



REPUBLIC OF KENYA

High Court at Nakuru

Succession Cause 231 of 2006

IN THE MATTER OF THE ESTATE OF JOHN CHEGE KAMAU (DECEASED)

**ZACHARY KAMAU CHEGE.....PETITIONER/APPLICANT
VERSUS**

MARY PIRRE CHEGE.....OBJECTOR/ RESPONDENT

JUDGMENT

The grant of representation in respect of the estate of the Late John Chege Kamau (the deceased) was initially issued to his son, Zachary Kamau Chege (the petitioner). However, a consent was recorded in which the widow of the deceased, Mary Pirre Chege (the objector) was joined in the cause as a co-petitioner.

It is common ground that the deceased left the following dependants:-

1st house

- i) Zachary Kamau Chege (petitioner)
- ii) Francis Macharia Chege
- iii) Paul Kimani Chege
- iv) Joseph Mureithi Chege
- v) Stephen Kinuthia Chege
- vi) Elizabeth Wanjiru Chege
- vii) Samuel Gacheha Chege
- viii) Anne Nyambura Chege

The first wife of the deceased, Esther Njeri, predeceased him in 1989.

2nd House

i) Mary Pirre Chege (objector)

ii) Kimani Chege

iii) Miriam Chege

iv) Isaiah Chege Peter

v) Malkia Chege

vi) Zacharia Kamau Chege, JR.

It is equally not in dispute that the deceased had the following properties-

i) NYANDARUA/KARATI/1206 (50 x100 or 0.056 Ha)

ii) Commercial Plot NO.27, Kisima Trading Centre Samburu (50 x100 ft)

iii) Commercial Plot NO.31 Kisima Trading Centre, Samburu (50 x100 ft)

iv) Commercial Plot NO. 32 Kisima Trading Centre, Samburu (50 x100 ft)

v) Commercial Plot NO. 162 within Maralal Township

vi) Commercial Plot NO. 6 within Lodokejek Trading Centre.

vii) NYANDARUA/KARATI/1212 (0.042 Ha)

viii) NYANDARUA/KARATI/1218 (0.064 Ha)

ix) Shares with –

- Standard Chartered Bank
- Kenya Commercial Bank

x) Posho Mill

xi) 2 motor vehicles

- KAB 183 L
- KXF 431

It is conceded that the parcel of land measuring 21 acres at Kinamba Ngarua does not exist. The dispute is over the distribution of:

i) plot No. 32;

ii) cash retrieved in the deceased's safe and in the bank;

iii) income from the posho mill business.

The other dispute relates to two relatives of the deceased, David Mutahi Chege (David) and Zacharia Waigwa Chege (Zacharia). They are sons of the niece of the deceased. In other words they are grandsons of the deceased person's sister.

While the petitioner, representing the 1st house, would like both David and Zacharia to be included as beneficiaries in their house, the objector does not approve of the arrangement arguing that it would give undue advantage to the 1st house in terms of the number of dependants. As an alternative, she has proposed that David be included as part of her house while Zacharia be part of the 1st House.

There is evidence that David and Zacharia lost their mother in 1989 when they were very young, their mother having been murdered by her husband, who was tried and jailed. The deceased in this case took David under his care while the deceased's brother took Zacharia. The objector and her son, Zacharia Kamau Chege Junior, have confirmed that David has lived with them all along and that they consider him part of the family. It is the deceased who took him to school and provided parental care.

In terms of **Section 29(b)** of the **Law of Succession Act**, I come to the conclusion that both David and Zacharia qualify as dependants of the deceased, the latter having taken them into his family as his own. The objector has further confirmed that David is currently living with her. That being so, Zacharia will be considered as part of the 1st house.

Regarding Plot No. 32, it is the petitioner's case that it should be distributed to the 1st house in view of the fact that there are 10 dependants in that house compared to six in the 2nd house. With Zacharia, the 1st house has nine dependants while David brings to six the number of dependants in the 2nd house, as the objector, by dint of **Section 40** of the **Law of Succession Act**, is taken as an additional unit.

In distributing the estate in an intestate cause, the court has a complete discretion but always having regard to, among other considerations, the existing and future needs of the dependants and whether the deceased had made any gifts to the dependants during his lifetime.

In this case of a polygamous marriage the net estate must be divided, in the first instance, among the

“..... houses having regard to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

(See Section 40(1).

It is now settled that this section is not concerned with equal distribution of the estate among the children of the deceased but rather emphasizes equity in the making of provisions to the dependants. This position was scantily explained in the Judgment of Omolo, J.A in **Mary Rono V. Jane Rono & Another**, Civil Appeal No. 66 Of 2002 as follows-

“.....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 Succession Act, Cap 160 of the Laws of Kenya, lays down as a requirement that the heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a Judge has no discretion but to apply the principles of equality as was submitted before us by Mr. Gicheru. I can find no such provision in the Act..... My understanding of that section is that while the net intestate estate is to be distributed according to the houses, each house being treated as a unit, ...the Judge doing the distributing still has a discretion to take into account or consider the number of children in each house.”

It is not in dispute that the following properties were distributed to the 1st house by the deceased in his lifetime, although still registered in his name that is to say;

- (i) plot No. NYANDARUA/KARATI /1217-to Francis Macharia Chege
- (ii) plot No. NYANDARUA/KARATI/1218 to Zacharia Kamau Chege (petitioner)

(iii) plot No. 6 Lodokejek Trading Center to Paul Kimani Chege

It is also in evidence that Plot No. 41 Kisima was given to Joseph Mureithi Chege of the 1st house. In total therefore, the 1st house has received four properties and the objector has agreed that in addition to those four, they can have Plot No. NYANDARUA/KARATI/1206. The 2nd house is therefore left with only three parcels of land Plot Nos. 31 and 32 Kisima Trading Centre and 163 Maralal Township. In my view that proposal is equitable, indeed magnanimous on the part of the objector in the circumstances of this case.

Turning to the income from the businesses, there is no evidence of such income. The objector has not proved that indeed Zacharia Kamau Chege (petitioner) received Kshs.500,000/= from the various businesses left by the deceased. Similarly the petitioner has not provided any basis for demanding Kshs.170,500/= from the objector. He has alleged that Zacharia Waigwa confirmed that Kshs.341,000/= was left in the safe by the deceased. Zacharia Waigwa did not testify to confirm this. The objector has however conceded that she only retrieved Kshs. 50,000/= from the safe and has always been ready and willing to share this with the 1st house but for the adamance of the petitioner.

For the foregoing reasons the distribution of the entire Estate of the deceased shall be in accordance with the affidavit of Mary Pirre Chege (objector) sworn on 20th August 2006 save for the property at Kinamba Ngarua, that does not exist and Kshs.250,000/= that has not been proved.

No orders as to costs.

Dated, Signed and Delivered at Nakuru this 24th day of September, 2012.

**W. OUKO
JUDGE**