



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Succession Cause 567 of 2008**  
**IN THE MATTER OF THE ESTATE OF SIMON MBUA KAGIA (DECEASED)**  
**RULING**

When the protest came up for hearing, counsel for the parties framed the issues for determination as follows;

- i. Whether the respondent/protestor is entitled to 2 acres from parcel of land No. HABATI/WENDO BLOCK 2/97 RUGURU and;
- ii. How parcel of land No. BAHATI/WENDO BLOCK 2/97 RUGURU is to be distributed among the two (2) houses.

Before I embark on the determination of the two issues it may be useful to point out the following undisputed facts.

The deceased, Simon Mbuu Kagai, aged 71 years, died on 10<sup>th</sup> November 2006 and was survived by two widows, (the Petitioner and the protestor) and twelve (12) children, six from each house.

The grant was issued to the two widows. The second widow sought confirmation of the grant under **Section 71(3)** of the **Law of Succession Act** and **Rule 40(3)** of the **Probate and Administration Rules**, before the expiration of six (6) months. She made proposal on the distribution of the estate that has prompted

*H.C.SUCC.C.NO.567/2008*

this protest from the first widow. It is clear that the protest only relates to one property, namely BAHATI/WENDO BLOCK 2/97 RUGURU. The second widow proposed that that property be inherited by her save for a portion measuring 60ft x 130ft which was to be curved out for Joseph Maina Mbuu, the first widow's son. The 2<sup>nd</sup> widow claims 2 acres of this property on account of a gift *inter vivos* to her by the deceased. The 2<sup>nd</sup> widow's claim is that she is settled on this land save for the portion occupied by Joseph Maina Mbuu. That when she got married to the deceased, he settled her on this land and that the 1<sup>st</sup> widow had deserted her matrimonial home. That when she eventually returned, she was settled by the deceased in L.R. BAHATI/WENDO BLOCK 5/2. The deceased was buried on the land in dispute.

According to the affidavit in support of the petition, the deceased had the following parcels of land:-

1. BAHATI/WENDO BLOCK 5/57 (WENDO FARMERS) measuring 2.470 Ha. Approximately 6 acres (see certificate of official search)

2. BAHATI/WENDO BLOCK 2/97 (RUGURU) the property in dispute - measuring approx. 6 acres (see certificate of official search)
3. Banita Commercial Plot No. 1
4. Bahati Commercial Plot.

*H.C.SUCC.C.NO.567/2008*

Apart from these, the deceased also had shares in various companies and bank accounts, all of which were proposed by the 2<sup>nd</sup> widow to be shared equally between the two houses. The water tank would be for the common use by the two houses.

Of the first four (4) properties, the 2<sup>nd</sup> widow wanted to retain only the disputed property, BAHATI/WENDO BLOCK 2/97 (RUGURU). That left the 1<sup>st</sup> widow with BAHATI/WENDO BLOCK 2/57, BANITA Commercial Plot No. 1 and BAHATI Commercial Plot.

As I have noted BAHATI/WENDO BLOCK 2/57 and the land in dispute measure more or less the same acreage - 6 acres. The 1<sup>st</sup> widow has averred that the former land is not as arable as the latter, hence the latter has higher economic value. She has also averred that she lived with the deceased on the disputed land even before he married the 2<sup>nd</sup> widow; that indeed she shared her house with the 2<sup>nd</sup> widow when the latter was married by the deceased. The 1<sup>st</sup> widow has estimated the value of the Banita commercial Plot at Kshs.25,000/= and BAHATI/WENDO BLOCK 5/57 at Kshs.300,000/= per acre. She thinks that the value of the land in dispute is about Kshs.500,000/= per acre. These averments have not been controverted while at the same time it is noted that these estimates of the value are not based on any professional valuation.

*H.C.SUCC.C.NO.567/2008*

On behalf of the 1<sup>st</sup> widow, it was categorically submitted that should the 2<sup>nd</sup> widow insist on retaining the entire property in dispute, she (the 1<sup>st</sup> widow) would insist on equal distribution between the two houses. On the other hand, there is no doubt that the 2<sup>nd</sup> widow is only giving the other properties to 1<sup>st</sup> widow on condition that the disputed property is retained by her.

I have considered these arguments as well as authorities cited. The property in dispute is in the name of the deceased. I am equally satisfied that it was occupied by the 1<sup>st</sup> widow before she deserted. That a portion of it was given to her son, Joseph Maina by the deceased, for commercial and residential purposes. It also seems to me that the property is of greater value than BAHATI/WENDO BLOCK 2/57. Otherwise I have no explanation for the generosity of the 2<sup>nd</sup> widow donating the latter as well as two commercial plots to the 1<sup>st</sup> widow. I find no probative value of the documents purportedly written by the deceased as his last wish. They do not declare that the deceased left two (2) acres to the 1<sup>st</sup> widow. The resolutions of the family meetings similarly can not be the basis for distribution of the estate of a deceased person, particularly where there is a contest. That is the function of a probate court.

The role of this court in distribution of the net intestate estate in a polygamous marriage is guided by **Section 40** of the **Law of Succession Act**.

In **Mary Rono Vs Jane Rono & William Rono, Civil Appeal No. 66 of 2002, Waki, JA** agreed with trial judge on appeal that in seeking a fair distribution of the deceased person's net estate, the court has a discretion which must be exercised judicially and on sound legal and factual basis. **Section 40** aforesaid which was the basis of that decision and also this dispute 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.”**

In this dispute both widows are alive. Each house has the same number of children, one has died in the 1<sup>st</sup> widow's house leaving two children who are said to have been dependants of the deceased.

Although **Section 40** aforesaid enjoins the court to consider the number of children as well as a surviving spouse, I do not understand the provision to insist that the courts must provide equal share of the estate to each house. As Omolo, JA observed in the **Rono** case (supra); that-

**“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. Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied the Act does not provide for that kind of equality.”**

I may only add that **Section 40** of the **Law of Succession Act** emphasis equity rather than equality. The ages of the children in each house are not given. There is however, evidence that all of them hold national identification cards which are only issued to adults, the presumption therefore, being that they are all adults. There are 2 grandchildren in the 1<sup>st</sup> widow's house, Simon Mbua and Samuel Ndungu. They are said to have been dependants of the deceased.

Their mother, Lucy Nyambura was unmarried and is deceased. They are in the custody and care of the 1<sup>st</sup> widow.

The definition of a child or children under **Section 3(2)** of the **Law of Succession Act**

is wide enough to include the two. A child is defined to include, among others, a child for whom the deceased has expressly recognized or in fact accepted as his child or for whom he has voluntarily assumed permanent responsibility. In view of the hard and uncompromising positions of the widows, it is my view that the following distribution will be equitable taking into account the circumstances of this dispute, set out in the previous paragraphs.

**1<sup>st</sup> house:**

- a) BAHATI/WENDO BLOCK 2/57 - 4 acres
- b) BAHATI/WENDO BLOCK 5/97 - 2 acres (including the 60X130ft occupied by Joseph Maina)
- c) BANITA Commercial Plot

**2<sup>nd</sup> house:**

- a) BAHATI/WENDO BLOCK 5/57 - 2 acres
- b) BAHATI WENDO BLOCK 2/97 - 4 acres
- c) BAHATI Commercial Blot
- d) Post Office rental box number 557-20100 Nakuru.

**Equally between 1<sup>st</sup> & 2<sup>nd</sup> house**

- a) Kenya Airways shares
- b) Kengen shares
- c) ICDC shares
- d) Shangilia Baba no Mama Ltd shares
- e) Funds in equity bank account No. 0130100236825
- f) Water tank - for common use.

As this is a family matter, each party to bear own costs. Those are the orders of this court.

**Dated, Signed and Delivered at Nakuru this 12<sup>th</sup> day of February, 2010.**

**W. OUKO**  
**JUDGE**