



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 242 OF 2008**

**IN THE MATTER OF THE ESTATE OF KAMONJO NJIINU alias KAMONJO GACHINU  
(DECEASED)**

**JUDGMENT**

The Petitioner applied for a Grant of Letters of Administration on 13<sup>th</sup> May 2008. The Petition was advertised under Gazette Notice Number 4568 dated 16<sup>th</sup> May, 2008 and published on 30<sup>th</sup> May 2008.

Following the publication of the Petitioner as aforesaid, Mary Njeri Mburu and Nancy Waithera Kamonjo (*the Objectors*) filed on 12<sup>th</sup> June 2008 an objection to making of the grant to the Petitioner. There is no record that this objection was determined, and despite of it, the Grant of Letters of Administration Intestate (*of the estate of Kamonjo Njiinu (also known as Kamonjo Gachinu)*) was made to the petitioner on 1<sup>st</sup> July 2008.

Following the said grant the Petitioner applied for confirmation thereof on 10<sup>th</sup> November 2008. Despite appearances in court by counsel for the Objectors on 19<sup>th</sup> October 2009, 16<sup>th</sup> December 2009 and 17<sup>th</sup> February 2010, no mention is made of the objection application by the objectors. However a consent order was made on 17<sup>th</sup> March 2010 allowing counsel for the Petitioner and Objectors respectively to "*file one further affidavit each, and thereafter the matter to be decided on affidavit evidence on record, and counsel's written submissions to be filed and exchanged by 31<sup>st</sup> March, 2010.*"

The matter was thereafter mentioned on 22<sup>nd</sup> April, 13<sup>th</sup> May, 10<sup>th</sup> June, 24<sup>th</sup> September 2010 and 21<sup>st</sup> October 2010 when the court noted that both parties had filed their submissions. On 18<sup>th</sup> November 2010, Counsel were satisfied with their submissions, and asked the court to give them a judgment, being this judgment.

The Objectors submissions which are undated but were filed on 13<sup>th</sup> May 2010 do not refer to or mention the objection to making of the Grant to the Petitioner, the submissions refer to the distribution of the estate to exclude the Petitioner, but to include the other children of the deceased. It seems therefore proper to determine, which I hereby do, that the Objector's application aforesaid is deemed to have been abandoned, and the only question for determination herein is the distribution of the deceased's estate. This finding is also consistent with the submissions by Mr. Ondieki dated 29<sup>th</sup> March 2010, and the supplemental submissions dated 28<sup>th</sup> September 2010.

At this stage I will mention a consent dated 11<sup>th</sup> September 2008 among the Objectors and Petitioner, and filed on 16<sup>th</sup> September 2009. The petitioner has disowned the purported consent as an act of fraud and forgery and should be ignored by the court in determining the distribution of the deceased's

estate. Again since no reference is made to the said consent by the Objectors in their counsel's submissions, I will ignore all the contents of the said purported consent. I will therefore consider the distribution of the estate in accordance with the applicable law that is to say, the Constitution of Kenya, the Judicature Act, (*Cap. 8, Laws of Kenya*) and the governing law on intestacy, the Law of Succession Act, (*Cap. 160, Laws of Kenya*).

It is common ground that the accused, Kamonjo Njiiru alias Kamonjo Gachinu died intestate on 8<sup>th</sup> August 2007. It is also common ground that the deceased had two wives, Grace Wangari Kamonjo (*deceased*) being the 1<sup>st</sup> house, and the widow Serah Muthoni Kamonjo, the Petitioner, (*the 2<sup>nd</sup> house*).

### **The 1<sup>st</sup> house comprised**

- (1) Grace Wangari Kamonjo (*deceased*) and 3 daughters
- (2) Mary Njeri
- (3) Tabitha Wambui
- (4) Susan Wanjiku (*deceased*)

### **The 2<sup>nd</sup> house comprised**

- (1) Serah Muthoni Kamonjo (*widow*)
- (2) Paul Peter Mwangi (*deceased*) but represented by his children -
  - (a) Rosemary Muthoni
  - (b) Mercy Wanjeri Mwangi
  - (c) Faith Njeri Mwangi
  - (d) John Kamonjo Mwangi
  - (e) Duncan Njoroge Mwangi
  - (f) Jane Wanjiku Mwangi
  - (g) Florence Wangechi Mwangi
  - (h) Mary Muthoni Mwangi
- (3) Jerusha Njambi Kamonjo
- (4) Felista Wanjiku
- (5) Nancy Waithera
- (6) Lucy Wangari

The petitioner claimed in her counsel's supplementary submissions that Paul Mwangi (*also deceased*) took care of Mzee Kamonjo Njunu (*alias Kamonjo Gachinu*) (*deceased*) during the time he was ailing and as a result he called the entire family and made a pronouncement "***that all the land at Naivasha devolve to Paul Peter Mwangi upon his demise. The Objectors were present and never raised any issue***", and concluded that the true beneficiaries of the estate are Paul Peter Mwangi (*deceased*) and his estate.

The Petitioner's counsel also makes the point that all the Objectors are married daughters of the deceased, and that it will not be in the interest of justice if they inherit where they are married and came back to make a claim from their father's land effectively disinheriting Peter Paul Mwangi (*deceased*) and his children.

The question then becomes who are the proper and true beneficiaries of the estate of the deceased, Kamonjo Njiiru alias Kamonjo Gachinu. The answer to this question is to be found in Section 66 of the Law of Succession Act, to include, the surviving spouse or spouses, with or without association of other beneficiaries and other beneficiaries entitled on intestacy with priority to respective beneficial interests as provided by Part V of the Act. The ruling provisions is under Part V of the Act are Sections 40, and sections 35 to 38 of the Act. In this case the immediate relevant provisions are Section 40 and 35 of the Act. Section 40 says -

*"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.

(2) *The distribution of the personal and household effects shall then be in accordance with the rules set out in Sections 35 to 38."*

Section 35 provides that where an intestate has left one surviving spouse, and a child or children the surviving spouse is entitled to -

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

(b) *a life interest in the whole residue of the net intestate; provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.*

In this case, the Petitioner is the surviving widow of the deceased. So whatever personal and household effects which deceased had, devolved upon her absolutely. Any residue of the net intestate is determining after distribution of the estate in accordance with section 40 of the Act which I set out above.

According to Section 40, the estate is divided first among the houses according to number of children in each house.

In this case, the first house has two surviving children the objectors. The second house has five surviving children plus the surviving widow, the Petitioner. In other words, there were altogether eight beneficiaries to the estate including the surviving widow. The dispute is over the distribution of one property, namely Muicingiro Block 2/49 comprising approximately 15 acres which the objectors want to be shared among all the surviving children of the deceased and which the petitioner objects on the ground that the property had been settled upon, the son, Peter Paul Mwangi who also took care of the deceased father in his old age, and upon his demise. Apart from the Petitioners' contention, there is no independent oral or written evidence that the said land was settled upon the said Peter Paul Mwangi who and is also now deceased. So the said parcel of land along with others is available for distribution. The only question is to whom the net intestate should be distributed.

Mr. Ondieki, learned counsel for the Petitioner submitted that though the former Constitution, and the current Constitution do not allow any form of discrimination on the grounds of gender - not sex (*which relates to a person's reproductive make-up*), Section 82(4) of the former Constitution allowed discrimination in respect of non-citizens, and in matters of adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law, and the application of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of that other person.

The current constitution does not contain similar provisions, and does not permit any form of discrimination on matters of devolution of property upon death. Indeed the current constitution by incorporating "**customary international law and international agreement applicable to Kenya**" as a source of Kenyan law, has reinforced the position in our law that no form of discrimination is allowed on the grounds of gender. This position is reinforced by the decision of the Court of Appeal in the case of **MARY RONO vs. JANE RONO and WILLIAM RONO, ELDORET CIVIL APPEAL NO. 66 OF 2002** decided on 25<sup>th</sup> April 2005, that Kenya subscribes to international Bill of Rights, the **UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948)** and two international human rights covenants, the **COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS** and the **COVENANT ON CIVIL AND POLITICAL RIGHTS** (*both adopted by the UN General Assembly in 1966*) Kenya also ratified in 1984 without any reservations the **COVENANT ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN ("CEDAW")**.

Article I of CEDAW defines discrimination against women as :

**"Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of**

***impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social cultural civil or any other field."***

Kenya also subscribes to the African Charter of Human and Peoples Rights, otherwise known as the Royal Charter (1981) which it ratified in 1992 without reservations. Article 18 of the Charter enjoins member states to *inter alia* -

***"... ensure the elimination of every discrimination against women and also ensure the protection of the woman and the child as stipulated in international declarations and conventions."***

It is thus clear from the point of view of both Kenya law and international customary law to which Kenya subscribes that no person, or in this case, no unmarried/married women may be discriminated on the basis of her status as a married or unmarried woman.

The deceased in this matter died on 8<sup>th</sup> August 2001 well after the commencement of the Succession Act, in 1981 (by Legal Notice No. 93 of 1981, published on 23/06/1981. Section 2(1) provides -

***"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 cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of those persons."***

It is quite clear that the application of customary law whether Kikuyu, or Kalenjin or otherwise, is expressly excluded unless the Act itself makes provision for it. Section 32 and 33 of the Act do indeed make provision in respect of agricultural land and crops thereon or livestock where the law or custom applicable to the deceased's community or tribe should apply. The application of customary law is only limited to such areas as the Minister may by Notice in the Gazette specify. By Legal Notice Number 94 of 1981 made on 23.06.1981 Minister specified the various district in which the provisions are not apply. The list does not include Nakuru/Naivasha District. The law applicable in the distribution of the agricultural land in issue is also written law.

The applicable provision of the Act is Section 40 as already set out above. The property to be divided was MUICINGIRI BLOCK 2/49 comprising 15 acres. On the basis of the above captioned principles, the property will be divided among the two houses, taking into account the number of children, and the surviving spouse as an additional unit. According to this formula, the two houses consisted of four and six units respectively including the surviving spouses. The said property would therefore be divided on the basis of four and six units respectively, so that the first house would be entitled to four tenths of the property, and the 2<sup>nd</sup> house to six tenths of the property or 6 and 9 acres respectively.

Other properties will also the distributed in similar manner.

Muicingiri Block 2/49 approximately 3 acres -

Ø1<sup>st</sup> House - 1.2 acres

Ø2<sup>nd</sup> House - 1.8 acres

**Nyahururu property 3 acres**

Ø1<sup>st</sup> House - 1.2 acres

Ø2<sup>nd</sup> House - 1.8 acres

The shares were not specified, but if there were any, they would be shared the same way.

In practical terms, the property due to the first house would be shared equally among the objectors and the property due to the 2<sup>nd</sup> house would be shared equally among the children of Paul Peter

Mwangi and their aunts Jerusha Njambi Kamonjo, Felista Wanjiku, Nancy Waithera and Lucy Wangari, unless the aunties were to renounce their entitlement in favour of nephew the children of their brother Peter Paul Mwangi.

Finally, Mr. Ondieki in his submissions suggested that the court do confirm the grant to the petition "*in association with another beneficiary*". I would therefore confirm the grant among the Petitioner, Mary Njeri and Jerusha Kamonjo.

As these are family matters I would direct that each house bears in the same proportion 4:6 of the costs of giving effect to the distribution of the estate.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 20<sup>th</sup> day of May 2011**

**M. J. ANYARA EMUKULE**  
**JUDGE**