



In re Estate of Kaga Kimaru Gathua (Deceased) (Succession Cause 42 of 2015) [2024] KEHC 2750 (KLR) (13 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 42 OF 2015**

SM MOHOCHI, J

MARCH 13, 2024

**IN THE MATTER OF ESTATE OF KAGA KIMARU GATHUA
(DECEASED)**

BETWEEN

FLORENCE NJOKI KAGA APPLICANT

AND

JOSHUA KARIUKI KAGA RESPONDENT

JUDGMENT

Background

1. Kaga Kimaru Gathua died on the 5th July 2003 at Nyahururu District Hospital leaving behind a surviving spouse and seven (7) sons and eight (8) daughters from two (2) houses. The Applicant - Florence Njoki Kaga is the surviving spouse from the 2nd house moved this court for confirmation of a grant of letters of administration intestate for the estate of the deceased on the 24th May 2022 after the 1st and 2nd house disagreed on the mode of distribution. The Respondent is the 2nd Administrator representing the 1st House.
2. The late Kaga Kimaru Gathua was previously married to Rahab Wambui Kaga (Deceased) until 1974 upon her demise when he married Florence Njoki Kaga in 1975 and initially Florence had to take care of the six (6) children Peter Wang'ondou Kaga, John Waigwa Kaga, Deborah Muthoni Kaga, Caroline Nyokabi Kaga, Christopher Wachira Kaga and Joshua Kariuki Kaga of the late Rahab Wambui and they resided at Nyandarua/Matindiri/130.
3. The Applicant had nine (9) children namely, Jane Nyokabi Kaga, Peter Wang'ondou Kaga, Naomi Wanja Kaga, Mercy Njeri Kaga, Charles Wachira Kaga, Josphine Nyambura Kaga, Naomi Wangari Kaga, Monicah Wambui Kaga and Zachary Mwangi Kaga



4. It is noteworthy that, the all the six (6) beneficiaries from the 1st House are aged between 64 and 49 years old while the nine (9) beneficiaries from the 2nd house are aged 27 to 24 years old
5. Before me is an Application by Florence Njoki Kaga dated 24th May 2022, a Summons for Confirmation of Grant filed pursuant to Section 71 of the *Law of Succession Act* and Rule 40 of the Probate and Administration Rules) a surviving spouse in the estate of the above- Kaga Kimaru Gathua who died on the 5th July 2003 seeking the following reliefs: -
 - a. The grant of letters of administration intestate issued made to Florence Njoki Kaga and Joshua Kariuki Kaga on the 29th April 2017 be confirmed.
 - b. That, the costs of this application be in the cause.
6. The Application is supported by a sworn affidavit of Florence Njoki Kaga and is premised on the following grounds;
 - a) That it is well over six months since the grant herein was issued.
 - b) That there is no objection to the confirmation sought.
7. This court on the 5th May 2023 directed that the Application shall be heard and disposed-off by way of viva voce evidence and written submissions and parties complied as follows;
 - a. Hearing was on the 23rd June 2023 with Joshua Kariuki Kaga testifying for the Protestors and Florence Njoki Kaga testifying for the Petitioners.
 - b. Protestor Joshua Kariuki Kaga filed his amended Written Submission on the 28th August 2023;
 - c. The Applicant filed her written submissions on the 20th July 2023.

The Protestor/Respondent Case

8. The protestor Joshua Kariuki Kaga testifies and exhibited two chief's letters dated 7th June 2023 and 2nd letter dated 23rd June 2023 confirming the separate settlement of the two houses marked as Protestors Exhibit 1 and 2 respectively.
9. Joshua Kariuki Kaga's evidence is that, the deceased had clearly shown his intentions of how he wanted the two families settled during his lifetime, that after their mother Rahab Wambui Kaga died in 1974 she left the 1st administrator and his five other siblings on parcel Nyandarua/Matindiri/130 where their mother is buried. The land measures 58 acres, that the deceased married Florence Njoki Kaga and were blessed with nine children in the 2nd house.
10. It is the 2nd administrator's evidence that Florence Njoki Kaga the 2nd wife after marriage settled in the house the late Rahab Wambui Kaga was occupying and she brought up the children from both houses on this land for 10 years.
11. That Kaga Kimaru Gathua moved Florence Njoki Kaga from Matindiri and settled her on parcel Gituamba/Muhotetu Block 2/57 measuring 25 acres sometimes in the year 1985. He built for her a home there and indeed he is buried in this parcel of land it was his evidence that the two houses were settled separately by the deceased.
12. The 2nd administrator's evidence is that, before the deceased died he settled his brother John Waigwa Kaga, Joshua Kariuki Kaga and Christopher Wachira Kaga his younger brothers on parcel Nyandarua/



- Matindiri/130. He showed each of the brothers from the 1st house where to build on this parcel of land. John Waigwa Kaga constructed his house in 1984 while the 2nd administrator constructed his in 1996.
13. That, it is the 2nd administrator's case that their youngest brother from the 1st house was settled where the family homestead had been. Further, it's the 2nd administrator's case that their sister from the first house is also settled in this parcel of land. None of the children from the 2nd house was settled by the deceased on this land.
 14. That, the deceased settled Peter Wang'ondy Kaga the eldest son in the first house on parcel Gituamba/Muhotetu Block 2/2008 (Muhotetu) in 1982. He constructed a permanent house there and has done a lot of developments on the parcel of land since 1982. That later on, Charles Wachira Kaga a son from the 2nd house was also settled on the same parcel of land. It's therefore clear that the deceased had intentionally settled his children and wife according to how he intended them to live.
 15. The suggestion by the 1st administrator that the properties be shared equally amongst all the beneficiaries means persons being uprooted from places they were settled by the deceased and which places they have extensively developed. The Respondent contends that, it would be uneconomical and of great inconvenience to tell the 1st administrator to move from Gituamba/Muhotetu Block 2/57 where she has settled and buried the husband to move to Nyandarua/Matindiri/130 where she had been removed from by the deceased during his lifetime.
 16. That it's clear that parties were not only shown where to construct houses by the deceased but also who was to move to a particular farm hence the fact that he deliberately moved the first son from the first house Peter Wang'ondy Kaga and a son to the 2nd house one to Gituamba/Muhotetu Block 2/2008 (Muhotetu). He did not settle the 1st son from the 1st house on Nyandarua/Matindiri/130 where he settled the other sons from the 1st house.
 17. That, it's clear the deceased's intention on how his family was to be settled is clear from where each has built. I ask the court to honour the same and are to the 2nd administrator's mode of distribution as it is not only fair and just but follows in the deceased's footsteps as to how he wanted his family settled.
 18. The 2nd administrator's mode is equitable given that he proposes the 1st house is bequeathed the following parcels;
 - i. Nyandarua/Matindiri/130 - measuring 58 acres,
 - ii. Tetu/Kihingo/1/1(5-00893) (LR1607-00119) - measuring 0.125 acres and
 - iii. Gituamba/Muhotetu Block 2/2008 (Muhotetu) - measuring 26 acres.
 19. The 1st house is bequeathed a total acreage of 84.125 acres to be shared out equally between Peter Wang'ondy Kaga, John Waigwa Kaga, Deborah Muthoni Kaga, Caroline Nyokabi Kaga, Christopher Wachira Kaga and Joshua Kariuki Kaga.
 20. His proposal that the 2nd house led by the 1st administrator Florence Njoki Kaga is bequeathed the following parcels;
 - i. Gituamba/Muhotetu Block 2/2008 (Muhotetu) - measuring 31 acres,
 - ii. Mugunda/Rurii Block 1(Muthangra/38) -measuring 29 acres, Gituamba/Muhotetu Block 2/57 - measuring 25 acres therefore the 2nd house shall receive a total acreage of 85 acres
 21. The 2nd administrator also proposed an equal sharing of Muhotetu Farmers Company Shares between the two families while giving the 1st administrator Florence Njoki Kaga all the shares in Kenya



Commercial Bank. My lord, this is an equitable way of sharing the deceased's properties or his intention and how he settled the widow and the children during his lifetime clearly shows what his intention was.

22. That, the issues like the one before this court were dealt with in Nyeri High Court Succession 570 of 2011 the Estate of the late Kanyari Njari , the issue in the above case mentioned a stepson Samuel Njari Kanyari and his stepmother Beatrice Njoki Kanyari. The dispute was how a six-acre parcel of land Aguthi/Gaki/205 would be shared. The widow wanted the land divided equally according to the number of children of the deceased (She had 10) while Samuel Njari Kanyari and his brother who were the deceased's children from a first wife and who predeceased the husband who had passed on before the deceased Kanyari Njari were of the opinion that the Estate be divided in two equal shares of three acres per house as the deceased had settled the children and the wife on specific areas in such a way that each house had an equal portion of land.

23. That, Justice Ngaah Jairus at page 5 of the judgment thereof stated thus;

“in these circumstances it would, in my humble view, be unfair and inequitable if the court was to uproot any of the deceased's houses and their respective children from where they have settled since time immemorial and purport to shuffle them in the quest for equality (in the distribution of the deceased's estate)”.

The judge further noted that, the court had not been shown by Beatrice Njoki Kanyari the 2nd widow that equality rather than equity and fairness is the only scheme that is mete and just. The honourable judge stated the children of Beatrice Njoki Kanyari did not complain that they would be better off if they got additional shares from the portion occupied by the first house. The judge directed the land be distributed equally among the two houses among the 12 children; 2 from the first house and 10 from the 2nd house.

24. In Re Estate of the Late Siwanyang Ngilotochi (Deceased) [2021] eKLR_ justice J.M Bwonwong'a held at page 9 of the judgment thereof thus;

“The proposed mode of distribution of the petitioners respects the wishes of the deceased. I therefore approve it.

The proposed mode of distribution of the objector ignores the established wishes of the deceased, and I therefore do not approve it. Moreover, the objector is estopped from coming up with any mode of distribution; having been satisfied with the way the deceased had settled his three wives; since twenty years have lapsed following the death of the deceased. I therefore invoke the doctrine of estoppel to bar her from raising her claim.

The estate of the deceased will be distributed in accordance with the proposed mode of distribution of the petitioners”.

25. In Conclusion, the Respondent submit that, the intention of the deceased is paramount and this court is called upon to protect safeguard and actualize the same. He urges the court to be persuaded by the reasoning in the above decisions and further reiterate and submit that, the late Kaga Kimaru Gathua had settled the two families of the 1st wife who is deceased and the 2nd wife who is the administrator separately save for one property where he settled his two eldest sons from the two houses.

26. That the court ought to exercise restraint and not disrupt families that have already settled in specific parcels of land all in the name of equality and in the circumstances, the doctrine of equity should prevail over equality.



The Petitioners Case

27. By summons for confirmation dated 4th December 2018, the Applicant applied for Confirmation of grant. However, the Protestor did not execute the summons for confirmation. The matter was set down for confirmation, and the court directed service of summons for confirmation and hearing notice upon the beneficiaries who had not signed the consent. On 18th February 2019, the grant was confirmed and a certificate of confirmation was issued.
28. The Protestor did not cooperate in the execution of the said certificate of confirmation, and this state of affairs prompted the Applicant to file the summons for revocation dated 18th February 2021. The Protestor responded to the summons for revocation by filing a replying affidavit sworn on 12th January 2022.
29. On 24th March 2022, the parties consented to the setting aside of the certificate of confirmation, and the parties were given the liberty to file summons for confirmation. The Applicant fled the summons for confirmation dated 24th May 2022, and she made a proposal of equal distribution of all the assets to all the beneficiaries. The Protestor was not contended by the said proposed mode of distribution, and he filed the affidavit of protest, whereby he came up with his preferred mode of distribution. The matter was set down for hearing, and the parties herein testified and did not call any witness.
30. It is evident from the parties' preferred mode of distribution and their testimonies in Court, that they have totally different preferred mode of distribution of the estate. The parties did not have any issue on identity of the beneficiaries in circumstances, it is the Applicant's submissions that the issue for determination is the mode of the distribution of the estate.
31. The deceased did not leave a will and as such the current proceedings intestate proceedings. The deceased was in a polygamous union and was Survived by a spouse and children both from the 1st house and the 2nd house. The Applicant has listed the names of the beneficiaries in the affidavit in support of summons for confirmation, and as hereinbefore submitted, the identification of the beneficiaries is not in contest.
32. In her proposed mode of distribution, the Applicant is guided by the provisions of Section 40 of the [Law of Succession Act](#), which 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”.
33. It was the Applicant's evidence that she wanted all the beneficiaries to benefit equally from the estate. According to her, the properties should be shared out physically, and for sale of the assets that cannot be physically shared, and the proceeds be shared out equally among all the beneficiaries.
34. The estate was not subjected to valuation, and according to the parties, the value of the properties differs. In the circumstances, it would not be possible to achieve an equitable distribution unless all the properties of the estate are shared out equally among all the beneficiaries.
35. It is the Applicant's submissions that it would be fair and just for each beneficiary to benefit from all available assets. The Applicant stated that she should also be treated as one unit, and she does not want any preference over the children of the deceased.



36. It was the Applicant's evidence that she is ready and willing to cede any ground that she could be occupying for the sake of reorganization of the distribution to all the beneficiaries. It was her evidence that though she currently lives in Laikipia, she would want to have land in Nyandarua for safety reasons. She stated that at times Laikipia has security issues, and when such issues arise she would move to Nyandarua where safety is guaranteed.
37. In her evidence, the Applicant cited the case of 2 sons of the deceased who have occupied a parcel of land measuring 57 acres, and have denied 2 other sons to the deceased to use any portion on the land. It is such scenarios that the Applicant is trying to avoid by proposing that the beneficiaries should share the estate equally:
- a. L.R NYANDARUA/ MATINDIRI/130 measuring 24.5 hectares (60.5 acres)
 - b. L.R GITUAMBA/ MUHOTETU BLOCK 2/57 measuring 10.445 hectares (25.8 acres)
 - c. L.R GITUAMBA/MUHOTETU BLOCK 2/2008(MUHOTETU) measuring 23.85 hectares (58.9 acres).
 - d. L.R MUGUNDA RURII BLOCK 1/(MUTHANGIRA)/38 measuring 29 acres less 5 acres to be transferred to SAMUEL KAGITHI WAITHAKA
38. Florence Njoki Kaga urges the court to decree that the above properties be adopted by the court.
39. It is practically impossible to physically share out the following assets:
- i. TETU/KIHINGO/1/1 (5-00893) (L.R 1607-001 19)
 - ii. K.C.B SHARES
 - iii. MUHOTETU FARMERS COMPANY LTD SHARES
40. Florence Njoki Kaga urges the court to find that the only fair way to distribute the above assets is to order for them to be sold, and the proceeds be distributed equally among all the beneficiaries.
41. It is Florence Njoki Kaga submissions that the mode of distribution proposed by the Protestor goes against the provisions of section 40 of the *Law of Succession Act*. She urges the court to be guided by the decision in *In re Estate of Zablon Komingoi Mateget* [2018] eKLR, and decree for equal distribution of the estate to all the beneficiaries. In the matter it was held; -
- “In the absence of agreement between the parties on the mode of distribution of the estate, the law requires that the estate of the deceased, who was polygamous, be distributed in accordance with In view of the foregoing, we urge the court to dismiss the protest and adopt the Applicant's proposed mode of distribution. section 40 of the Succession Act”.
42. It is well settled that costs normally follow the event. It is evident from the court record that the Protestor has delayed the finalization of this matter, by failing to take up his role as an administrator to conclude the matter. In addition, the Protestor is currently delaying the matter by giving a proposal on mode of distribution that is contrary to section 40 of the *Law of Succession Act*.
43. The protest lacks merits and urge the court to award costs to the Applicant who came out boldly to state that she wants fairness in the distribution of the estate.



Analysis and Determination

44. Having considered the evidence on record for and against the confirmation and both the Applicant's and the Respondent's written submission I am persuaded that the Sole issue that presents itself for determination herein, is whether the Estate of the deceased should be shared equally amongst all beneficiaries or as per the settlement of the two respective houses and wishes of the deceased?
45. In other words, the Respondent is inviting this court to depart from the strict application of section 40 of the Law of succession Act and find that the Deceased had settled the two houses separately and that any attempt at equal distribution shall result in disruption of lives and relocation of families settled for decades.
46. Division of the intestate estate of a polygamist is provided for under section 40 of the Law of Succession Act. His personal and household effects and the residue of the net intestate estate should in the first place be divided among the houses according to the number of children in each house and the surviving spouse is added an additional unit in this instance the 1st housed shall comprise of six (6) units while the 2nd house shall comprise of ten (10) units.
47. The Division is based on the number of beneficiaries in the arrangement and each house gets units equal to their number. Distribution of the estate should thereafter follow the provisions under sections 35 to 38 of the Act.
48. The alleged discrepancy of value of land between Nyandarua/Matindiri/130 and Gituamba/Muhotetu Block 2/57 was intended to conflate issues and that the same is an afterthought two decades after the demise of the deceased and a longer period whereby the 1st and 2nd families remained separately settled
49. In re Late Morogo A Mugun (Deceased) [2019] eKLR and the case of Douglas Njuguna Muigai v John Bosco Maina Kariuki & Another the court noted the absurdity of a blind application of this provision of law and held that:
- “(17) it is therefore evident, that, although section 40 of the Law of Succession Act provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”
50. In Mary Rono vs. Jane Rono and another the deceased was survived by his two widows and their nine children. The first widow had three sons and two daughters while the other widow had four daughters. The first house sought to have the estate shared in accordance with customary law. This was rejected by the Court of Appeal.
- “Waki JA in the leading judgment, accepted the proposition that the Court had the discretion in ensuring a fair distribution of the deceased's estate but that, the discretion must be exercised judicially on sound legal and factual basis....It is therefore evident, that, although section 40 of the Law of Succession Act provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”



51. In this case however, there is evidence, both from the Respondent and the Applicant that the deceased did in fact settle his two houses separately save for his eldest son Peter from the 1st house and his son Charles from the 2nd house whom he settled in the 1990 on Gituamba/Muhotetu/Block 2/2008(Muhotetu)and they took possession of the same.
52. Apart from the Applicant who shares her willingness to relocate from Laikipia, Gituamba/Muhotetu Block 2/57 to Nyandarua, Nyandarua/Matindiri/130 for personal reasons none of the other nine (9) beneficiaries offered evidence that they too would be interested in getting a share in Nyandarua/Matindiri/130.
53. It is factually correct to note that the beneficiaries from the 1st house are soon to be senior citizens all of advanced ages between 64 and 49 years old, who are settled with their families and the Applicants proposal shall entail shuffling them around to share in all assets at the risk of relocation- which in the estimation of the court is more influenced on the number of beneficiaries from the 2nd house and alleged but unproven discrepancy in prices between properties where the two houses are currently located.
54. Succession is on behalf of the departed and should not in itself be drastic life-changing or disruptive on the living beneficiaries especially where the deceased left no will, the living should not be adversely affected by a probate and administration. The outcome of the probate must not achieve mathematical precision in equal distribution but rather equitable distribution.
55. No evidence has been offered or laid by the Applicant as to who Charles Wachira is? How he became a beneficiary? and if he is a purchaser from the deceased then no such evidence has been offered. If he is a purchaser from the 2nd Family after the demise of the deceased then the same shall constitute intermeddling subject to revocation however the 2nd house can accommodate him in their share away from this probate and administration.
56. This Court is persuaded there is a real danger of absurdity and shall depart from the strict application of section 40 of the *law of succession Act*, taking judicial notice of factual circumstances of may be relevant in ensuring equitable and fair distribution of the estate thus hereby issues the resultant orders;
57. This court remains alive to the judicious discretion expected where departure from Section 40 is allowed such as in this instance.
58. The Estate of the deceased shall be distributed in line with the separate settlement of the two houses by the deceased as follows below;



Property & Size	Parties to share the same equally
Nyandarua/Matindiri/130 - measuring 58 acres, Tetu/Kihingo/1/1(5-00893) (LR1607-00119) - measuring 0.125 acres and Gituamba/Muhotetu Block 2/2008 (Muhotetu) - measuring 26 acres, giving the 1 st house a total acreage of 84.125 acres	Peter Wang' Ondu Kaga, John Waigwa Kaga, Deborah Muthoni Kaga, Caroline Nyokabi Kaga, Christopher Wachira Kaga and Joshua Kariuki Kaga.
Gituamba/Muhotetu Block 2/2008 (Muhotetu) - measuring 31 acres, Mugunda/Rurii Block 1 (Muthangra/38) - measuring 29 acres, Gituamba/Muhotetu Block 2/57 - measuring 25 acres therefore the 2 nd house gets a total acreage of 85 acres	Florence Njoki Kaga Jane Nyokabi Kaga Peter Wang' Ondu Kaga Naomi Wanja Kaga Mercy Njeri Kaga Josphine Nyambura Kaga Naomi Wangari Kaga Monicah Wambui Kaga Zachary Mwangi Kaga
Kenya Commercial Bank-Shares Muhotetu Farmers Company-Shares	Florence Njoki Kaga Florence Njoki Kaga , Jane Nyokabi Kaga, Peter Wang' Ondu Kaga, Naomi Wanja Kaga, Mercy Njeri Kaga, Josphine Nyambura Kaga Naomi Wangari Kaga, Monicah Wambui Kaga, Zachary Mwangi Kaga and Peter Wang' Ondu Kaga, John Waigwa Kaga, Deborah Muthoni Kaga, Caroline Nyokabi Kaga, Christopher Wachira Kaga and Joshua Kariuki Kaga.

59. And the following Orders

- i. The Protestors Affidavit of Protest is found to be with merit and is accordingly allowed.
- ii. The Petitioner's Summons for confirmation of grant of letters *intestate* dated 24th May 2022 is found to be with merit and is partially allowed.
- iii. This being a family matter, parties shall bear their respective costs.

It is So Ordered.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 13TH DAY OF MARCH 2024.



S. MOHOCHI
JUDGE

