



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO. 1033 OF 1996**

**IN THE MATTER OF THE ESTATE OF MWANGI GITURE (DECEASED)**

**RULING**

One of the Administrators of the deceased estate by the name Eliud Muguku brought this application under Section 71 of the Law of Succession and Rule 4 of the Probate and Administration Rules seeking for the confirmation of the grant made on 7th October 1998.

The grant was issued jointly to the applicant representing the 2nd house and Esther Njeri Mwangi representing the 1st house. The applicant also sought for an order that the deceased property be shared amongst the heirs in accordance with the provisions of Section 40 of the Law of Succession.

The applicant also filed a supporting affidavits detailing the deceased heirs in each household, the deceased assets, their estimated values and his proposed mode of distribution. The co-administrator and also her mother who is also the deceased widow filed affidavits suggesting another mode of distribution whereby the deceased estate would be shared equally between the two houses.

Both parties also filed written submissions and expounded at great length on the mode of distribution that the court should adopt in this matter.

It would appear that there is no dispute as to what assets belonged to the deceased and even the values attached to the commercial properties is not in dispute. The only dispute is the mode of distribution.

The 1st house represented by Esther Njeri Mwangi and Milka Gathoni insist that the property should be shared equally between the two houses. This way, there will be equity as the 1st widow was married in 1939, while the 2nd widow was married 21 years later in 1960.

The major properties like the Commercial properties in Makadara, Mlango Kubwa and Pangani were acquired before the 2nd widow was married. The first widow argued that she contributed substantially to the acquisition of the properties especially when the deceased was sent into detention during the struggle for independence.

In this regard counsel for the 1st house argued that the intention of Section 40 of the Law of Succession read together with Section 35, the inference to be drawn from those sections is that the capital assets being the residue of the estate after the personal effects have been shared, should also be divided equally between the two houses. This sharing will also be in accordance to the Kikuyu Customary Law of Inheritance which counsel argued should guide this court. Several authorities were cited especially the decision of the Civil Appeal No. 89 of 1998 Maina Mwangi vs Gachichi Njihia page 7 where the Court of Appeal held that

**“Succession under Kikuyu Customary Law is patrilineal and inheritance is based on**

**equal distribution of the deceased men's property amongst his sons although the eldest son may get a slightly larger shares."**

The counsel for the 1st widow also relied on the Text restatement of Kenya Customary Law by Eugene Contran page 266 as adopted by Harris J (as he then was) in the matter of the Estate of Stephen Mbuti Civil Case No. 1289 of 1974 and the judge had the following to say.

**"I am of the opinion that the present –day customary law relevant and appropriate to this case requires that in addition to the rights of the first defendant as his widow, the plaintiff and all the five defendants are entitled to share on the basis of the "house" in the movable assets comprised in the deceased estate."**

In view of the above decision the court was asked to consider that Section 40 of the Law of Succession does not oust the customary Law of the deceased. The deceased was a Kikuyu married under the Kikuyu Customary and his estate should therefore be distributed according to the customary law as per the restatement by Eugene Contran.

The applicant on the other hand submitted that the distribution should be in accordance with the provisions of Section 40 of the Law of Succession which provides Where intestate was polygamous

**"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"**

Counsel for the 2nd widow also submitted that if the 1st widow had a genuine claim about her contribution to the deceased estate she ought to have pursued her claim under the Married Women's Property Act for such declarations as to what shares belongs to her. He therefore urged the court to ignore the time when the 1st wife got married as it is immaterial when dealing with the estate of the deceased.

I have evaluated the above submissions carefully as well as the decision referred to and the provisions of the Law. The deceased in this matter died on 29th February 1996. He was survived by the following:

1st widow and 4 daughters and the 2nd widow with 8 children. The deceased estate is governed by the provisions of the Law of Succession Cap 160 whose date of commencement is 1st July 1981. Section 2 (1) of Cap 160 provides as follows:

**"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 estate of deceased persons dying after the commencement of this Act and to the administration of the Estates of those persons."**

According to me therefore, the law applicable is Cap 160 and Section 40 thereto that deals with a polygamous intestate. I understand the submissions by the 1st widow regarding equal sharing but in this respect the law is clearly set out and there is no way the court can disregard the provisions of the law and apply customary law in the fact of a written statute. Perhaps it is the high time, the commission charged with the responsibility of law reform addressed the issue of the inequality raised under Section 40 of Cap 160. The 1st widow's entitlement vis vis the 2nd widow or subsequent widow who perhaps come into a marriage much later to find that the 1st widow has worked tirelessly and sometimes denying herself tremendous comfort to enable her husband create and accumulate wealth. The 1st widow is then relegated to the same position by virtue of Section 40 of the Law of Succession to the same position as the last born child of the 2nd or subsequent widows. The widow is supposed to be considered as a unit alongside the

children.

In this regard the last born child of the subsequent widow who will have contributed nothing is elevated in law because he will have notably absolute rights but will be entitled to an equal share with the 1st widow. The 1st widow is only entitled to a life interest and after the life interest the property revolves to her children in equal shares absolutely. I agree with counsel for the protester 1st widow that this state of affairs bleeds inequalities and inequities in our law and ought to be addressed urgently to enable our courts dispense justice that meets the provisions of the Constitution of Kenya and give due regard to the principals of non discrimination on the basis of sex which are also the principals of Non-discrimination provided for under the International Conventions Especially the Convention Against all forms of Discrimination against women (C.E.D.A.W.) which Kenya has signed and ratified. If the principals laid down in the International conventions were to be applied, the 1st widow would get a share of the property acquired during her marriage to the deceased, hearing the other half share to be shared by all the deceased heirs. If the distribution is of a polygamous intestate, each widow would get a share of what she contributed to. In the present case, the law to be followed here, in regard to the deceased estate is Section 40 of Law of Succession.

In the two affidavits of the applicant Eliud Muguku has suggested the mode of distribution, the affidavit sworn on 13th February 2004 paragraph 8 the applicant proposes the following mode of distribution.

**1st House**

LR No. 209/334 Makadara (Kshs.900,000/=)

LR No. 209/11373/94 Mulango Kubwa (Kshs.670,000/=) 1 plot at Langatta Development – Kshs.300,000/=

1st Plot at Kantafu Kshs.80,000/=

For unexplained reason the applicant introduces the issue of married daughters who should not inherit the agricultural land, as stipulated in paragraph 8 of his affidavit. Sworn on 13th February 2004.

As regards the proposal on the distribution of the Agricultural Land, I would adopt the applicants earlier proposal stipulated in his affidavit sworn on 8th April 2002 paragraph 3 whereby the 1st house should be given (1/3) one third of LR No.Loc 14/Kiru 953 and Loc 14/Kiru 424 combined. I have given due consideration to the definition of Agricultural land and also noted that the minister has never published a Notice to give effect to Section 32 of the Law of Succession.

In this regard the 1st house should also be entitled to 1/3 of all the shares and moneys in the bank. I notice that there are 5 plots known as Kimunye Plots, the 1st wife should be entitled to at least one plot.

Accordingly these are the orders of this court

**1st House**

Assets to be held by the 1st widow in trust of her children in equal shares.

LR No. 209/334 Makadara

LR No. 209/11373/94 Mulango Kubwa

1 plot at Langata Development

1 plot at Kantafu

1 plot at Kimunge

1/3 of LR Nos Loc 14/Kiru 953

Loc 14/Kiru 424

1/3 of shares in all the companies

1/3 of shares of all the monies in the deceased accounts less of course the liabilities to be paid first after due verification.

The **second house** to be entitled to the following:

LR No. 209/2389/87 Pangani

1 plot at Langata Development Co. Ltd.

4 plots at Kimunge Investments Co. Ltd.

1 Plot at Kantafu

2/3 of LR No

Loc 14/Kiiru/953

Loc 14/Kiiru/424

2/3 of all the shares in the companies

2/3 of all the monies held in the deceased accounts less of course the liabilities to be paid first after due verification.

The grant is hereby confirmed on the above basis.

Each party to bear their own costs.

It is so ordered.

Judgment read and signed on 30th April 2004.

**MARTHA KOOME**

**JUDGE**