



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

Succession Cause 26 of 1985

IN THE MATTER OF THE ESTATE OF
THE LATE JOSIAH MWANGI KARIUKI
ON BEHALF OF TERRY WANJIRU

RULING

This matter has a long history of several applications filed by members of three houses of the deceased since the year 1985.

The deceased who was a renowned personality of our country died under tragic circumstances on 2nd March, 1975. He left vast estate and beneficiaries from three houses.

The matter came before me for the first time in January 2007. I gave some directions to proceed with the distribution of the estate, which admittedly is the final aspirations of the beneficiaries in the estate.

The certificate of confirmation of 5th December, 1995 and protest of 17th January, 1996 were to be heard. But after my transfer to another Division of the High Court, no progress was made upto May, 2008.

On 11th November, 2008 all the counsel agreed that the three co-widows on record are accepted as widows of the deceased and that their respective children be the beneficiaries of the estate.

Thereafter the parties relied on their earlier affidavits and were directed to file further affidavits on proposals for the distributions annexing supporting documents. Thereafter, the hearing was to proceed either on submissions thereon or by cross examination of the deponents, if need be. The strict time limit to comply with the directions was given and on the hearing date fixed, which was almost after three months, this court refused to extend any further latitude to those who have failed to file further affidavits but retained discretion of the court to obtain further information, if need be.

All the counsel agreed to submit on the affidavits and documents filed on behalf of their respective clients.

It has to be noted at the outset that the deceased herein died before The Law of Succession Act (Cap 160) came into force which was on 1st July, 1981.

Sec 2 (2) of the said Act stipulates:

“The estates of persons dying before the commencement of this Act are subject to written laws and customs applying at the date of the death, but nevertheless the administration of this estate shall commence or proceed as far as possible in accordance with this Act”.

It is also an admitted fact that the deceased was Kikuyu by tribe.

Mr. Begi, the learned counsel who appeared for Esther Mwikali Kariuki, relied on his submissions filed on 13th February, 2009 as well as on an affidavit of Esther sworn on 15th January, 2009.

Esther has given list of properties/assets of the deceased in paragraph 4 of her affidavit.

She has shown the names of survivors in paragraph 1 of her affidavits. They are three widows and eight children of those widows. She has given the valuation of the immovable properties which are, namely:-

- (1) ? share of Kanyamwi farm Gilgil admeasuring 200 acres (share divided in three parts) valued at 33,500,000/=
- (2) Riverside Farm Ol Kalou admeasuring 808 acres with three sub-divisions valued at shs.47,500,000/=.
- (3) LR No. 1/401 Ngong Road valued at shs.35,000,000/=.
- (4) Castle Inn Garden Estate valued at shs.30,000,000/=

Her valuations are based upon the valuation report dated 23rd June, 2008 from Interlink Real Estate Ltd. (Annex ENK1 to her affidavit). Without specifying the exact numbers, she has mentioned several companies in which the deceased had shares (paragraph 5 and 6 of her affidavits), plus the Bank Accounts in various Banks (paragraph 7 of her affidavit).

She has made her proposals for distribution as under

“(9)That I am aware of the such meetings held at Garden Estate on 10th December, 2001 under the chairmanship of Hon. Waruru Kanja, now deceased in which a mode of distribution was agreed as follows;

(a) Castle Inn. LR No. 4894/188 measuring about 5.6 acres with all its developments valued at Kshs.30,000,000.00 to be registered in joint names of Doris Nyambura Kariuki and Esther Mwikali Kariuki as tenants in common for the benefit of the following names beneficiaries:

- ***John S. Kariuki***
- ***Gordon N. Kariuki***
- ***Antony M. Kariuki***
- ***Mark Kariuki***
- ***Jane Kariuki***
- ***Rosemary Machua***
- ***Ann Mumbi Magunya***
- ***Mark Kariuki***

· **Chiko Kariuki**

(b) 50% Kindaruma property being LR No. 1/104 Ngong Road Nairobi with all developments therein and valued at Kshs.35,000,000/= to be registered in the name of Terry Wanjiku Kariuki for the benefit of Chiko Kariuki.

(c) Riverside Farm, O'lkalou which is approximately 808 acres and currently valued at Kshs.47,500,000/= to be distributed as follows:

- **Doris Nyambura Kariuki – 77 acres**
- **Terry Wanjiku Kairuki – 77 acres**
- **Esther Mwikali Kariuki – 77 acres**
- **John Sekou Kariuki – 59 acres**
- **Gordon Njee Kariuki – 59 acres**
- **Antony Kariuki – 59 acres**
- **Mark Kariuki – 59 acres**
- **Jane Kariuki – 25 acres**
- **Rosemary Kariuki – 25 acres**
- **Ann Mumbi – 25 acres**
- **Chiko Kariuki – 25 acres**

Twelve (12) acres to be set aside and sold to pay off debts owned by the estate.

The two (2) widows Doris Nyambura Kariuki and Esther Mwikali Kariuki have been given an extra 10 acres comprising the two residential houses for the two widows

(d) ? of share of the property owned by Kanyamwi Trading Company Limited, which comprise of the following properties; LR 3777/204, LR 6564/6 and LR 6564/8 all measuring approximately 200 acres with the current market value assessed at Ksh.33,500,000/= to be subdivided and distributed in the following shares;

- **Doris Nyambura Kariuki – 20 acres**
- **Esther Mwikali Kariuki – 20 acres**
- **Terry Wanjiku Kariuki – 20 acres**
- **John Sekou Kariuki – 20 acres**
- **Gordon Njee Kariuki – 19 acres**
- **Antony M. Kariuki – 19 acres**
- **Mark Kariuki – 19 acres**
- **Jane Kariuki Carpenter - 8½ acres**

· **Chiko Kariuki - 8½ acres**

Eighteen (18) acres of the property is to be distributed to the squatters in the land and twelve (12) acres to be set aside for the family home.

(e) It is proposed that all the shares in various companies be sold and dividends be invested in the estate account

(i) To defray expenses and legal charges accruing to the estate.

(ii) The balance to be shared equally among the eleven (11) beneficiaries

(Attached herewith are the minutes of the said agreement which are marked as 'EMK2')

(f) It is proposed that the money in the estate accounts and all the monies accruing from the sale of shares of the estate which shall be deposited in the estate account be used as follows;

(g) LR No. 3777/279/14 within O'l Kalou Township in Nyandarua District commonly referred to as Kanyamwi Building measuring approximately 1 acre to be registered absolutely in the name of Esther Mwikali Kariuki to hold as a tenant for life for the benefit of Jane Kariuki Carpenter and Mark Kariuki"

Moreover, she has also relied on the family meeting held on 10th December, 2001 and sought to rely on the proposals therein.

Mr. Begi commented on affidavits filed by some beneficiaries.

As regards affidavit filed by Mark Kariuki, Esther's son, he commented that he has failed to give any proposals. I have perused his affidavit sworn on 17th September 2008 and do note that he has made proposals for distribution after thorough accounts being rendered and discounting the benefits enjoyed by some beneficiaries from their respective shares. Thereafter, he has proposed equal distribution between the three widows.

As regards affidavit of Terry sworn on 14th January, 2009, it is contended that it shows the wasting of the estate properties, but there were Rulings on these complaints. However, that affidavit also does not give proper proposals of distribution. She has agreed with the contents of paragraph 5 of affidavit of Rosemary Wanjiku Kariuki shown on 16th September 2008 in respect of proposal of distribution of property being L.R. No. 1/40 Ngong Road but her other proposals of distribution are as per Sec. 40 and Sec 29 of the Act and according to Mr. Begi the same should be allowed.

Mr. Begi thus proposed that the distributions be made as per Esther's proposal.

Mr. Mituku, the learned counsel for the children of Doris (a co-widow) made written submission. I must state that the assertion made in his submissions filed on 13th February 2009, to the effect that only wife of the deceased was Doris and that he only purported to marry Terry and Esther later on, cannot now be accepted in view of the counsel conceding that all three widows are the widows of the deceased.

It also contends that Terry transferred several shares of the deceased in her names held in several companies and also collected rent from L. R. No. 1/40 on her own.

It is also submitted that the debt of shs.14,000,000/= was for the entire estate and not only owed by Kanyamwi Trading Co. where the deceased held 50% share on one hand and Doris and Esther 25% each on the other hand. Reliance was placed on Ruling of Hon. Githinji J. (as then he was) delivered on 28th May, 1996. It might be prudent to cite the said order:-

1. *That all the assets of the Estate of the late Josiah Mwangi Kariuki be placed in the hands of the Administratrixes before payment of debts and distribution of the Estate.*
2. *That the Registration of either Terry Wanjiru Kariuki or Doris Nyambura or Esther Mwikali Kariuki as proprietor of any shares which originally belonged to the late J M Kariuki in Kedong Ranch Limited, Motor Mart Group Ltd, Kenya Breweries, CMC Holdings, Pan African Insurance Co. Ltd. ICDC, Kulia Investments, Market Ltd. Unga Ltd. Rift Valley Agencies, Standard Chartered or in any other Company is cancelled.*
3. *That all the above shares to be registered in the names of Doris Nyambura Kariuki, Terry Wanjiru Kariuki and Esther Mwikali Kariuki pursuant to a Grant of Letter of Administration given on 12.6.1995.*
4. *That the three Administrators to open an Estate account named "Estate of Late Josiah Mwangi Kariuki" in any Bank of their choice. If any of the three Administratrixes is not within the country, the documents for opening an Estate Account to be executed by his lawyer or in default by the Registrar or this Court.*
5. *That all the dividends due or accruing due and all the arrears of dividends from the share investments in the companies mentioned in paragraph 1 of this order to be computed and be retained by the respective companies until an estate account is opened in which case all the dividends shall be paid into the said estate account.*
6. *That the tenant of LR No. 1/401 Petterson Road (Mr. Lee) to retain half of the monthly rent due or accruing due from the date of this Order and be paying such half monthly rent into the estate account when opened.*
7. *That Mrs. Terry Wanjiru do file the Agreement of Lease in respect of LR. No. 1/401 in Court within 30 days.*
8. *That all the share certificates issued to either Doris Nyambura Kariuki, Terry Wanjiru Kariuki or to Esther Mwikali Kariuki by the Companies mentioned in paragraph 1 of this Order to be surrendered to their respective advocates within 30 days for handing over to the court.*
9. *That in order to clear the debt to KCB, the three Administratrixes, in the first instance, and with the permission of KCB, to offer 300 acres of Gilgil Farm for sale on their undertaking to the KCB to pay the proceeds of sale of KCB to discharge the outstanding loan.*
10. *That if the sale of the Gilgil Farm is impracticable the three Administratrixes to agree either on the sale of "Castle Inn" on terms to be approved by the court.*
11. *That the parties herein be at liberty to apply*
12. *That this order to be served on all Companies holding shares of the estate, Mr. Lee and the Legal Officer of KCB.*

I have not been given the details whether the said orders were complied with. The only issue raised was in respect of order no. 9 i.e. sale of 300 acres of Gilgil Farm.

The proposals made in the affidavit sworn by Rosemary Wanjiku Kariuki on 16th September 2002 were adopted by children of Doris. The affidavit proposes the distribution as under:-

4. *That I propose the estate of the late Josiah Mwangi Kariuki to be shared as follows:*
5. *That Ms. Terry Kariuki and her daughter should retain the 50% interest of the late Josiah Mwangi Kariuki in LR No. 1/40/Ngong Road valued at Kshs.35,000,000/=. The effect is that each*

takes Kshs.8,750,000/= value of the property.

6. *That Doris Nyambura Kariuki and Esther Mwikali Kariuki and any one of their sons or daughters to take up 100% interest of LR No. 4894/188 in which stands Castle Inn value at Kshs.30,000,000/=. The net effect is that each of the four beneficiaries takes Kshs.7,500,000/= worth of property.*

7. *That estate to give 240 acres (worth 11,229,840/=) to Pricilla Wanjiru Ndung'u and Group (those who have occupies the land but are not among the immediate family members of J M Kariuki) from LR Number 3777/207 as per the consent order recorded before Justice Githinji on 18th March 1999.*

8. *That the net of LR no. 3777/207 which is worth 23,770,160/= plus LR No. 3777/115 and LR No. 3777/273 making a total of 36,270,160/= to be shared among the remaining 5 beneficiaries, each getting land worth7,254,032/=*

9. *That Kanyamwi Building in Ol Kalou that form part of LR No. 3777/279/14 original 7338/14 is to be shares by the 5 beneficiaries catered by paragraph 8 above so as to make them almost at par with the rest of the beneficiaries.*

10. *That LR No. 3777/204 which is also part of the Kanyamwi farm in Gilgil is currently occupied by squatters who should be made to pay the worth of the land occupied by them i.e. 8,000,000/=. 50% of the amount should go to the estate and the remaining sum to be shared between Doris Nyambura Kariuki and Esther Mwikali Kariuki who have 50% stake on the property.*

11. *That Land Reference Number 6564 6564/6, 6564/8 and 3774,/204 (Kanyamwi Farm in Gilgil that is owned by Kanyamwi Trading Company Ltd.) that form part of the land that J M Kariuki was laid to rest should be shared in the ration of 5:2.5:2.5 between the estate, Doris Nyambura Kariuki and Esther Mwikali Kariuki. The two widows have equal shareholding in the company i.e. 25% each.*

12. *That 50% of the money realized from the sale of pat of Land Reference No. 6564/6, 6564/8 (The property of Kanyamwi Trading Company Limited) and used to redeem loan accounts in respect of J M Kariuki's personal account, J M Kariuki and Esther Mwikali Kariuki from the estate account*

13. *That all shares that belonged to the late J M Kariuki should be valued to ascertain their worth before distribution among the beneficiaries equally.*

14. *That all monies collected on behalf of the estate by way of rents and dividends and all debts due to the estate should be deposited in the estate account and used to pay the estates' debts and the balance to be distributed among all beneficiaries, taking into account the disparities in the sharing of real property, so as to bring all parties at par.*

They also associate themselves with the proposals made by Mr. Begi and valuation reports.

The submissions filed by Doris on 13th February, 2009 surprisingly raises the issue against the status as a co-widow of the other administratixes and specifically against Terry.

In her verifying affidavit sworn on 21st May, 1995 she has agreed that she is one of the widows and one of the administratixes of the estate.

In her application for summons for confirmation on 5th December, 1998, she has stated that her husband died on 2nd March, 1975 and maintained all the three household and their respective widows and children as persons surviving the deceased. In her affidavit sworn on 27th February, 2007, she has averred that she was the wife of the deceased under African Christian Divorce Act. But the certified copy of an entry of marriages gives under column of condition as married under customary law. The certificate was issued under the Marriage Act. The earlier certificate was issued by Native Registry.

Thus simply put, she cannot make contradictory averments in her submissions.

Since 1988, the issue of other two co-administratives not being co-widows has never been raised and cannot be allowed to be raised in the submissions and I reject those averments.

Doris has given her list of assets of the estate and proposed the distribution as per Sec. 40 and 41 of the Act. This also is not available to the estate in view of very clear and unambiguous provision of the Act (Sec. 2 (2)).

She further urges to allow her to give evidence as to the marriage, which request once again made through submissions and in stark contrast to her own earlier affidavits, two of which I have mentioned hereinbefore, cannot be granted in all fairness to all the parties and in view of the record of this case.

As regards Philisila's contention, it is contended by Doris that she has received her share along with her group earlier by consent of parties and should not be given anything further from the estate.

In short, she urges the court to accept her proposal which is accommodating children from other three co-administratives.

She has, since the filing of this cause, sworn 10 (ten) affidavits, the latest one was sworn on 27th February, 2007 in which she gave details of the estate of the deceased. They are:-

A. Immovable properties

- (1) **50% share in LR No. 1/401 Nairobi**
- (2) **LR No. 3777/204, IR 6604, Gilgil**
- (3) **LR No. 3777/207, IR 6634 Ol Kalou**
- (4) **LR No. 3777/115, IR 4336 Ol Kalou**
- (5) **LR No. 3777/273, IR 6730 Ol Kalou**
- (6) **LR No. 4894/2 (4 portions sold) present title 4894/188 (Castle Inn)**
- (7) **Plot No. 4953/16/V/Uhuru Estate. (1/5 shares)**

B. Companies:

- (1) **Nyandarua Laikipia Agencies Ltd.**
- (2) **Nyandarua Samburu Agencies Ltd. – (properties owned by it)**
- (3) **Kanyamwi Trading Co. Ltd, (? Shares) In respect of this company a certificate of incorporation No. 6651 issued on 14th March, 1966 has been placed on record. The memorandum and Articles of Association of 12th March 1966 shows three shareholders with one share each, namely the deceased, Doris and Esther)**

C. Shares in following companies.

1. **Kenya Breweries 5575**
2. **BAT**

3. ***ICDC Investment Co. Ltd. 26977***
4. ***Merchat Limited 522***
5. ***Car and General***
6. ***CMC Holdings Ltd. 3864***
7. ***Pan African Insurance Co. Ltd. 915***
8. ***Kedong Ranch Ltd. 1450***
9. ***Unga Group Ltd. 522***
10. ***Rift Valley African Agencies Ltd. 8750***
11. ***Lonrho Motors E.A. Ltd.***
12. ***Motor Mart Ltd. 250***

I must lament that no supporting documents to show the proprietorship are annexed by her.

She has also shown a lease of 9th March, 1995 which she executed as an Administratrix of the estate, in respect of LR No. 1/401, IR No. 12702/1 for 5 years and 3 months in favour of Seoul Garden Restaurant Ltd.

Mr. Kahuthu, the learned counsel for Terry made very detailed and elaborate submissions.

He relied on several pleadings and documents filed before the court – namely:-

1. ***Application dated 2nd April 1997 by Terry***
2. ***Supplementary Affidavit filed in court on 12th February 1998 and sworn on 11th February 1998***
3. ***Application dated 25th November, 1996 and Affidavit in support filed on 25th November 1996***
4. ***Supplementary Affidavit filed on 21st January 2000***
5. ***Terry's Applications dated 31st May 2001 and 23rd June 2003***
6. ***Terry's Affidavit filed on 14th January 2009 and sworn on 12th January 2009***
7. ***Philisila Wanjiku Ndung'u Affidavit filed on 11th April 2007***
8. ***Philisila Wanjiku Ndung'u Beneficiary Affidavit filed and sworn on 7th July, 2008***
9. ***Grace Wangui Gateiyu Beneficiary Affidavit filed and sworn on 24th June 1999***
10. ***Gatheru Gathemia's Supplementary Affidavit filed and sworn on 24th June 1999***
11. ***Terry Wanjiru Kariuki, Philisiala and Grace submissions filed on 16th March, 2009 and dated 14th March 2009***
12. ***Horeria & Company Valuation Reports***

He began his submission by reiterating that the estate has to be divided as per the Kikuyu customary law and that there are three houses in the estate. He stressed that there is no element of discrimination in the said custom.

He lamented that except his client's house, the other two houses have not complied with the order of the court to file and serve the Accounts of the Properties under their respective control.

His client Terry has filed her accounts vide verifying affidavit of 23rd May, 1996 and further by the Accountants' affidavit sworn on 14th January 2009.

The 1st house of Doris has filed her Accounts only in May, 1996 vide her affidavit sworn on 19th May, 1996. Similarly, the 2nd house, (Esther) has filed her Account on 23rd May, 1996 and in any event, she is now substituted by her son Mark Kariuki.

It was submitted further that in respect of property bearing LR No. 1/401, it is not in dispute that Terry owned half share of the said property as a tenant-in-common. Her matrimonial home stands on that property. According to Terry, the said property was bought through loan and was charged on 19th September, 1973. Terry was working and personally cleared the loan not the estate. All these facts are deposed in her application dated 2nd April 1997. The deceased died after about 1½ years from the date of deposit for the property. It is contended that in law, she has 50% share on the property and can get ? of other 50%. Thus her right of about 67% is as per law. But it was added that because of her own contribution in the acquisition and development on the property, the property should be given to her solely and the same be excluded from the list of assets of the estate. Her application of 2nd April, 1997 was directed to be heard by Hon. Githinji J. (as then he was) along with application for confirmation of grant of 5th December, 1995 and the objection to the said application by Terry filed on 17th January 1996.

It is also contended that shs.677,000/= which ½ rent of the aforesaid property, was supposed to be deposited in a joint account of M/s Gatheru Gathamia & Co. Advocates (for Doris) and Kahuthu & Kahuthu Co. Advocates after removing the same from the Court where it was kept. But Doris with her lawyer banked the same in another Account and thus Doris should be held responsible to pay the same to Terry.

Other facts of how Terry with her own efforts and through difficulties saved the said property are averred as well as she has placed on record that a sum of shs.2,500,000 is still payable by her for arrears of rates over that property. She has given accounts of the said property in her affidavit sworn on 12th January, 2009.

Terry also contended how Doris and Esther took the rents for their own personal use without accounting from LR No. 4894/188 (which is carved out from original 4894/2 (Castle Inn), after four plots were sold. It is also stated that Doris and Esther and their children without paying any rent are occupying two cottages in this property. According to her, Doris illegally received shs.2,335,000/= from a tenant through an unregistered company described as J M Kariuki's Estate Investments Ltd. Even one Mr. Mwaniki (a purported son of Doris) was given a sub-divided plot No. 4849/189 (1.2 acres) without knowledge or consent of other two administratrixes.

Her proposal as regards the said property is that Terry's house be given 2 acres, Esther's house be given 3 acres and Doris' house be given 0.950 acres considering the intermeddling by Doris.

As regards the shares in the estate, it is proposed that, apart from Kanyamwi Trading Co. Ltd. and Nyandarua Laikipia Distributors Ltd, all shares be divided equally amongst the three houses and if possible be sold and proceeds to be divided equally. But then, she urged that shares of Rift Valley Agencies Ltd. should not be sold but divided equally amongst the three houses.

The proceeds of Sale of LR No 4953/16 IV Uhuru Estate held by Machira & Co. Advocates be divided equally amongst the three houses.

In Nyandarua Samburu Agencies, the deceased owned 58 shares and it is submitted that Doris has unlawfully taken control of that asset refusing to account for the income received.

Laikipia Laikipia Distributor Ltd. in which the deceased had 5332 shares should be equally divided among the three houses.

In respect of Kariuki & Gathecha Resources Ltd, it is suggested that further investigation be carried out as Dominic Gathecha the 50% shareholder in the company has transferred the deceased's shares, in his names.

On the Riverside Farm Ol Kalou LR. Nos. 3777/115, 3777/207 and 3777/273, the following was submitted.

This property was occupied by the father of the deceased, who is buried there. His widow namely Philisila Wanjiku Ngugu (the stepmother) and Grace Wangui Bateiy (sister) are also on the land. After the death of the deceased's father, Philisila lives on the said farm which admeasures 808 acres. The proposals are that 100 acres be given to Philisila, 20 acres to Grace, 50 acres to community service and 20 to squatters and ex-workers of the deceased. This proposals are not accepted by Doris but are accepted by Terry, Esther and Mark.

From the record of the Court of 18th March, 1999, a consent order was recorded by Hon. Githinji J. (as then he was) to the effect that 240 acres be given to the group of Philisila and Grace and I am not told that the said consent was set aside or varied. Thus, reject their proposal for further endowment.

The remainder thereof shall be divided as an estate property, and it is proposed that 618 acres be divided between Terry and Esther as Doris has sold Gilgil Farm LR No. 6564/4 in total disregard of the court order. Relying on the affidavit sworn by Gatheru Githamia on 24th July 1999 (who was the previous advocate of Doris) wherein he has given a detailed version of his association with the family and his work done in respect of representation of Doris in this matter. It is averred how, instead of sale of 300 acres ordered by the court, Doris and her daughter Rosemary Machua agreed to sell 500 acres as per the agreement but sold 400 acres for the sum of shs.22,500,000/=, when the sum of the debt due and payable to the Bank was only shs.8,000,000/=. The charge over the property was discharged (see paragraphs 90, 91, 102, 116, 118, 123 of his affidavit). It is on record that Doris has not accounted for the balance.

It is thus urged that the remainder of Riverside Farm be divided equally amongst the houses of Terry and Esther.

Ol Kalou Township Plot LR No. 3777/279/14 is proposed to be divided equally amongst the three houses.

Kanyamwi Trading Co. Ltd. had, as aforesaid, three share holders. As at 1975, the deceased had 50% and Esther and Terry were given 25% each. It is contended that the said shares were held in trust by the two co-widows for the estate of the deceased as neither Doris nor Esther paid any money to obtain the shares given to them or was involved in running of the company.

It is stressed that all the properties acquired under the said company are conceded by all the parties to be the estate properties. They are:

- (1) ***LR No. 3777/279/4 (Original 7338/4)***
- (2) ***LR No. 3777/204 (sub-divided into 6564/3, 6564/7, 6564/8) 811 acres***
- (3) ***LR No. 6564/4 – 681 acres***
- (4) ***LR No. 6564/3 (the deceased buried in this property) 144 acres.***

Total acreage of these properties are 1636 acres.

The company has been run by Doris as if it was her own property which is against the order of Hon. Githinji J. (as then he was).

Thus it is urged that Doris has to face the responsibility of her own action. The company has not filed any documents or annual returns.

It is also shown that 6564/3 and 6864/4 were amalgamated to create 6564/5 totaling 825 acres and reserving 14 acres for roads.

Doris sold, out of those, 400 acres 6564/2 to Kiki and through wrong valuation report by Interlink Real Estate Ltd., LR No. 3777/204 (811 acres) were illegally transferred to Doris company Jodarest. Ltd. from Kanyamwi Trading Co. Ltd. In any event no document is shown as per law to base this transaction.

Thus the court was asked to ignore the valuation report of Interlink Real Estate Ltd and to hold the following properties to be the assets of the estate.

- (1) ***LR No. 3777/204 811 acres (Jodorest Ltd.) (Estate Property)***
- (2) ***LR No. 6564/6 10 acres (Kanyamwi Trading Co. Ltd.)***
- (3) ***LR No. 6564/8 400.7 acres (Kanyamwi Trading Co. Ltd.)***
- (4) ***LR No. 6564/7 400 acres (kiki) sold by Doris***
- (5) ***LR No. 6564/511 14.08 Road Reserve.***

In view of what is alleged to have been wrongful acts by Doris, it was then proposed that:

- (1) ***LR No. 3777/204 be reverted back to the estate and be divided equally amongst three houses.***
- (2) ***LR No. 6564/8 (the deceased was buried there and all three co-widows have their matrimonial home).***

It is proposed that this property be divided by giving 183.5 acres to house of Terry and Esther each and 33.5 acres to Doris due to her sale of extra 100 out of 400 acres which were actually sold although the agreement of sale showed the sale of 500 acres. Given the transfer of 400 acres was contrary to the court's order.

- (3) ***LR No. 6564/6 (Kanyamwi Trading Co. Ltd.) 10 acres be divided equally amongst the three houses.***

Mr. Waiganjo for Mark Kariuki a co-administrator adopted the submissions and proposals made by Mr. Kahuthu and added that Mark has been the most neglected beneficiary in the estate He stressed that intermeddling by Doris should be taken into account.

Mrs. Kahunya in rejoinder stressed that the loan taken were guaranteed by the company and the payment thereof had to come from the estate. She reiterated that only 50% of Kanyamwi Trading Co's property is for the estate.

She emphasized that all the parties in this cause have been enjoying benefits from the estate. She also retaliated by submissions that 50% held by Terry in Ngong Property then also be held in trust for the estate and she has been using the same exclusively.

Thus learned counsel submitted that Castle Inn be divide equally between Doris and Esther.

The Court was told that 240 acres in Riverside Farm has been given out by the court order vide consent recorded on 18th March, 1999.

It is further contended that the debts are also not mentioned by any party which needs to be taken into account.

Those are the facts which are brought before this court since the demise of the deceased. There has been several applications and interim distribution of the estate. There are allegations made, mainly against Doris who seem to have taken over the control of the properties of Kanyamwi Trading Co. Ltd. The sale of 400 acres (though as per agreement it is 500 acres) thereof to Kiki has obviously been in contravention of the court order 28th May, 1996. She did not involve any of her co-administrators and instead of 300 acres sold 400 acres for shs.22,500,000/= knowing very well that the amount payable to the Bank was only shs.8,000,000/=. She has also refused to bring forth any other documents to show how her version of debt of shs.14,000,000/= can be accepted by the court in the face of Mr. Githama's affidavit showing the proof of discharge of charge for the sum of shs.8,000,000/-. She has totally kept silent on the balance sum of the sale price. Mere allegations against her previous Advocate Mr. Githama do not help her and in any event since 1996 she has refused to give any accounts of the sum received by her. She has failed to explain substantially the whereabouts of shs.677,000/= which was released by the court to be deposited in the joint account of two advocates. Same is the position of the receipts of rents and incomes from Castle Inn.

Esther have settled in USA leaving only Mark behind her from her house. Moreover, Terry also seems to have taken control of LR No. 1/401 though she has tried to give accounts for the said property. I also note that due to her own contribution over the repayment of loan and development since the demise of the deceased, and due to the fact that she is registered as tenants in common in equal share she has asked the said property to be given to her solely.

I am also keeping in mind that any beneficiary who have taken any benefit from the estate, without any order, the same shall be considered as an advance to him/her.

Doris has tried to give her accounts and explanation in her affidavit sworn on 21st May 1996 as well as unsigned documents purported to be issued from M/s Njuguna Kioi & Associates. In which she stated that she was receiving steady income only from shares held by the deceased in Rift Valley African Agencies and out of which she maintained her family and educated the children. She has stated that as at 1996 the total sum received by her was Kshs.1,749,350/=. From Gilgil Farm she received shs.90,000/= and from Castle Inn she received shs.25,000/=.

I am sure, similarly the other houses must have received money for their maintenance from the estate property since the demise of the deceased.

In the premises, the amounts received by each house during their occupation of estate property should not be taken into account. In any event, I do not have appropriate details to accurately arrive conclusion of maintenance received by each house. This is an old matter and several applications and orders are made for interim maintenance. These matter shall best be buried at this stage.

The only sum which I shall take note of is the sale of 400 acres by Doris for the property which is the sum of shs.22,500,000/= and the payment of only shs.8,000,000/= to Kenya Commercial Bank to discharge the charge on the estate property which was the reason that the order of sale of 300 acres was made by the court. It is evident from the record of the cause that Doris with her daughter without involving the other two administrators went ahead and entered into an agreement for sale for 500 acres which then was changed to actual sale of 400 acres for shs.22,500,000/= and that, apart from shs.8,000,000/= paid to the Bank, there is no evidence how the balance of the said sum was used by Doris. With this fact before the court, I shall hold which I hereby do, that the balance of the said sum in the sum of shs.14,500,000/- shall be considered as an advance to Doris' House.

It is also averred by Terry that Doris has not accounted for Kshs.2,335,000/= received from a tenant through an unregistered fraudulent Company (Ann Twak - 1) in her affidavit sworn on 12th January, 2009). The property was sub-divided and LR No. 4849/189 (1.2) acres was given to one Mr. Mwaniki without any intimation or consent from the other administrators. On the other hand, there are counter

allegations of receiving rents by the other parties. I shall thus not take into consideration shs.2,335,000/= but shall take into account the transfer of LR No. 4849/189 from the property (originally LR NO. 4894/2) and known as Castle Inn.

I shall also hold Doris responsible for non deposit of shs.677,000/= as ordered by the court. No one can be pardoned for non-obedience of a Court order.

With the aforesaid observations made, I shall first consider the issues of (a) whether the Law of Succession Act (Cap 160) apply to this estate and (2) whether the Kikuyu customary law is unconstitutional and/or discriminatory in view of Sec. 82 of the Constitution.

I just have to reiterate, what I have observed herein before, that the estate in this cause cannot be governed by provisions of Law of Succession Act.. and hereby find so.

It is urged by Mrs. Kahunyu that Kikuyu customary law should not be applied because it does not recognize the right of daughters. She relied on the case of ***Rono v- Rono*** (2005) KLR 538, where Court of Appeal held that in the succession matters also, both international customary law and treaty law can be applied by State Courts where there is no conflict with existing state law even in the absence of implementing legislation.

I must note that the estate in the aforesaid case was governed by the Law of Succession Act which does not discriminate between male and female offspring of a deceased.

On pages 548 and 549 of the Rono's case (*supra*) Sec 3 (2) of the Judicature Act (Cap 8) and Sec. 82 of the Constitution were considered. It was also noted that Sec. 82(3) of the Constitution was amended only in 1997 by an Act No. 9 of 1997 to include the words "or sex".

However, it is evident that the court in Rono's case did not ignore and considered specifically the provisions of Sec. 82(4) of the Constitution which allows the discrimination in personal customary laws as regards, adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.

I would also note that most of the International treaties and Conventions and specifically the Convention on the Elimination of All Forms of Discrimination Against Women "CEDOW" was made after the year 1975.

In Rono's case (*supra*), the factor that the daughters would go away from the family on marriage was recognized as a matter for consideration by the Court (page 541).

Now let me consider the Kikuyu Customary Law. The Book on Restatement of African Law Vol. 2 by Eugene Cotran on pages 12 and 13 specifies the succession of the estate of a Kikuyu married man with two or more wives, sons and daughters. As per the customary law the Land is to be divided equally amongst each house and the rules for distribution within that house is also specified, namely equally amongst males issues.

As regards the daughters, it is stated inter alia that: "***Daughters, do not normally share in the inheritance. They live with their mother until they are married. If however, a daughter remains unmarried, she may be allocated a piece of land by the muramati for use during her life time, and if she has illegitimate male children, then they shall inherit her portion, after her death***"

The above propositions of customary law does not fit in any of the criteria stipulated in Sec. 3(2) of the Judicature Act namely (1) (a) Repugnant to justice and morality or (b) inconsistent with any written law (the Law of Succession Act was not in effect at the time of demise of the deceased).

In short, I shall devolve the estate herein as per the Kikuyu Customary Law and on the basis of substantive justice.

All the parties have agreed that all the shares in several companies held by the deceased shall be divided equally amongst the three houses and I shall uphold that consensus.

The list of landed assets of the estate are also shown to be agreed by the parties except their valuation. Terry urges the court to rely on the Valuation Report prepared by Horeria & Co. Valuers and other two filed joint accounts prepared by Interlink Real Estate Ltd. The first valuation Report is quite substantial in its details. I shall endeavour to consider both while distributing the properties, and to balance between the two.

The first Report has placed following valuation on properties

- (1) LR No. 3777/279/4 original 7338/14 Ol Kalou valued at shs.1,200,000/-**
- (2) LR Nos. 3777/204, 6664/6, 6564/7 and 6564/8. Kanyamwi Farm – Gilgil. Valued at shs.54,859,000/= Kshs.1,200,000/=, Kshs.32,000,000/= and kshs.34,500,000/= respectively.**
- (3) Castle Inn Kshs.60,000,000/-**
- (4) River side Farm – LR no. 3777/115, 3777/2078, 3777/273 valued at Kshs.2,000,000/-, Kshs.112,000,000/- and Kshs.10,000,000/= respectively.**

This report has not given valuation of LR No. 1/401 Ngong Road. The second valuation Report from Interlink Real Estate Ltd. gives valuations of the properties as under

- (1) Kanyamwi Farm – Gilgil LR No. 3777/204 – LR No. 6564 6-8 valued at shs.8,000,000/=, Kshs.500,000/= Kshs.25,000,000/=, Total of Kshs.33,500,000/-**
- (2) Ol Kalou Building LR 3777/279/14 (Original 7335/14) valued at Kshs.500,000/-**
- (3) River side Farm LR No. 3777/115, 3777/207 and LR No. 3777/273 valued at Kshs.3,500,000/-, Kshs.9,000,000/- and Kshs.35,000,000/- totaling Kshs.47,500,000/=**
- (4) Castle Inn valued at Kshs.30,000,000/-**
- (5) LR 1/401 Ngong Road Kshs.35,000,000/=**

I shall consider first the contested properties which are LR. No. 1/401. Terry is evidently a tenant in common in equal shares. It is also shown to the court that the property has been substantially developed to attract tenancy, and Interlink Valuers have valued the same as Kshs.35,000,000/-.

It is the contention of Terry that this property be given solely to her because of the development she has carried out thereon and due to her efforts solely the value of the property has increased to the present state and second property are the big properties owned by Kanyamwi Trading Co. Ltd. It is on record that the deceased held 50 percent share in the said company and Esther and Doris held 25 percent each. But Terry's contention is that those shares were held by the two co-widows in trust for the deceased and thus the said property should be divided equally amongst the three houses.

The above proposition from Terry has to be weighed against her 100% claim on LR No. 1/401. Yes, I have the evidence which shows that she on her own developed the said property and transformed it into a valuable asset. I do not have similar evidence in respect of the second property held by Kanyamwi Trading Company.

The best I could do under the circumstances is to treat the said devolution of shares as a gift intervivos to the two co-widows namely Doris and Esther.

The valuation of these properties does vary quite widely as shown in the two valuation reports. It is

almost the difference of three times..

Considering the two reports, the one filed by Horeria & Co. gives all the details and I do agree that the valuation of shs.8,000,000/- for an agricultural land measuring 811 acres is definitely too low. The Interlink on the other hand had given a premium price of kshs.35,000,000/= on the property at Ngong LR No. 1/401 which is being used by Terry.

Doing the best without much help from any side, I shall estimate the value of 25% shares at shs.15,000,000/= each.

Similarly, I shall also estimate the share of LR No. 1/401 as shs.7,000,000/= in respect of Terry. This sum shall be considered as an advance for her in respect of the property bearing LR 1/401.

With these findings, now I can determine the issue of distribution of the properties, as under:-

- (1) LR No. 1/401 (Seoul Garden) Ngong to Terry – with the rider that shs.7,000,000/= shall be considered as a gift *inter vivos* to her.**
- (2) Castle Inn – LR No. 4898/188 – be divided equally between the houses of Terry and Esther. (Considering the improper intermeddling by Doris in the said property as specified hereinbefore).**
- (3) The sale proceeds held by M/s Machira & Co. Advocates be shared equally amongst three houses.**
- (4) Riverside Farm.**
 - (a) 240 acres has already been given to the group represented by Philisila Wanjiku Ndungu and Grace Wangui Yateiyu. I direct that Philisila and Grace give the proposal how to distribute those acres, as I do agree they cannot be given any further shares**
 - (b) The remainder be divided as under**
 - (1) 250 acres to Terry**
 - (2) 250 acres to Esther**
 - (3) 118 acres to Doris**
- 5. Ol Kalou Township plot CLR No. 3777/279/14 to be divided equally amongst the three houses as it is a commercial property.**
- 6. LR No. 3777/279/4 amalgamated to be distributed between homes of Doris and Esther.**
- 7. LR No. 3777/204 (811 acre) – (to be reverted to Kanyamwi Trading co. Ltd. from Joderest Ltd.) Thereafter the property be held in the ratio of 35:35:30 amongst houses of Doris, Terry and Esther.**
- 8. LR NO. 6564/8 400.7 acres – (Matrimonial houses and body of the deceased was buried in the same) be distributed,**
 - i. Home of Doris – 50 acres**
 - ii. Home of Terry 180.5 acres**
 - iii. Home of Esther 170.5 acres**
- 9. LR No. 6544/6. 10 acres be distributed equally or be sold and proceed divided equally among the three houses.**

10. *The cash at Bank etc shall be divided equally amongst the three houses.*
11. *The shares in companies be shared equally amongst the three houses.*
12. *The three co-widows shall hold the properties in trust for their children in equal shares.*
13. *The claim of the estate in respect of Kariuki and Gathecha Ltd. be vindicated by the estate in an appropriate forum.*

I hope that I have given substantive justice to all under the circumstances of this case which dates back to at least 1985, if not 1975..

There shall be no orders as to costs.

Dated, Signed and delivered at Nairobi this **8th** day of **December, 2009.**

K. H. RAWAL

JUDGE

8.12.2009