



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of John Chege Ngeru (Deceased) (Succession Cause
127 of 2015) [2023] KEHC 1040 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1040 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
SUCCESSION CAUSE 127 OF 2015
SM GITHINJI, J
FEBRUARY 8, 2023**

RULING

1. This matter relates to the estate of John Chege Henry Ngeru. A brief background into this matter is that the deceased was married to one Salome Wanjiku Chege under Kikuyu Customary Law in 1964 and together they had one child Priscilla Wanjiru Gichihi born in 1966. The deceased and Salome Wanjiku lived together as husband and wife until the year 1968 when she left her matrimonial home never to cohabit again and remained estranged up to the death of the deceased. After the deceased's separation from his first wife, he remarried Wairimu Chege in 1970 with whom they had 4 children. The deceased and his wife lived in Kiambu as husband and wife until the year 1978 when they moved as a family to Kilifi where they all lived until his demise on December 31, 2006. In 2009, Salome Wanjiku then moved to Mnarani where she was living in one of the rental rooms belonging to the deceased.
2. Upon the demise of John Chege Henry, Wairimu Chege successfully applied for letters of administration in her capacity as the widow of the deceased which grant was issued by the Senior Resident Magistrate's Court Kilifi on July 2, 2007 and confirmed on March 6, 2008. The grant was subsequently rectified by Wairimu Chege to include additional immovable properties of the estate and to include her step daughter Priscillah Wanjiru Chege aka Priscillah Wanjiru Gichihi as a dependant. On 27/8/2009, Salome Wanjiku Chege and Priscillah Wanjiru Chege aka Priscillah Wanjiru Gichihi filed an application for revocation of the grant on grounds that Wairimu Chege had concealed material information from the court including; failure to disclose that the objectors are beneficiaries of the estate of the deceased, failure to include the objectors in the list of beneficiaries and that the estate of the deceased was at a risk of wastage. The application was determined vide the ruling dated May 15, 2015 and delivered on July 9, 2015 directing that parties file a fresh petition in accordance with the law so that the interests of all the beneficiaries can be considered and determined.
3. In compliance with the ruling, Hon. Justice J. Chitembwe on February 23, 2017 issued the following orders inter alia;
 - i. That Priscilla Wanjiru Gichihi and Priscilla Wanjiru Chege be appointed as co administrators of the estate of the deceased, and John Chege Henry Ngeru in place of Salome Wanjiku Chege. A grant be issued accordingly.



- ii. That Wairimu Chege to file audited accounts for the period she administered the estate that is from her first appointment until 23rd February 2017. The audited account to be filed within sixty days thereof.
 - iii. That Salome Wanjiku Chege (aka Salome Wanjiku Kagichu) and Wairimu Chege to be paid a sum of Kshs. 15,000 per month from the rental income accruing to the free assets of the estate for their maintenance, effective from February 23, 2017 until the determination of the intended appeal or until further orders of the court.
 - iv. That the intended appeal be prosecuted within six months from the date thereof.
 - v. That the newly appointed administrators obtain a grant immediately to prevent waste of the estate and grant to be served upon all rent collecting agents and property managers of the estate's free assets.
 - vi. That the costs of the proceedings be borne from the estate's free assets.
 - vii. The grant issued on May 24, 2016 and rectified on September 29, 2016 be revoked.
4. In light of the above orders, Priscilla Wanjiru Gichihi and Priscilla Wanjiru Chege, the daughters of the deceased were appointed as co administrators of the estate of John Chege Henry Ngeru (deceased).
5. Vide the application dated November 13, 2019, Priscilla Wanjiru Gichihi one of the administrators moved the court for orders that the grant be revoked and the Public trustee be appointed to complete the administration of the estate of the deceased. Her application was based on the grounds that Wairimu Chege, the former administrator of the estate had refused to release some title deeds thus frustrating the administrators' efforts to identify, trace and collect the assets of the deceased. The court vide a ruling issued delivered on May 11, 2022 directed as follows;
- i. Wairimu Chege do avail copies of titles in her possession to the advocate of the applicant within 14 days. Upon being availed, each house to make a list of what constitutes the estate and its liabilities.
 - ii. Each house to then make a proposal on distribution of the estate, serve and file.
 - iii. The administrators to tender each an account of the estate so far in relation to the income obtained therefrom. The balance in Equity account should be as well disclosed.
6. Counsel for Priscilla Wanjiru Gichihi a co administrator filed a proposed distribution of assets and liabilities dated September 26, 2022 which proposes that the estate be distributed as follows; Mnarani corner house (27 rooms- house without land on plot No. 7 Mnarani) be granted to Wairimu Chege in whole. Mnarani near school (11 rooms- house without land on plot No. 7 Mnarani) be granted to Salome Wanjiku in whole. Mnarani abutting main highway (6 shops- house without land) be granted to Salome Wanjiku in whole. Kilifi/Vipingo/9 approx. 2.1 ha be owned in equal share between Salome Wanjiku and Wairimu Chege. Kaloleni/Chalani/479 approx. 3.6 Ha be owned in equal share between Salome Wanjiku and Wairimu Chege. Githunguri/Ikinu/1540 approx. 0.4 Ha be owned in equal share between Salome Wanjiku and Wairimu Chege. 26 shares in Gatatha farm of Kshs. 45 each be owned in equal shares of 13 each by Salome Wanjiku and Wairimu Chege. Dividends accrued from 2018 of Kshs. 4,816 be shared equally between Salome Wanjiku and Wairimu Chege. Equity Bank A/C no. Kilifi Branch amount be shared equally between Salome Wanjiku and Wairimu Chege. ABSA/ formerly Barclays Bank Kenya, Kilifi Branch amount be shared equally between Salome Wanjiku and Wairimu Chege. ABSA/ formerly Barclays Bank Kenya, Kiambu Branch amount be shared equally between Salome Wanjiku and Wairimu Chege.



7. On her part, Priscilla Wanjiru Chege through her advocate filed a proposed mode of distribution of the assets as follows; Salome Wanjiku Chege and Priscilla Wanjiru Gichihi to acquire plot at Mnarani comprising of 6 rooms commonly referred to as the Barabarani plot. Priscilla Wanjiru Chege, Emily Njeri, Rosemary Chege shall acquire plot no. 7 at Mnarani comprising 27 rooms commonly referred to as Corner plot; Wairimu Chege and Leah Njoki shall acquire Plot at Mnarani comprising 11 rooms commonly referred to as shule. Githunguri/Ikinu/ 1540 measuring approximately 0.4 ha shall be acquired by Wairimu Chege. Kilifi/Vipingo/9 measuring approx. 2.1 ha be subdivided among all beneficiaries. Kaloleni/Chalani/479 measuring approx. 3.6 ha, half an acre be given to the caretaker and the remainder be subdivided equally amongst all beneficiaries. Proceeds from the shares held by the deceased at Gatatha farm be distributed equally amongst all 7 beneficiaries. Money held in equity bank account Kilifi Branch to cater for the cost of the distribution and the remaining amount equally distributed amongst each beneficiary.
8. To bring this matter to an end, I make the following disposition. In a case of this nature where the deceased died intestate and was a polygamous man survived by two widows and children the anchor on distribution of his estate is section 40 of the Law of Succession Act which primarily provides as follows; “(1) 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 interest within each house shall then be in accordance with the rules set out in sections 35 to 38”
- “The mode of distribution is in line with the principles laid down in the following cases *Rono v Rono* Civil Appeal No 66 of 2002, where Waki J.A stated *inter alia* that; - “More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.” A “house” in a polygamous setting is defined in section 3 of the Act as a “family unit comprising a wife and children of that wife.”
9. In addition, *in the Matter of Re Estate of Benson Ndirangu Mathenge (deceased)* Nakuru HCSC No 231 of 1998 (Ondeyo J), the deceased was survived by his two widows and their children. The first widow had four children, while the second widow had six children. The court stated that the first house was comprised of five units while second had seven units. The two houses of the deceased combined and looked at in terms of units made up twelve units. The court distributed the estate to the children and the widows treating each as a unit. The land available for distribution was forty acres, which was divided by the court into twelve units. Out of the twelve units, five were given to the first widow and her four children, while the remaining seven units went to the second widow and her six children.
10. Guided by the above position, I have no reason to depart from the principles as anticipated by section 40 of the LSA and thus make a finding that the deceased was indeed survived by two widows. There is no contest that the first widow Salome Wanjiku Chege had one child while the second widow Wairimu Chege had four children. Flowing from logic and for purposes of this succession, the first



house therefore comprises of two units while the second house consists of five units making a total of 7 units who are entitled to the estate of the deceased in equal share.

11. The court *In Re Estate of John Musambayi Katumanga – Deceased* [2014] eKLR held as follows:

“The spirit of Part V, especially sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in sections 35(5) and 38 is ‘equally’ as opposed to ‘equitably’. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”

12. I have taken note of the two proposals made by each house. In my view, the proposal by the first house only factors for the widows and not express to the entitlement of the children who are also beneficiaries with equal shares. On the other hand, the second house has given a fair proposal which is expressly considerate of all the beneficiaries. It is trite that the court has the discretion to interfere with the mandatory provisions of section 40 of the *Law of Succession Act* which position was well settled in the case of *Re Estate of John Musambayi Katumanga – Deceased* [2014] eKLR (Supra).

13. I have considered the duration to which the 1st wife was married and lived with the deceased. They were married for a period of four years and had one child and remained estranged up to the time of death of the deceased. She only moved to one of the deceased’s properties in the year 2009 about three years after his death. On the other hand, the 2nd wife was married to the deceased from the year 1970 and lived with him as husband and wife up to the time of his death. Together, they had five children with four surviving. It is on this account that I find that the 1st wife’s contribution was for a short span unlike the 2nd wife’s contribution thus not merited for equal distribution. In the circumstances, I am inclined to depart from the provisions of section 40.

14. That said, I shall proceed and distribute the estate in the following terms;

- a) Mnarani Corner house (house without land) comprising 27 rooms – be and is hereby distributed to the 2nd house in whole and in equal shares.
- b) Mnarani near school (house without land) comprising 11 rooms – be and is hereby distributed to the 1st house in whole and equal share.
- c) Mnarani Abutting main highway 6 shops (house without land) – be and is hereby distributed to the 2nd house in whole and equal share.
- d) Kilifi/Vipingo approximately 2.1 ha the house shall be acquired by Salome Wanjiku on a portion on which the house stands. The remainder of the land to be distributed equally among all the other beneficiaries.
- e) Kaloleni/Chalani/479 approximately 2.6 Ha to be distributed equally among all units. This shall be after half an acre has been hived out to compensate the caretaker as all the other beneficiaries are in agreement on this.
- f) Githunguri/Ikinu/1540 approximately 0.4 Ha shall be acquired by Wairimu Chege.
- g) The 26 shares in Gatatha Farm of Kshs. 45 each shall be shared equally between Salome Wanjiku and Wairimu Chege.



h) Cash held at Equity Bank account number 1060173076988, Kilifi Branch shall be withdrawn and cater for the costs of distribution of the estate. The remainder shall be shared equally among the seven beneficiaries.

15. Lastly, Counsel for Priscillah Wanjiru Gichihhi the co-administrator alluded to the allegation that the 2nd wife Wairimu Chege had not made a full disclosure to all the deceased's bank accounts. It is alleged that the deceased had Absa Bank Accounts in both Kilifi and Kiambu branches. There was no credible evidence to support the same. For that reason, I am unable to make a determination on the said accounts for want of credible evidence.
16. Each party shall bear their own costs noting that the claim herein is a succession matter involving members of one family.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 8TH DAY OF FEBRUARY, 2023.

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S.M. GITHINJI

JUDGE

In the presence of; -

- 1. Mr Muliro for the Administrator, Priscilla Wairimu Chege**
- 2. Ms Kimani holding brief for Mr Kimani for the Petitioner**

