



**REPUBLIC OF KENYA**

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

**Succession Cause 435 of 2002**

**IN THE MATTER OF THE ESTATE OF DUNCAN KAMAU KIMANI (DECEASED)**

**AND**

**JULIA KABURA KAMAU.....PETITIONER**

**Versus**

**DORCAS NJOKI KAMAU**

**DAVID WANJOHI KAMAU**

**JAMES NYAGA KAMAU**

**BERNARD NGURE KAMAU**

**SAMUEL GACUCU KAMAU.....PROTESTORS**

**JUDGMENT**

The succession hereof related to the Estate of DUNCAN KAMAU KIMANI (deceased). The only asset belonging to that Estate is a property measuring approximately 10.3 acres. The deceased left surviving him two widows with children. The first wife of the deceased is Dorcas Njoki Kamau. She had 5 sons, namely David Wanjohi Kamau, James Nyaga Kamau, Bernard Ngure Kamau and Samuel Gacuca Kamau. The second wife is Julia Kabura. She had one son and two daughters, namely Stephen Kinyanjui kamau, Janet Wairimu Kamau and Priscilah Kagure Kamau. The Petitioner **JULIA KABURA KAMAU** in her application for confirmation of grant applied for distribution of the property of the Estate to be divided on the basis of each house getting half of that property. Therein lay the dispute which was directed to be heard by oral evidence.

The evidence of the first house was that the property should be subdivided equally amongst the deceased's son. That their deceased's father had directed that division be amongst the sons and if they could not agree on the exact area where each son should inherit, that balloting was to be undertaken. With regards to the two daughters in the second home, the first house evidence was that they were not entitled to inherit because they were married. Although a lot of time was spent by counsel appearing for the second house in cross-examination on whether or not the daughters were married when one of the said daughters gave evidence she accepted that they were married.

The evidence of the second house was that the deceased had wished that the property be divided equally between the two wives. That the two wives were to subsequently divide their portions to their children.

Janet Wairimu, daughter in the second house gave evidence and confirmed she married in 1970. She got her first born in 1970, the second one was born in 1972. She confirmed that she has in total 7 children, and she was still living with her husband. She also confirmed that her sister Priscilah Kagure is also married and lives with her husband in Eldoret. The argument of the second house is that the daughters although married should inherit just in case they are chased away from their matrimonial homes they would have somewhere to return to.

In submissions counsel for the Petitioner, second house, argued that to fail to give property to the daughters on the basis that they are girls was discriminatory and contrary to the provisions of the Constitution. Section 3(2) defines discrimination:-

**“.....affording different treatment to different persons attributable wholly or mainly to their respective description by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disability or restriction to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”**

The provisions against discrimination in s82(1) however are taken away by provisions of section 84(4) of the constitution, whereby it provides that the provisions of subsection (1) do not apply to the law so far as the law makes provisions:

**(a)**

**(b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;**

Counsel for the first house argued that subdivision of the property be carried out in accordance with the provisions of section 40 of The Law of Succession Act by dividing the property amongst all the deceased's children of both houses each child being one unit and adding the two widows as a unit each.

Having considered the evidence tendered and the submissions of counsel, I am of the view that the applicable section in The Law of Succession Act section 40(1).

That section provides:

**“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 considering the provisions of this section Omollo J. A. in the case of **RONO V RONO & ANOTHER (2005) 1 E. A. 363** stated as follows:

**“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.**

It is important to note that Section 40(1) provides that division should be on the basis of the number of children in each house. Clear evidence was adduced that the two daughters in the second house are married and living with their husbands. It is pertinent to note that only one daughter, namely Janet Wairimu Kamau attended court to give evidence. She confirmed that she was married in 1970 and her first born was born that same year. She has in total 7 children. The basis of her laying claim to her deceased's father's property was that in case her marriage broke down and she was chased away by her husband she would have property from her late father's estate where she could settled. The court did not

hear from the other daughter Priscilah Kagure Kamau but clear evidence came out that she is married. In view of the two daughters being married and living with their husband, I am of the view that they are not entitled to inherit their late father's property. In reaching that conclusion I do not think the said daughters can claim to be discriminated against. After all they would be included in the unit of their husband's estate. There was no evidence that there is any prospects of them being separated from their husband. The daughters instead want the court to act on their fears that they might be chased away by their husband. On the evidence tendered by the second house the court finds that they are not entitled to inherit.

The judgment of this court therefore is in the following terms in respect of the distribution of **OTHAYA/KIHUGIRU/157:**

- (1) That the widows Dorcas Njoki Kamau and Julia Kabura Kamau shall get two acres each.
- (2) The remainder of that property shall be shared equally between the following children of the deceased:
  - (a) **DAVID WANJOHI KAMAU**
  - (b) **JAMES NYAGA KAMAU**
  - (c) **BERNARD NGURE KAMAU**
  - (d) **SAMUEL GACUCA KAMAU**
  - (e) **STEPHEN KINYANJUI KAMAU**

There shall be no orders as to costs.

Dated and signed in Nyeri this 30<sup>th</sup> day of July 2007.

**MARY KASANGO**

**JUDGE**