



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

**Succession Cause 38 of 1995**

**ESTATE OF KIMOTHO KAHIGA KARARU (DECEASED)**

**RULING**

The late **Kimotho Kahiga Kararu** hereinafter referred to as “*the deceased*” died on the 26<sup>th</sup> June, 1994 at the Provincial General Hospital, Nakuru. He was survived by two widows, **Rebecca Wanjiru Kimotho** (hereinafter referred to as “*the first wife*” and **Jane Wanjira Kimotho** (hereinafter referred to as “*the second wife*”). Both widows are the joint administratrix of the deceased’s estate. The hearing was conducted for purposes of determining the mode of distribution of the deceased’s estate. It is not in dispute that the following properties were owned by the deceased prior to his demise and therefore they form part of his estate.

1. Nyandarua/Upper Gilgil/32.
2. Loc. 8/Gatuya/Kariara/T.176.
3. Loc.8/Gatuya/218.
4. Lembus Mosop/Mumberes/Block 1(Gilgil)103.
5. Bahati/Kabatini Block 1/77.

There were two properties over which there existed a dispute as to whether they belonged to the estate of the deceased prior to his demise and these were:-

- (a) Plot No.23 Langalanga within Nakuru Municipality.
- (b) ¼ share in Plot C 22 Kahuro Market in Murang’a District.

On the 18<sup>th</sup> May 1994 the deceased executed a will wherein he bequeathed to the first wife all that parcel of land known as **Nyandarua/Upper Gilgil/32**. The first wife lives on that parcel of land together with some of her children and grandchildren. She had been there for over 35 years. The parcel of land measures 36 acres or thereabout. According to the first wife, she was the sole owner of the said property. On the other hand, the second wife wanted that parcel of land to be divided equally between the two houses. The first wife got three sons, Ignatius Kararu, Mohamed Kiragu and Bernard Nyaga. Mohamed Kiragu has since died but he left behind a widow by the name Wanjiku Kiragu and twelve children.

The second wife has five sons and five daughters namely Veronica Waithera, Veronica Mukami, Joseph Mucheru, Hannah Nyambura, Joshua Kanyingi, John Mugo, Bernard Nyaga, William Kamau, Ruth Wanjiku and Rose Njeri.

Turning to the other properties over which there existed a dispute, **Plot No. 23 Langalanga** is a developed property which consists of several residential premises. The rent accruing therefrom is collected by M/S Muigai Commercial Agencies Ltd then it is shared equally between the two houses. However, one of the sons of the first wife, **Ignatius Kararu Kimotho**, claimed that he was the one who had put up the residential houses that stand on that parcel of land. He alleged that his late father gave him the plot and told him to develop it. He said that he developed it in 1969 and produced several receipts which he said were for the building materials that he purchased for the construction of the property. The property was registered in the name of the deceased and a title deed thereto issued to him in 1971 and by the time he died the title deed was still in his name. He had also instructed Muigai Commercial Agencies as his rent collectors.

From the foregoing, I hold that Ignatius Kararu Kimotho did not prove that the said property belonged to him. By virtue of the provisions of **Sections 27 and 28 of the Registered Land Act**, the property rightly belonged to the deceased, the registered absolute proprietor. If indeed the property belonged to Ignatius Kimotho there would have been no reason why the same had not been transferred to the claimant during the life time of his father. The receipts which the claimant produced for purchase of various building materials cannot override express statutory provisions regarding ownership of a registered property. I therefore hold that the property known as **Langalanga Plot No. 23 Nakuru Municipality** is part of the deceased's estate and is available for distribution between the two houses of the deceased.

I now turn to **Plot No. C 22 Kahuro Market** in Murang'a District. This property was purchased by the deceased and three other people in equal shares and therefore the deceased's share thereof was one quarter ( $\frac{1}{4}$ ). Bernard Nyaga Kimotho alleged that he bought the deceased's share at Kshs.200,000/- which he had paid by instalments, beginning from 1978. He said that he had entered into an agreement with the deceased for purchase of the same sometimes in 1987. However, the agreement that the claimant allegedly prepared between himself and the deceased showed a total sum of Kshs.100,000/- which was to be paid in three instalments as follows:-

Kshs.50,000/- on 16/2/87

Kshs.30,000/- on 7/5/92

Kshs.20,000/- on 7/4/94

Bernard was the one who prepared the agreement and it was allegedly signed by the deceased, although his signature thereon is remarkably different from the deceased's known signature, for example, the signature appended to his will. No reason was given for that variation. It is also worth noting that no other family member was present when the said agreement was signed. Counsel for the petitioner submitted that the alleged agreement between Bernard Nyaga and the deceased was contrary to the provisions of **Section 3(3) of the Law of Contract Act** which provides as follows:-

*“No suit shall be brought upon a contract for the disposition of an interest in land unless:*

*(a) The contract upon which the suit is founded –*

*(i) is in writing*

*(ii) is signed by all the parties thereto; and*

*(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party ...”.*

Since the signatures of the deceased and the claimant had not been attested to by a witness as required under the law, the claim by Bernard Nyaga is unsustainable. Further more, the evidence of Patrick Mwangi Kimotho contradicted that of Bernard Nyaga. Patrick Mwangi testified that the deceased had given his share of the property to Bernard for free and that the claimant had not paid anything to his father. Secondly, the records of Murang'a County Council showed the names of the owners of the plot as the original four people who had bought it, the deceased and three other people. The claimant's name did not feature anywhere. In the circumstances, I hold that the quarter share of **Plot C 22 Kahuro, Murang'a** is part of the estate of the deceased as Bernard Nyaga did not prove that he had purchased the same.

Regarding **Nyandarua/Upper Gilgil/32**, there was no dispute that the deceased had prior to his death bequeathed the same to his first wife vide a will dated 18/5/94. Counsel for the petitioner urged the court to interfere with the deceased's will by applying **Section 26** of the **Law of Succession Act** which permits the court to make an adequate provision to a dependant not adequately provided by a will or an intestacy. He urged the court to set aside the said will and order full distribution of the deceased's estate since the will had not made reasonable provision for all the dependants. The second wife prayed that the property be divided equally between the two houses.

The deceased had a vast estate. His aforesaid will was in respect of Nyandarua/Upper Gilgil/32 only, which he bequeathed to his first wife. He did not distribute any other part of his estate amongst the other beneficiaries. All the other beneficiaries were in occupation of certain portions of the deceased's estate.

Turning to distribution of the deceased's estate, Section 28 of the **Law of Succession Act** sets out the factors which a court has to consider in distributing the estate of a deceased person. They are as follows:-

- (a) The nature and amount of the deceased's property.
- (b) Any past, present or future capital or income from any source of the dependant.
- (c) The existing and future means and needs of the dependant.
- (d) Whether the deceased had made any advancement or other gift to the dependant during his lifetime.
- (e) The conduct of the dependant.
- (f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any will.
- (g) The general circumstances of the case including so far as can be ascertained the testator's reasons for not making provision for the dependant.

The provisions of **Section 26** of the **Law of Succession Act** are applicable where the court is of the opinion that the disposition of the deceased's estate effected by his will or by gift in contemplation of death or the law relating to intestacy does not make reasonable provision for a dependant. Where the court is so satisfied, it will order that such reasonable provision as it will deem fit be made for that dependant out of the deceased's net estate. In considering whether such an order should be made, the court will take into account the circumstances as set out in Section 28 of the Law of Succession Act.

No application was made by any dependant under the provisions of **Section 26** of the **Law of Succession Act** and in my view, no sufficient reasons were advanced to justify this court's interference with the deceased's will. The deceased had other properties which he had not bequeathed to anybody and in his own wisdom he chose to exclude all those other properties from his will but gave to his first wife **Nyandarua/Upper Gilgil/32**. He married her in 1936 and she had occupied that property for about 35 years.

At the time of his death, occupation and/or utilisation of the deceased's other properties was and remains as follows:-

**(a) Quarter share of Plot No.C 22 Kahuro Market:**

Bernard Nyaga Kimotho, a son of the first wife was the one who was getting the share of the rent that the deceased was entitled to.

**(b) Nakuru Municipality/Langalanga/23:**

The rent from the properties developed thereon is collected by Muigai Commercial Agencies Ltd then it is shared out equally between the two wives of the deceased.

**(c) Location 8/Gituya/Kariara/T.176:**

This is a small parcel of land measuring 0.052 Hectares and is occupied by Joseph Mucheru, a son of the second wife.

**(d) Location 8/Gatuya/218:**

Half of it is occupied by Joseph Mucheru, a son of the second wife and the other half by Bernard Nyaga, a son of the first wife.

**(e) Lembus/Mumberes Blocl 1/103:**

This parcel of land measures 2.776 Hectares and is occupied by Joshua Kanyingi, son of the second wife.

**(f) Bahati/Kabatini Block 1/77:**

This parcel of land measures 0.65 Hectares. Bernard Nyaga, a son of the second wife used to live there. He died together with his wife leaving behind one son.

Having taken all the relevant factors into consideration I decline to vary the will of the deceased and hold that **Nyandarua/Upper Gilgil/32** was bequeathed to the deceased's first wife and does not form part of the deceased's estate that is available for distribution.

I have already set out the estate of the deceased that is available for distribution. I have also taken into consideration the provisions of **Section 28** as hereinabove and in my considered view, the provisions of **Section 40** of the **Law of Succession Act** also come into play. The same provides as follows:-

***“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 and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in Section 35 to 38.”***

Section 42 of the Law of Succession Act requires that where an intestate had during his life time or by will given any property to or for the benefit of a child, grandchild or house that property be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

In determining the distribution of the net intestate in this matter, I must therefore take into account the fact that **Nyandarua/Upper Gilgil/32** was given to the first house. In distributing the net intestate estate of the deceased I must also consider that the deceased's second wife has five daughters who, according to

the evidence on record, are not enjoying any share of their later father's property. Two of them had been married but they divorced or got separated from their husbands. The others are unmarried. But whether married or unmarried, they are entitled to a share of the deceased's estate.

Apart from the three properties which had disputes, the parties who testified in this matter had no objection to distribution of the deceased's estate amongst his beneficiaries as it was at the time of his demise. Doing the best I can, I order distribution of the deceased's net intestate estate as follows:-

**1. Quarter share of Plot No. 22 Kahuro Market:**

To Bernard Nyaga Kimotho of the first house.

**2. Nakuru Municipality/Langalanga/23:**

To be shared between the two houses according to the number of children in each house including the two widows. The first house has four units and the second house eleven units making a total of fifteen (15) units. The two widows shall have a life interest over their share of the estate. For avoidance of doubt, each of the deceased's daughters, whether married or unmarried, shall be entitled to an equal share of this property just as the other beneficiaries.

**3. Location 8/Gatuya/Kariara/T.176:**

To Joseph Mucheru, son of the second wife.

**4. Location 8/Gatuya/218:**

To Joseph Mucheru ( son to the second wife) and Bernard Nyaga (son to the second wife) in equal shares.

**5. Lembus/Mumberes Block 1/103:**

To Joshua Kanyingi, a son to the second wife.

**6. Bahati/Kabatini Block 1/77:**

To the children of the late Bernard Nyaga who was a son to the second wife.

The first wife and her children will exclusively have Nyandarua/Upper Gilgil/32, which was bequeathed to her by the deceased as earlier stated.

Any money that may be in any bank or company shares shall be shared equally between the two widows. The grant of letters of administration that was issued to both Jane Wanjira Kimotho and Rebecca Wanjiru Kimotho is now confirmed. The costs of this matter shall be borne by the estate of the deceased.

DATED, SIGNED and DELIVERED at Nakuru this 25<sup>th</sup> day of September, 2006.

**D. MUSINGA**

JUDGE

Ruling delivered in open court in the presence of Mr. Maragia holding brief for Mr. Muhia for the objector and Mrs Mbeche holding brief for Mr. Mutonyi for the petitioner.

**D. MUSINGA**

JUDGE