



REPUBLIC OF KENYA



**In re Estate of the Late Joseph Muhika Irungu (Deceased) (Succession Cause 441 of 2011) [2024] KEHC 2316 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2316 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 441 OF 2011  
HM NYAGA, J  
MARCH 1, 2024**

**IN THE MATTER OF THE ESTATE OF THE JOSEPH MUHIKA IRUNGU (DECEASED)**

**RULING**

1. The deceased herein died on 24<sup>th</sup> March 2011. By a Petition filed in court on 11<sup>th</sup> July, 2012, the Petitioner petitioned for Letters of Administration intestate. This was after a citation dated 14<sup>th</sup> September, was served.
2. The Petitioner listed the following beneficiaries;-
  - a. Hannah Wangari Muhika
  - b. Benson Muhika Irungu
  - c. Stanley Kinyanjui Muhika
  - d. Monicah Wairimu Muhika
  - e. Jane Mukuhi Muhika
3. The Petitioner listed one property as belonging to the deceased, namely Kiambogo/Miroreni Block 1/480.
4. Subsequently a Grant of Letters of Administration intestate was issued. By summons dated 9<sup>th</sup> February 2015. The Petitioner applied for confirmation of the said grant.
5. Upon filing the said Summons for Confirmation the protestors filed protest to the Confirmation of the Grant dated 20<sup>th</sup> April, 2017 and another dated 31<sup>st</sup> March 2021 with the other protestors.
6. In a nutshell the protestors state that the 1<sup>st</sup> Protestor and the deceased lived together as husband and wife on the parcel of land known as Itherero Farm Mbaruku until their separation in 1974 when she moved out of the matrimonial home but the parties never instituted divorce proceedings. That the deceased thereafter married the Petitioner and they went on to live in what used to be her matrimonial home until the deceased's demise.



7. The 1<sup>st</sup> protestor avers that the deceased and the Petitioner never had any children.
8. The 1<sup>st</sup> Petitioner further avers that the Petitioner fraudulently omitted her and her children in her Petition for Letters of Administration. That the Petitioner has without any right, proceeded to dispose of 10 acres from the 15 acres comprising the deceased's property.
9. While acknowledging that the deceased had two (2) wives the 1<sup>st</sup> Protestor proposed that the net estate of the deceased be shared between herself and her six (6) children and the Petitioner equally. She also urged the court to consider her matrimonial home where she lived before the Petitioner went into the land.
10. In response, the Petitioner swore a Replying Affidavit on 17<sup>th</sup> April, 2018.
11. The Petitioner avers that the parcel of land in question is the sole property which forms the net estate of the deceased. That upon her marriage to the deceased, he settled her and her children on the said land and therefore it became her matrimonial home.
12. The Petitioner further avers that the deceased had purchased another parcel of land known as Kiambogo/Miroreni Block 1/206 where he settled the protestor and her children. She annexed a copy of the title deed.
13. The Petitioner further states that the protestor and the deceased had a case, being High Court Civil Suit No. 250 of 1989 in which the court found that though the parcel of land was purchased by the deceased, the same was meant for the ownership and benefit of the protestor. She annexed a copy of the Judgment in the said suit.
14. The Petitioner thus avers that the matrimonial home of the protestor was on that parcel of land known as Kiambogo/Miroreni Block 1/206 and as such she has no right to inherit the matrimonial home where she had settled with the deceased.
15. The 1<sup>st</sup> protestor filed a Further Affidavit sworn on 31<sup>st</sup> March 2021. She averred that upon the death of the deceased, the parties went to the chief who proposed that Kiambogo/Miroreni Block 1/480 be shared equally amongst the 2 families but the Petitioner stormed out. She reiterated her position on how she wanted the estate shared.
16. Charles Mutonga Muhika also swore an Affidavit on 1<sup>st</sup> April, 2021. He basically reiterated what the 1<sup>st</sup> protestor stated. He added that during the burial of the deceased, they played an active role.
17. In her further Affidavit sworn on 3<sup>rd</sup> May 2021, the Petitioner stated the High Court in the said Civil Suit No. 250 of 1989 found that the Protestor and the deceased had divorced in 1975 and therefore the protestor is estopped from denying this fact. That being divorced, then Section 3(5) of the [Law of Succession Act](#) does not include the 1<sup>st</sup> Protestor.
18. The Petitioner further states that the chief's letter confirms that she and the deceased had children. That the property described by the protestor as Itherero Mbaruk's is unknown to her.
19. The Petitioner avers that the protestor is activated by sheer greed. That the land was acquired by the deceased in 1990, long after the protestor and the deceased had divorced. That from the judgment in the civil case, the court was clear that the protestor got her share of 15 acres before the death of the deceased which she has sold. That as the divorced wife the protestor has no locus standi to file the protest.



20. Although the Summons for Confirmation were filed way back in 2015, and the protest shortly thereafter, for one reason or another the protest was never heard until 2022, when the matter/protest came up for directions, the parties agreed to file Written Submissions which they did.
21. In their Submissions, the protestors submit that the deceased was survived by the two houses namely that of the 1<sup>st</sup> protestor and the Petitioner. The 1<sup>st</sup> house's six (6) children are listed. For the 2<sup>nd</sup> house, they submit that it is only the petitioner who is a beneficiary entitled to the estate.
22. The protestor's case is that although the Petitioner claims that the 1<sup>st</sup> protestor was divorced, she did not adduce any evidence to prove it. The protestors point out that in her evidence, the Petitioner was hard pressed to explain why her first born son and daughter were not named in accordance with Kikuyu customs. That the Petitioner confirmed that her children were born prior to 1978, the year that the protestor separated from the deceased.
23. The Protestors point out that the suit in question, namely HCCC No. 250 of 1989 in which the deceased sought to be declared the owner thereof, was dismissed.
24. The Protestors submit that Keziah was not divorced for the purposes of the Act and that the proceedings to purport as such before the chief were a nullity. She urged the court to find that she was a wife and ought to be considered under Section 40 of the Act.
25. For the Petitioner, it is submitted that the questions for the courts to answer are;-
 

Whether the protestor (Keziah) is entitled to a share of the net estate of the deceased, who are the beneficiaries and whether the protestor's house is entitled to a share of the only property that forms the net estate.
26. The Petitioner submits that the protestor and the deceased divorced in 1975 or thereabout and thereafter, the deceased remarried and was blessed with five (5) children.
27. It is submitted that having been divorced and a finding to that effect made by a court, the protestor cannot be allowed to approbate and reprobate, and attack a judgment that was delivered in her favour. Reference was made to *Republic vs Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Gateria* [2010] eKLR where the court set out the principles of approbation and reprobation. Also cited on this point was the English case of *Banque De Moscow vs Kindersley* 1950 2 All ER 549 and *Roya Ngao Holdings Ltd vs N. K. Brothers Ltd & Another* [2021] KEHC 275 KLR.
28. To fortify that a divorced wife is not a former wife and a dependant for purposes of the Act, the Petitioner cited the decision in *Re Estate of TKG (Deceased)* [2014] eKLR.
29. The Petitioner takes issue with the protestor's averment that her children are not beneficiaries of the estate. She avers that the protestor has conflated the fact of marriage and divorce with the fact of siring children. That whereas the former is a social circumstance the latter is a biological process. That the protestor, in her own Affidavit relied on a chief's letter that lists the Petitioner's children as persons who survived the deceased.
30. The Petitioner argues that had the protestor intended to challenge the paternity of her children she ought to have filed for a DNA testing. The Petitioner submits that she has fully countered these arguments by producing the birth certificates and identity cards of her children with the deceased.
31. It is the Petitioner's submission that the High Court having found that the protestor was bequeathed the land known as Kiambogo/Miroreni Block 1/206 she cannot now lay claim to Kiambogo/Miroreni Block 1/480 where the Petitioner was settled upon her marriage to the deceased.



32. The Petitioner finds inequitable for the protestor to address herself to the land the former was settled in and fail to address herself on the land she was herself settled in. She urges the court to find that the protestor is not entitled to any portion of Kiambogo/Miroreni Block 902.
33. Having considered the matter and the submissions filed, I find that the following are the issues for determination;-
- a. Whether the protestor is entitled to a share of the estate.
  - b. Who are the beneficiaries of the estate and
  - c. Whether the protestor's house is entitled to the only property that forms the net estate.
34. Before I delve into the determination, it is necessary to point out a few facts that are not in dispute. These are;
- i. The protestor was the 1<sup>st</sup> married wife married by the deceased.
  - ii. The deceased and the protestor were involved in HCCC No. 280 of 1989 over the property known as Kiambogo/Miroreni Block 1/206.
  - iii. The petitioner was the 2<sup>nd</sup> wife by the deceased.
  - iv. The only property that forms the net estate of the deceased is Kiambogo/Miroreni Block 1/480.
35. That said, I will now deal with the issues at hand.
36. The protestor's position is that although she separated from the deceased, they were never divorced and thus she is a wife for the purpose of the Act.
37. In HCCC No. 250 of 1989, the protestor, who was the 1<sup>st</sup> defendant, pleaded and testified that she got married to the deceased, who was the Plaintiff in 1963. That their union was dissolved in 1975. The protestor also pleaded and testified that the disagreement with the deceased in that suit arose when the two were divorced.
38. So here, the protestor claims that she was not divorced to the deceased, yet in the said case, she was categorical that the two had divorced. I agree with the Petitioner that the protestor cannot be allowed to approbate and reprobate that issue. She is estopped from denying a fact that she willingly pleaded in the said case.
39. I therefore find that the protestor was divorced from the deceased, as far back as 1975.
40. Having been divorced, is the protestor to be considered a surviving spouse? In the cited case of *Re Estate of TKG (deceased)* (supra) the court held that;-

“Am I to treat B N in equal measure? The material before me establishes that she divorced the deceased in court sometime in the 1990s. So as at the date of his death in 2002, she was not his wife and did not therefore survive him as a spouse. The definition of “wife”, “spouse” and “widow” is at Section 3 of the *Law of Succession Act*. It states as follows:-

“wife” includes a wife who is separated from her husband and the terms “husband” and “spouse,” widow” and “widower” shall have a corresponding meaning.”



This definition does not include a divorced wife. The effect is that a separated wife is a surviving spouse, but a divorced wife is not. B N, therefore, being a divorced wife, did not survive the deceased and she is therefore not one of the persons who are entitled to a share in the estate.”

41. In the Law of Succession by Justice William Musyoka at Page 100, it is stated that:

“For the purpose of the rules of intestacy, a divorced spouse has no rights to the intestate’s estate; a judicially separated spouse is, however, entitled. This applies to all legal marriages whether contracted under statute or customary law. Customary law marriages include the woman-to-woman marriage arrangements. Under Section 3(1) of the Law of Succession Act, a separated wife is considered a wife for succession purposes. The divorced spouse may make a claim under the family provisions in Section 26 of the Law of Succession Act for reasonable provision from the estate. The definition in Section 29 of a dependant for the purpose of Section 26 includes a former wife or former wives recognized as such and protected under Section 3(5) of the Law of Succession Act.”

42. Therefore, having been divorced from the deceased as far back as 1975, the protestor cannot now come to court and ask the court to consider her to be a spouse under the Act. The protestor cannot describe herself as divorced when it suited her then negate that averment when it now works against her.

43. I will now move to the 2<sup>nd</sup> issue.

44. It is not in dispute that the deceased had two (2) wives. The existence of the children of the 1<sup>st</sup> house is not disputed.

45. It is the protestor who disputes that the children of the 2<sup>nd</sup> house were the deceased’s. She had not given any sound reasons for that belief and those submissions can only be treated as unsubstantiated. The widow of the 2<sup>nd</sup> house had provided evidence, by way of birth certificates, to the effect that the deceased was the father of her children. Those documents have not been disputed and they are deemed to be proper.

46. In any case and in agreement with the petitioner siring of children as a biological function and if the protestor felt that the children did not belong to the deceased, she ought to have applied for the necessary orders.

47. It is thus my finding that the children of the 1<sup>st</sup> and 2<sup>nd</sup> house as listed are presumed to be the deceased’s.

48. I will now deal with the last issue. The protestor states that she and her children are entitled to the net estate of the deceased. This is denied by the Petitioner, who states that the protestor was given her own land and decided to sell it.

49. From a look at the documents herein, and the evidence adduced, it is apparent that the deceased had two wives at the same time at some point. I say so because, Benson Muhika Irungu, from the 2<sup>nd</sup> house, is said to have been born in 1971, while still married to the protestor. Stanley Kinyanjui was born in 1975, when the deceased divorced the protestor.

50. It is also apparent, and this is borne by the judgment in the High Court case, that the protestor settled on her land and the Petitioner was settled on the other land belonging to the deceased. Both were of the same size 2.4 hectares.



51. The High Court found a possibility that even though the deceased purchased the land the protestor claimed it was registered in her name and that the deceased left her to use the land to bring up her children.
52. The deceased, with the notion that he had settled the protestor on her land, moved to court when he learnt that the protestor was about to dispose of the land. This is clearly an indication that to his mind, the land was his, even if it was subsequently registered in the name of the protestor.
53. It is thus my finding that both houses were settled on their respective parcels of land, equal in size. It is thus a sign of avarice for the protestor to now stake a claim in the land where the deceased had settled the 2<sup>nd</sup> wife and her children. She already had her own land and if she chose to dispose of it, she cannot now move to demand a share of the land that the 2<sup>nd</sup> house was settled. These are occurrences that took place over forty (40) years ago and each house is deemed to have accepted their respective properties.
54. Thus, and in answer to the last question, I find that the 1<sup>st</sup> house is not entitled to any part of the net estate that the 2<sup>nd</sup> house settled on. That property is only available for the 2<sup>nd</sup> house.
55. Accordingly, I dismiss the protest with costs to the Petitioner.
56. The grant shall be confirmed as proposed by the petitioner.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 1<sup>ST</sup> DAY OF MARCH, 2024.**

**H. M. NYAGA,**

**JUDGE.**

\*In the presence of;

C/A Oleperon

Mr. Machoka for Githui for petitioner

Mr. Njoroge for protestors

