mortgage Account No: 600-0002521 with H.F.C.K. to be shared equally between Maryanne Njoki “A”, Maxine Njambi, David Kariuki, Faith Njeri Muniu and Maryanne Njoki “B”.**

**(h) Micro Finance Loan with Kadet Limited Kangemi to be shared between Maryanne Njoki “A”, Maxine Njambi, David Kariuki, Faith Njeri Muniu and Maryanne Njoki “B”.**

5. On 17<sup>th</sup> March 2011, Mary Njoki “A” and Maxine filed an objection to Faith’s summons for confirmation of Grant, on the grounds that set out as follows:

**1. No consent on the mode of distribution has been obtained from other co-administrators and dependants.**

**2. The distribution takes into account assets that do not belong to the estate.**

**3. The distribution fails to include proceeds collected from the estate solely by Faith Njeri Muniu from the time of the death of James Thuita Kariuki, to date and which she has not accounted for.**

**4. One of the dependants, Dahlia Aldora Kariuki, the wife of the deceased and therefore a dependant has been left out of the distribution.**

6. On 4<sup>th</sup> April 2012, Maryanne Njoki “A” filed an affidavit in support of distribution of the estate in court. She cites the consent order of 25<sup>th</sup> October 2012 wherein she, her sister Maxine and Faith Njeri Muniu were appointed joint administratrix of the estate and depones that the deceased was survived by herself, Dahlia Aldora Kariuki, Faith Njeri Muniu, Maxine Njambi, David Kariuki and Maryanne Njoki “B”.

7. She proposes that the deceased’s estate be distributed as follows:-

**(a) Plot No. Dagoretti/Uthiru/T.78 to be sold and proceeds to be shared equally between Mary Njoki, Kariuki, Maxine Njambi Kariuki, David Kariuki and Mary Anne Njoki (Junior).**

**(b) Plot No. Dagoretti/Ruthimitu/430 to be sold and proceeds to be shared at the ratio of 25% to Faith & 75%(....) Faith to be given 75% of the proceeds from the sale of the main dwelling house and Dahlia to get 25% thereof.**

**(c) Motor vehicle KWQ 976 & KAB 232Y to be sold and proceeds to be given to Dahlia Aldora Kariuki.**

**(d) Monies held in the deceased’s account No. 12515176 to be shared equally between Mary Njoki “a”, Maxine Njambi Kariuki and David Kariuki.**

**(e) That the share of Maryanne Njoki “B” who is a minor be held in trust for her by her mother Faith Njeri Muniu until she attains the age of Majority.**

8. Maryanne “A” has deponed in her affidavit of 12<sup>th</sup> February 2011 that she has the authority of her co-administratrix to swear the same. She has annexed the consent of her mother and brother to the mode of distribution proposed in the said affidavit.

9. On the 14<sup>th</sup> September 2011, Faith filed a further affidavit in which she intimated that the deceased had a mortgage with the Housing Finance Company of Kenya (H.F.C.K.) which should be considered as liability of the estate which should be considered as a liability of the estate. She did not, however, produce any documentary evidence to prove the said mortgage nor provide any particulars as to which of the deceased's properties had been tendered as security.

10. On 25<sup>th</sup> June 2011, leave was granted by consent of the parties herein that the matter proceeds by way of written submissions. The petitioner's (Faith) submissions were filed on 8<sup>th</sup> September 2011 while those of the objectors were filed on 25<sup>th</sup> October 2011. The petitioner filed further submissions on 25<sup>th</sup> October 2011.

11. The petitioner contends that she is the second wife of the deceased and so entitled to inherit as his widow. She also says that she is entitled to an inheritance from him for the reason that she is the mother of his undisputed daughter, Maryanne "B", the minor. She submits therefore that the deceased's estate should be taken as comprising of two houses, that of Dahlia Aldora Kariuki and her own. She claims to have acquired the status of a wife of virtue of cohabitation with the deceased since 1994 and relies on the following authorities.

**1. HOTTENSIAH WANJIKU YAWE .vs. PUBLIC TRUSTEE civil appeal No. 13 of 1976 (E.A.C.A.)**

**2. MARY WANJIRU GATHATHU .vs. ESTHER WANJIRU KIARIE Nairobi Civil Appeal No. 20 of 2009.**

12. The petitioner has submitted that she has lived in the matrimonial property, DAGORETTI/UTHIRU/T.78 since 1994 but the respondents say she moved in after the death of the deceased and refused to move out or to cede the same to Dahlia Aldora Kariuki who claims to have contributed to the purchase and development thereof in 1982.

13. The petitioner says that the property known as DAGORETTI/RUTHIMITU/430 forms part of the deceased's ancestral home and therefore not part of the deceased's estate. This is despite the fact that in her affidavit to support her proposed mode of distribution she includes the same under item (c) of the schedule of assets, proposing that it be distributed to all the children of the deceased equally. In the same schedule she lists the immovable property Title No. 62 BAXTON RD THORTON HEATH CR7.7HG BUILDING, UK (which she complains has not been included in the respondents' objectors' proposal for distribution) and proposing that the same be distributed to Maryanne "A", Maxine Njambi and David Kariuki.

14. The inclusion of the UK property, in the petitioner's application for distribution and the failure to include Dahlia as one of the beneficiary in the same form part of the objection dated 14<sup>th</sup> March 2011. The objection also raises the issue of rental income received by the petitioner since the deceased's demise which the objectors say should be included in the distribution. This asset, however, appears to have been abandoned and is not included in the objectors' affidavit in support of the distribution filed on 4<sup>th</sup> April 2011.

15. The petitioner commenced these proceedings on 16<sup>th</sup> July 2007 when she filed a citation directed at Dahlia and her children, intimating in her supporting affidavit that she was desirous of petitioning for a grant herself. This was just over a month after the death of the deceased, and she was armed with a chief's letter dated 4<sup>th</sup> July 2007. The chief's letter names Dahlia as the 1<sup>st</sup> wife and the petitioner as the 2<sup>nd</sup> wife of the deceased.

16. Apart from the Chief's letter, the petitioner has not produced any documentary evidence that she was married to the deceased but claims to have cohabited with him since 1994, a fact that is disputed by the objectors. The birth of her daughter, Maryanne Njoki (Maryanne "B") in 1999 is not disputed. Nor is the fact that she was fathered by the deceased.

17. In their submissions, the objectors' state that the petitioner's claim to have been the deceased's wife is not proved nor is has she produced any evidence to demonstrate that she acquired any property jointly with the deceased. Relying on the authorities of **MARGARET DOREEN ATIENO ODONGO .vs. BENJAMIN ADONGO ADEYA ODONGO [2006] eKLR** the objectors have urged the court to find that the petitioner is not a widow of the deceased as no presumption of marriage can be made in the absence of supporting evidence. Also that, by virtue of the deceased's statutory marriage to Dahlia, which marriage had not been dissolved at any one time, he lacked capacity to enter into any marriage of the nature alleged by the petitioner.

18. The objectors have produced documentary evidence as follows:-

*(a) Marriage certificate evidencing the marriage between the deceased and Dahlia Aldora on 13.11.76 at the Registrar's office in Lambeth District, London.*

*(b) Birth certificate in respect of Maryann "A" Maxine and David all born in London.*

*(c) Land certificate in respect of L.R. No. Dagoretti/Uthiru/T.78 dated 4<sup>th</sup> May 1982 (James Thuita Kariuki as proprietor).*

*(d) Copy of motor vehicle log book for KWQ 976 (registered in the name of James Thuita Kariuki)*

*(e) A copy of motor vehicle log book for KAB 323Y (registered in the name of D.A. Kariuki)*

*(f) Copies of correspondence relating to the importation of the motor vehicles by Dahlia.*

*(g) Correspondence and inventory in respect of household effects imported by Dahlia for the matrimonial home.*

*(h) Copies of receipts for various household items purchased by the objectors and Dahlia in Nairobi.*

*(i) Copies of correspondence exchanged between the deceased and the objectors, the last such correspondence being a letter from the deceased to Dahlia dated 11<sup>th</sup> December 2006. The deceased died six months after the said letter.*

19. The documents filed show that the motor vehicles were registered in 1985 and 1993 respectively, prior to the time the petitioner claims to have started cohabiting with the deceased. She could not possibly have contributed to their acquisition in any way. Nor could she have contributed to the acquisition of the land known as Dagoretti/Uthiru/T.78 which was acquired in 1982.

20. I have not seen any documentation regarding the property known as Dagoretti/Rithimitu/430, which the petitioner says is not estate property. Her assertion contradicts her deposition in paragraph 5 of her affidavit in support of her proposed mode of distribution where the same is included. I chose to deem the same as being estate property and available for distribution.

21. The objectors have submitted that the immovable property known as **HOUSE NO 62, BUXTON ROAD, THARTON HEATH CR7 HG U.K** was independently acquired by Dahlia and belongs to her absolutely. Although the documents intended for production to prove this fact were not so produced, the petitioner has produced nothing to rebut this contention. I will therefore not include it as part of the estate.

22. The court at this stage is required to confirm whether the identification and shares of all persons beneficially entitled to the deceased's estate have been ascertained in order to confirm the Grant as might have been issued to the joint administrators, in order for them to distribute the estate as provided under the law. The sharp difference between the petitioner on the one hand and the objectors on the other in this regard, clearly indicates that there is a dispute not only as regards who is beneficially entitled to inherit the estate but also the intestacy available for the distribution and the shares to be inherited by the beneficiaries.

23. There is no dispute as to who are the deceased children in view of the fact that the objectors recognize Maryanne Njoki “B” as a child of the deceased. The share of her inheritance, rather than her legal entitlement is therefore what is in issue, with the petitioner submitting that she should share equally while the objectors think otherwise.

24. As to who is and is not the deceased’s widow is a contentious issue. The petitioner appears not too keen to recognize the mother of her co-administrators either as a widow or beneficiary of the deceased’s estate as appears in paragraphs 3 and 5 of her affidavit in support of the distribution where she names herself as the widow, leaving Dahlia out, and excludes her in the schedule of heirs, properties and proposed mode of distribution.

25. By virtue of the marriage certificate produced to prove Dahlia’s marriage to the deceased she cannot, in the absence of any evidence of a dissolution of that marriage, be anything but a widow of the deceased. She is therefore a lawful beneficiary under **Section 35 of the Law of Succession Act (Cap 160 of the Laws of Kenya)**. Her marriage was conducted under the Marriage Act of England and was therefore not polygamous or potentially polygamous.

26. In view of the above therefore, the said marriage is statutorily protected and the alleged marriage between the deceased and the petitioner, (which is not proved in any event) could not have been anything but a bigamous marriage, if it even did take place. It would be void under the law governing the deceased;s marriage to Dahlia and could not have conferred any rights of inheritance or dependency under either **Section 29(a) or 35 of the Succession Act**. Clearly, the petitioner is not entitled to inherit the deceased either as a widow or dependant and cannot acquire such a right by virtue of being the mother of his child. **Section 40 of the Act** does not therefore apply and there is only one house.

27. In view of my above finding the only beneficiaries entitled to inherit the deceased are **DAHLIA ALDORA KARIUKI, MARYANNE KARIUKI (MARYANNE “A”) MAXINE KARIUKI, DAVID KARIUKI AND MARYANNE KARIUKI “B”**.

28. Being a minor, Maryanne “B” could not file any consent to the confirmation of the Grant or the distribution of the estate. Her mother, the petitioner was appointed administrator to guard her interest. She is therefore deemed to be her trustee under **Section 84 of the Act** which provides that:

**“Where the administration of the estate of a deceased person involves any continuing trusts, whether by way of life interest or for minor beneficiaries or otherwise, the personal representative shall, unless other trustees have been appointed by a will for the purpose of the trust, be the trustees thereof:”**,

and **Section 3(1) of the Act** which defines a **“personal representative”** as the executor or administrator of a deceased person.

29. The minor Maryanne’s trustee has not consented to the proposed mode of distribution filed by the objectors. Neither have the consented to her proposed mode of distribution. There is therefore neither consent to distribution nor agreement as to the shares of the beneficiaries. The estate property is deemed by this court to be as follows:-

1. **L.R. NO. DAGORETTI/UTHIRU/T.78**
2. **L.R. NO. DAGORETTI/RUTHIMITU/430**
3. **MOTOR VEHICLE REGISTRATION NO. KWQ 976**
4. **MOTOR VEHICLE REGISTRATION NO: KAB 323Y**
  
5. **FUNDS HELD IN ACCOUNT NO: 125141746, KENYA COMMERCIAL BANK KENCOME BRANCH.**

30. The liabilities of the estate are yet to be ascertained since

the loans stated by the petitioner as being due from the estate have not been proved by any

documentation.

31. Considering the facts and documentation filed and in view of my findings above, it is clear to me that the intestacy herein is governed by **Section 35 of the Succession Act**, being one where the deceased **JAMES THUITA KARIUKI** left one surviving spouse, **DAHLIA ALDORA KARIUKI** and the children named above.

32. In view of the above, and having considered the Summons for Confirmation of Grant dated 16<sup>th</sup> February 2011, the Objection thereto dated 14<sup>th</sup> March 2011, the affidavits filed to support the differing proposals as to the mode of distribution, filed by the petitioner on one hand, and the objectors on the other, the submissions and legal authorities filed to support either of the opponents' positions, and being guided by the provisions of **Section 35 of the Succession Act**, I would confirm the Grant if issued by this court to **MARYANNE NJOKI KARIUKI, MAXINE NJAMBI AND FAITH NJERI MUNIU** pursuant to the court order of 25<sup>th</sup> October 2010, for distribution of the estate in accordance with **Section 35 of the Succession Act**.

33. Accordingly, in the event that the Grant is confirmed, the estate shall be distributed to the widow **DAHLIA ALDORA KARIUKI** who shall inherit:-

**(a) The personal and household effects of the deceased absolutely.**

**(b) A life interest in the whole residue of the net intestate estate, determining ipso facto in the event that she remarries.**

34. For the purposes of the provision of **Section 35(5) of the Succession Act**, Maryanne Kariuki "B" is hereby deemed and declared to be entitled to an equal share with the rest of the children of the deceased and the widow shall hold her share in trust, until she attains the age of 18 years, but with the option of exercising her power of appointment under **Section 35(b)**, in which case the petitioner, as her trustee would hold the minor's interest in trust for her.

35. The minor's representative, **FAITH NJERI MUNIU** (petitioner) may apply for the appointment of her share in accordance with **Section 35(3)**.

36. To facilitate the distribution and exercise of the power of appointment, if required, the petitioner is hereby ordered to account to the estate of all the rental income received by her since the demise of the deceased. The widow on the other hand is hereby ordered to account for all rental income she may have received pursuant to the order recorded on 7<sup>th</sup> December 2007 in C.M.C.C. 5345 of 2007 cited by the petitioner in these proceedings.

37. In the event that the power of appointment is to be exercised, a valuation of the residue of the net estate shall be undertaken by a reputable valuer to be appointed by agreement of the 3 administrators.

38. It being apparent that no grant was applied for and none therefore issued, pursuant to the appointment by the of the three administrators herein on 25<sup>th</sup> October 2010, I order that the same do issue forthwith, followed by a certificate of confirmation of the same in the above terms, being of the view that expedient justice is required in this case. I deem the failure to apply for the Grant to be the fault of the advocates engaged in the cause, which must not be visited upon the parties. The parties herein will not be prejudiced by such an approach in any event but will benefit instead. I have taken this approach in order to avert the incidence of further delay and in order to cure the irregularity, in the interests of justice, and in compliance with the provisions of **Section 159 2(a) and (d) the Constitution of Kenya 2010**.

39. The discovery of the absence of a Grant happened in the course of writing this judgement, having been misled by the record to believe that such a Grant existed. Whether deliberately or by inadvertence, counsel avoided that issue in their submissions. It is worthy of note that the matter was previously handled by three judges now in the court of appeal, none of whom addressed the issue of obtaining a

Grant before the Summons for Confirmation was admitted to hearing.

40. I find that the case law cited by counsel herein, though relevant, does not address the peculiar facts and circumstances of this cause.

41. Orders to issue as provided for in this judgement, with leave to any of parties to apply.

**DATED, SIGNED and DELIVERED at NAIROBI this 20<sup>th</sup> DAY OF JULY, 2012.**

**M.G. MUGO**

**JUDGE**

**In the presence of :**

Mr. Ndirangu for the petitioner.

Mr. Githaiga holding brief for Ms. Muhia for the respondents.