



REPUBLIC OF KENYA



In re Estate of the Late Jane Kagure King'ori (Deceased) (Succession Cause 457 of 2005) [2025] KEHC 4512 (KLR) (Family) (8 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4512 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 457 OF 2005

HK CHEMITEI, J

APRIL 8, 2025

IN THE MATTER OF THE ESTATE OF THE LATE JANE KAGURE KING'ORI (DECEASED)

BETWEEN

NELSON KING'ORI GICHUHI APPLICANT

AND

ERIC WARUTERE 1ST RESPONDENT

EUNICE WAIRIMU KING'ORI 2ND RESPONDENT

SILVIA WAMBUI KING'ORI 3RD RESPONDENT

RULING

1. In his amended summons dated 8th June 2023 the Applicant prays for orders that:-
 - (a) The asset LR No Aguthi/Gatitu/3197 be sold and the proceeds equally distributed to all the beneficiaries to complete the distribution of the estate.
 - (b) The legal costs associated with the sale of the property to be shared equally among the beneficiaries.
2. The application is based on the Applicant's affidavit sworn on the same date and the grounds thereof.
3. The gist of the application is that the Applicant is the widower and the Respondents are his children. The property namely Aguthi/Gatitu/3197 pursuant to the grant of this court is registered in the names of the four and the Applicant is holding it in trust for them.
4. The Applicant deponed that he wishes to have the same fully distributed so that each of the children can have their share now that they are of age.



5. The 1st Respondent Eric Warutere on his behalf and that of his two siblings has opposed the application on the grounds that the Applicant intends to disinherit them and relied on Section 38 of Cap 160. He deponed that the said property ought to be devolved to them and not the Applicant.
6. That the property is too small to be subdivided into four shares. He therefore prays that the application be dismissed.
7. The court directed the parties to file written submissions which they did and I have perused the same extensively together with the cited authorities.
8. It is the submissions of the Respondents that the provisions of Section 38 of Cap 160 preclude the Applicant from dealing with the property and more so as a trustee his interest ends with simply holding the same in trust for the Respondents.
9. What is evidently clear is that the property in question is registered in the four names and the Applicant is holding it in trust for the children. They have since attained the age of majority and capable of inheriting. That is the basic argument in the Applicants' submissions.

Analysis And Determination

10. From the affidavits on record, it is agreed that the parcel of land is too small to have any meaningful subdivision and I guess that is the reason why the Applicant requested that it be sold and the proceeds divided equally.
11. The Respondent's contention is that their father has no right over the same pursuant to Section 38 of the Act. That he simply has a life interest.
12. The Applicant relied on Section 35 of the Act and argued that he has a life interest in the estate of his wife.
13. I think the two sections are distinguishable and clear. Section 38 states as hereunder:-

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”
14. In the above section the Act envisages a situation where the deceased left no surviving spouse. In the case at hand the Applicant is alive and according to Section 35(1) he has a life interest. The same states as hereunder:-

“Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

 - (a) the personal and household effects of the deceased absolutely; and
 - (b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.” (Underlining mine)



15. On the other hand, Section 37 gives the surviving spouse powers to deal with the property subject to the consent of the children and or the court. It goes on to state that:-

“A surviving spouse entitled to a life interest under the provisions of section 35 or 36, with the consent of all co-trustees and all children of full age, or with the consent of the court, may, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:

Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.”

16. The record of the court confirms the toxic relationship between the Applicant and the Respondents. For reasons best known to them the Respondents have put hurdles on every step their father has attempted to take in regard to the deceased estate. They believe that their father should not have any interest in the estate.

17. The saving grace however is that he has a life interest provided by the law and they have no right to deny him. They may have their differences but he is insulated. As a matter of fact, they are now adults and the law envisages that they ought to be venting for themselves.

18. Odero J on 15th May 2023 found that all of them were beneficiaries to the estate and that cannot be wished away. The estate therefore must be distributed and closed and they part ways. Since he has a life interest the Applicants rights must be respected least of all by the Respondents.

19. What he has sought to do is within the law, namely, distribute the estate so that he does not need to hold it in trust for the Respondents who have since attained the age of the majority.

20. Musyoka J in *Jolly Jimmy Gitbeiya* (2013) eKLR summarized similar position rightly:-

“The Applicant says that the children are not happy with the issue of life interest, and have become abusive and that they are now hostile towards her. She says the life interest has generated hatred by the children towards her. This is pretty strong language. If that is the case, then the children are clearly in the wrong. Life interest is not a matter of choice by the surviving spouse; it is an imposition by the law. It is in fact supposed to safeguard both the children and the surviving spouse. The ultimate destination of the property estate should be to the children. However, if everything passes to the children, there is a real possibility that the surviving spouse could be left destitute. To safeguard his or their position, he or she is given life interest in the estate. This means a right to enjoy the property during her life time. It entitles them to utilize it. The right does not give them absolute right over the property. It only gives them a right of user. It is in that respect that the children are safeguarded. The surviving spouse is only entitled to user, the property does not belong to them and they can only enjoy the same during lifetime. They cannot dispose of it at will, except in compliance with the provisions of 37 of the *Law of Succession Act*.

The children need not hate their mother over the life interest. It is given to her by the law. It is her right. Section 35 of the *Law of Succession Act* is very clear on this, it provides –

- 1) subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

The personal and household effects of the deceased absolutely;



A life interest in the whole of the residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her remarriage to any person.’

This provision is very clear. The estate is not to be divided amongst the children while the surviving spouse is still alive. Distribution among the children should only happen upon her remarriage or death. Neither of that has happened in this case and therefore the surviving spouse is entitled to continue enjoying life interest.”

21. I agree with the above observations. The toxic relationship should not be allowed to subsist if the law can permit a lawful parting of ways. More so is the interest of the Applicant who has the life interest over the property. He should be allowed to enjoy and not to be left destitute.
22. If the property cannot be subdivided because it is too small then the right thing to do is to have it sold and the proceeds shared out equally. If the Respondents are able to redeem it then the better. A proper valuation ought to be undertaken though.
23. In the premises I do not find any merit in the objection by the Respondents. The Applicant has sought the consent of this court since the Respondents have refused and this perfectly fits with the above cited portion of the law.
24. The application is allowed as follows:-
 - (a) Land parcel number Aguthi /Gatitu/3197 be valued by a professional registered valuer appointed by the parties and in default by the deputy registrar of this court and the same be sold in open market and the proceeds be divided equally among the Applicant and the beneficiaries.
 - (b) The above exercise be undertaken within 90 days from the date herein.
 - (c) Either the Applicant and or the Respondents be at liberty to buy the same after the above valuation.
 - (d) The costs of valuation, conveyancing and legal charges if any shall be paid out of the sale proceeds
 - (e) Costs in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 8TH DAY OF APRIL, 2025.

H K CHEMITEI

JUDGE

