



REPUBLIC OF KENYA



In re Estate of the Late Moses Maina Ndegwa (Deceased) (Succession Cause 375 of 2019) [2025] KEHC 3300 (KLR) (Family) (20 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3300 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 375 OF 2019

HK CHEMITEI, J

MARCH 20, 2025

IN THE MATTER OF THE ESTATE OF THE LATE MOSES MAINA NDEGWA (DECEASED)

BETWEEN

VIRGINIA WANJA WAITITU PETITIONER

AND

MATHEW NDEGWA MAINA 1ST OBJECTOR

DOUGLAS MURITHI MAINA 2ND OBJECTOR

JUDGMENT

1. The deceased herein died intestate on 6th March 2021 leaving behind Virginia Wanja Waititu the widow, Mathew Ndegwa Maina and Douglas Murithi Maina who are the children he sired with one Victoria Mureithi whom they separated in 1997.
2. The deceased left behind the following assets:-
 - (a) Ruai plot number 1-1XXX (Nairobi block 105/XXX)
 - (b) Plot number 1XXX Embakasi also known as Nairobi block 105/XXX
 - (c) LR No. Othaya /Kihugiru/XXX
 - (d) LR No. Othaya /Kihugiru/XXX
 - (e) Kshs.200,000 at KCB Prestige Plaza account number 11XXXX
3. By a consent of the parties dated 7th June 2021 the three were made joint administrators of the estate herein.



4. The Objectors filed an application dated 19th April 2022 for confirmation of the grant and they proposed their mode of distribution. The Petitioner by her affidavit dated 12th May 2022 protested to the said mode of distribution and suggested her mode to be adopted instead.
5. The court directed the parties to file written submissions so as to dispose the application and give a final determination on the distribution. The parties have complied and the court has gladly perused the same together with the attendant authorities cited.
6. The issues which are in dispute and which runs across both submissions is whether the Applicant is entitled to inherit the estate in view of the fact according to the Objectors the Applicant did not stay with the deceased for more than four years.
7. The description of the properties and their acquisition is not in dispute. They are all registered in the name of the deceased.
8. It was their case that they only stayed as husband and wife for the period between 1998 to 2002 when they parted and the deceased came back and stayed in his matrimonial home. That the Petitioner only resurfaced after about 10 years and when the deceased was unwell.
9. The sets of evidence on record by several witnesses notably Esther Muringe the deceased sister, Naftali Maina Nduati and David Kinyua Ndegwa the deceased neighbor and brother respectively paints a picture of the deceased and the Petitioner having parted ways not long after their marriage.
10. The Petitioner on the other hand submitted that she stayed with the deceased till his demise. That they only moved out of the Ruai home to Ngei and Kileleshwa estates because of proximity to her place of work. That she heavily contributed to the treatment of the deceased and she evidenced the same by the insurance cover she provided.
11. She also submitted that she contributed to the development of the matrimonial home at Ruai although the parcel was purchased by the deceased before marrying her.
12. On the issue of the other assets, it was the Petitioner's case that the properties in Othaya belonged to her late husband and they were ancestral and he inherited them from his parents. They were ancestral as evidenced by the fact that that is where he was buried and his parents as well.
13. They each in their various submissions submitted their mode of distribution. The Petitioner submitted that property number Nairobi 105/XXXX and Othaya 1735 should devolve to her and Othaya 2944 should go to both Objectors. Property number 1-1XXX should be shared on a 50% basis with her taking 50% and the other 50% between the two Objectors.
14. On the other hand, the Objectors submitted that Mathew should be given Nairobi 105/1XXX , Douglas Othaya 1XXX and Virginia Othaya 2XXX. No 1-XXX should be shared equally.
15. The amount in the two KCB accounts should be used to offset any liabilities including the legal charges.

Analysis And Determination.

16. The issue of the relationships between the parties herein is not disputed. The deceased married the Petitioner after his first marriage with the Objectors' mothers failed.
17. I have looked at the question of whether the deceased indeed lived with the deceased for their entire marriage period since it was one of the contentious issues. I do not find any evidence to suggest that they lived consistently for the entire period.



18. Apart from the evidence of the witnesses it is apparent that by her own admission in her application on record dated 12th May 2022 the Petitioner was seeking this courts orders to access her matrimonial home and management of the premises situate at Nairobi Block 105/XXX and the rest of the income generating premises.
19. She was not living with the deceased at the time of his demise and this lent credence to the submissions by the Objectors. As a matter of fact she was living in a rented house and that is why she was seeking maintenance after losing her job courtesy of Covid pandemic.
20. I doubt whether she lived in the rented house because of proximity to her place of work. Paragraph 15 of her supporting affidavit sought the orders of the court to occupy the Ruai home “without any interference”
21. Since the Objectors admittedly lived abroad one wonders why the Petitioner was not in control of her husband’s property in the usual manner of a genuine marriage between two adults. Save for the marriage certificate I do not find any evidence of active living between her and the deceased.
22. I have also perused through the evidence on record and I respectfully do not find any evidence that the Petitioner contributed to the development or maintenance of any of the properties whether in Ruai or Othaya. Although she claimed that she participated in the development of Ruai home I do not see any actual tangible evidence considering that the deceased had purchased the same way before he married her.
23. The deceased sister Esther Murige in her statement on record explained how the deceased housed her there with her children and later she took care of the deceased after coming back, that is, after parting ways with the Petitioner.
24. This brings me to the question of whether in light of the evidence on record what is the extent of her entitlement of the estate as a wife. There is no doubt that she remained his wife by virtue of the marriage between them which subsisted till the end. Beyond that however there is no tangible evidence of her contribution to the acquisition of any of the properties or actual improvement of what she found. Indeed, all that she found had already been purchased by the deceased or inherited from his deceased parents.
25. In my view therefore she cannot claim more rights as a wife in the sense provided under section 35 of the Act as was discussed by my brother Nyakundi J in Nicholas Kaaka Kapore (deceased) 2018 eKLR where he reasoned that:-

“The rights the spouse and surviving children is well captured in Section 35 (2), (3) (5) and Section 38 of the *Law of Succession Act* which provides as follows:

“A surviving spouse shall, during the continuation of life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date. Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made. Subject to the provisions of Section 41 and 42 and subject to any appointment or award made under this Section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children. 38 where an



intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”

My understanding of Section 35 of the Act is that it was expressly stated to cater for the surviving spouse and the children of the deceased. Eva Kaaka was a wife of the deceased for purposes of Section 29 and 40 of the Act. The law also appreciates the position that the deceased surviving children include even those born outside the marriage therein. In arriving at an appropriate formula on the mode of distribution the letter and spirit of Part (v), of the law of succession and more specifically Section 35, 38 and 40 should be adhered to unless there are exceptional circumstances for the court to exercise discretion to the contrary.” (underlining mine)

26. I reckon that this is a matter which this court in view of the evidence before it must exercise exceptional discretion in arriving at the Petitioners rights and share of inheritance of her husband’s estate.
27. Taking the totality of the evidence before this court I find that the only portion of entitlement of the Petitioner in this estate is part of the matrimonial home which in this case is simply because of the short stint she had with the deceased and the help and care she showed during the last stages of his illness. At the same time because she remained a legal wife till his death, I find that she deserved some portion of the estate.
28. The rest of the ancestral properties in my view she does not merit any share for the simple reason that she did not participate in any acquisition or developments or at all. The rental houses in Othaya were developed by the deceased and there is no input by the Petitioner. The same goes for the tea bushes.
29. Had she lived with the deceased throughout and shown any evidence of such stay I think the court would have considered otherwise. It will be unfair to reward her for what she did not contribute during the coverture.
30. In conclusion the estate shall be distributed as follows:-
 - (a) Half share to the Petitioner in plot number 1-1XXX Embakasi also known as Nairobi Block 105/XXX. The two Objectors shall share the other half equally.
 - (b) Plot number 1-127 Embakasi known as Nairobi block 105/XXX to be shared equally between the two Objectors.
 - (c) Othaya/Kihugiru/1XXX to be shared equally between the two Objectors.
 - (d) Othaya/Kihugiru/XXX to be shared equally between the two Objectors
 - (e) The amount at Kenya Commercial Bank Prestige Plaza Account Number 11XXXXX totaling Kshs.200,000 and Account Number 12XXXXX at Milimani branch or any other amount therein to be shared out equally between the Petitioner and the Objectors after paying out all the liabilities including legal charges.
 - (f) Each party to meet its respective costs.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 20TH DAY OF MARCH, 2025.

H K CHEMITEI

JUDGE

