REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE 160 OF 2007

IN THE MATTER OF THE ESTATE OF JOSEPH KIRUMBA GITHAIGA (DECEASED)

JANE GATHONI GITONGA

MURIUKI GITONGA ……...…… PETITIONERS

VERSUS

LYDIA WANDIA KIRUMBA ……... OBJECTOR

JUDGMENT

During the Confirmation of the Grant in this matter, a question arose regarding the distribution of the estate. The deceased was polygamous and was survived by his two wives and children. The first wife was Hilda Karema Kirumba Githaiga who had six children, and Eunah Gichuku Kirumba who had one daughter, Jane Gathoni Gitonga.

Whereas the parties were agreed on all other aspects of the property of the deceased, an issue arose regarding the sharing of Land Reference No. Kirimukuyu/Kiria/282. It was due to that issue that this matter was brought to Court. With leave of the Court, the parties filed their written submissions through their respective Advocates. The latter did not wish to highlight those submissions but left the Court to study them and write this judgment.

Having considered the respective submissions, I note that only one property is the subject matter of the application i.e. the above referred to Land Reference No. Kirimukuyu/Kiria/282. The issues for determination are whether the said property should be shared equally among all the children of the deceased as provided for in **Section 40** of the **Law of Succession Act,** or whether it should be shared equally between the two households. Secondly, there is the issue as to who, if at all, should pay the costs.

With regard to the property, the Applicant's submission is that the land in question should be shared equally among the children of the deceased. On her part, the Respondent contends that the property should be shared on a 50/50 basis so that each household obtains a 50% share. In other words, the Applicant's contention is based on the number of children while the Objector's formula is based on the number of households.

It is not in contention that the deceased in this case died in 1984. Against that background, it is noteworthy that the **Law of Succession Act** came into operation on 1st July, 1981. Since the deceased passed on after the **Law of Succession Act** was operational, it follows that his estate was and still is governed by the statutory provisions of that **Act.** For the avoidance of any doubt, **Section 2 (1)** thereof states as follows –

"2 (1). Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all the cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons."

This terminology leaves no room or scope for invoking Kikuyu customary law as the **Law of Succession Act** applies uniformly among all and sundry in Kenya. The only exception is in regard to agricultural land and crops or livestock in various districts set out in the Schedule to **Section 32** of the **Act.**

Since the intestate was polygamous, his estate is governed by **Section 40 (1)** of the **Law of Succession Act.** That **Section** provides that –

"40 (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."

Commenting on that **Section** in the case of **RONO v. RONO & ANOR. (2008) 1 KLR (G & F) 803**, Omolo, J.A. said at page 817 –

"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 a discretion to take into account or consider 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."

These wise words fortify my conviction that the Court ought to be guided by the number of children and not the number of houses when it comes to distribution of the net intestate estate.

For the above reasons, I find that the prayer by the Applicant for sub-division of the estate among the children is the more reasonable and better option than the division thereof among the houses. I accordingly direct that Land Reference No. Kirimukuyu/Kiria/282 be shared equally among all the children of the deceased without reference to houses.

Each party to bear its own costs.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 18th day of July, 2012.

L. NJAGI
JUDGE