



REPUBLIC OF KENYA



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**In re estate of Njuguna Njunge (Deceased) (Succession Cause 371 of 1998)
[2024] KEHC 14106 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
SUCCESSION CAUSE 371 OF 1998
AC MRIMA, J
NOVEMBER 13, 2024**

BETWEEN

VERONICA WAIRUMU NJUGE 1ST PETITIONER

NJUGE NJUGUNA 2ND PETITIONER

AND

MILKA WANJIRU NJENGA 1ST PROTESTOR

JHN NJUGUNA NJENGA 2ND PROTESTOR

JUDGMENT

Introduction:

1. This judgment addresses the manner in which an estate of a deceased devolves in a polygamous set-up. The deceased herein, Njuguna Njunge, was married to two wives. The first wife is the 1st Petitioner who is also the Applicant in respect to the Summons for Confirmation of Grant dated 28th February 2023, the subject of this judgment. She formed the first house. The second wife is the 1st Objector who found the second house. The two wives were blessed with 11 and 10 children respectively.
2. Whereas there largely was consensus that the estate properties be equally shared between the two houses, there was divergence on the identifiable assets forming the estate of the deceased, hence, the dispute.
3. The matter was, therefore, heard by way oral evidence where the two wives testified as well as John Muiru Njenga, the 2nd Objector herein, who was also one of the children of the deceased from the second house thereby resulting to the instant judgment.



The Summons for Confirmation:

6. The Summons for Confirmation of Grant (hereinafter referred to as 'the Summons') sought the following orders: -
 1. That the grant of letters of administration intestate made to the said Veronica Wairimu Njunge and Njunge Njuguna Njenga in this matter on 30/09/1998 be confirmed.
 2. That the cost of this Application be in the cause.
3. In support of the Summons, the Applicant swore an affidavit where she indicated that the deceased was survived by 17 dependants namely, Veronica Njunge (widow), Njunge Njenga, Sammy Gikonyo Njenga, Margaret Wairimu Njenga, Samuel Njoroge Njenga, Naomi Wamuhu Njenga, Anna Wanjiku Njenga, Milka Wanjiru Njenga, Njunge Njenga, Peter Kithome Njenga, Margaret Wairimu Njenga, Kinyanjui Njenga, John Muiru Njenga, Rahab Nigoo Njenga, Damaris Wanjiku Njenga, Simon Miringu Njenga and Maria Wanjiru.
4. The Applicant proposed the following mode of distribution in the Affidavit and Further Affidavit deposed to on 11th May 2023 and 5th July 2023 respectively: -
 - a. To Veronicah Wairimu Njenga on behalf of herself and in trust for her children:
 - i. Plot No. 54 in Kiptoi Settlement Scheme – 4 acres
 - ii. Plot No. 24 in Kiptoi Settlement Scheme - 1 acre
 - iii. Part of L. R No. 6614/14 (Not in deceased's name)– 4½ acres
 - iv. Commercial Plot No. 5 in Kachibora – 2/3 share
 - v. Meru Farm – Trans-Nzoia/ Kimila/271 – 1.368 Ha.
 - vi. Part of Plot No. 549 Kikopey Gilgil - 2 ½ acres
 - vii. Land in Rumuruti – 1 acre
 - b. Milka Wanjiru Njenga on behalf of herself and in trust of her children:
 - i. Plot No. 85 Kiptoi Settlement Scheme – 10 acres
 - ii. Plot No. 24 Kiptoi Settlement Scheme – 1 acre
 - iii. Part of plot no 549 Kikopey – Gilgil - 2 ½ acres
 - iv. Land in Rumuruti – 1 acre
 - v. Commercial plot in No. 5 Kachibora – 1/3 share.
5. In the Further Affidavit, the 1st Petitioner deposed that she was the Allottee of Plot No. 13 in Kiptoi Settlement Scheme which got registered in her name on 1st March 1989 and as such the property does not form part of the estate. She deposed further that the deceased had bought 1½ acres in Meru Farm which had not title deed at that time and as per their sharing arrangement between the two houses, the Meru farm was part of her share and the title was registered in the name of her son.
6. It was her further case that on account of a debt of Kshs. 200,000/- owed to the SFT over Plot No. 85 measuring 10 acres which is occupied by the Objector, the 1st Petitioner and the 1st Objector [being the



- widows of the deceased] agreed that each house to sell its one-acre share in Plot No. 24 - Kiptoi to be able to settle the dues. They, however, sold different plots and settled the dues.
7. The 1st Petitioner also stated that the deceased had three plots in Tuwani Farm measuring about 0.0175 hectares which had no title documents. That, her son, Sammy Gikonyo, successfully pursued the documentation and the widows eventually took a plot each and gave the said Sammy Gikonyo the third plot for the effort and assistance extended to the family in the matter.
 8. The 1st Petitioner deposed further that when the title for Plot No. 54 in Kiptoi scheme was ready, one acre thereof was issued to Samuel Njenga [the 1st Objector's son] and the other one-acre title to herself. As regards the commercial plot in Kachibora, it was her deposition that the widows agreed to give one of the shops to Damaris Wanjiku Njenga. She also deposed that the widows jointly sold Motor vehicle No. KTT 114 Toyota Hilux Pick-up and shared the proceeds.
 9. Annexed to the Summons was a consent on the mode of distribution duly executed by Njunge Njenga, Sammy Gikonyo, Margaret Wairimu Njenga, Samuel Njoroge Njenga, Naomi Wamuhu Njenga and Anna Wanjiku Njenga.
 10. In her oral evidence, the 1st Petitioner admitted that the 1st Objector was her co-wife. It was her case that she had 11 children and lived well with her co-wife before the death of the deceased. According to the 1st Petitioner, issues in their home began when the deceased died. It was the 2nd Objector who began by intruding into and cultivated her two-acre portion of the 4-acre piece of land in Plot No. 54 Kapkoi which the deceased used to cultivate.
 11. According to the 1st Petitioner, the widows agreed to equally share the estate with each having 14.5 acres of land in total. She was, however, not agreeable that all parcels be equally divided because each house had settled on different parcels and the arrangement would cause disharmony.
 12. On cross-examination by the 1st Objector, it was her case that the 1st Objector and herself lived separately and that the 1st Objector had even admitted that she had no share in Plot No. 13 Kapkoi.
 13. When the 2nd Objector cross-examined her, she maintained that the 2nd Objector invaded her land when she was admitted in hospital.
 14. In further support of the case, the Petitioners filed written submissions dated 6th February 2024 in expounding the foregoing.
 15. In objecting to the Summons, Milka Wanjiru, [hereinafter referred to as 'the 1stObjector'], filed an Affidavit in Protest deposed to on 10th May 2023. It was her case that she was the wife of the deceased. She averred that the deceased had two wives and that the first house belonged to the 1st Petitioner who was blessed with 11 children and her house, being the second one, with 10 children.
 16. On the properties left behind by the deceased, the 1st Objector deposed that the deceased left behind motor vehicles, but they were nowhere to be seen. She blamed the 1st Petitioner for the loss. She, however, admitted that she did not know the vehicles registration numbers. She also stated that some of the properties including Plot No. 7 Lokitang Centre, Plot No. 5023 Rumuruti (measuring 2 acres) and a Plot in Subukia (measuring 2 acres) which were indicated by the 1st Petitioner in the proposed mode of distribution were not known to the second house.
 17. The 1st Objector blamed the Applicant for selling some of the deceased's parcels of land to third parties including Plot No. 549 Kikopey Gilgil, Plot No. 29 Meru Farm Kitale [measuring 2 acres] and Plot No. 6614/14 Kachibora measuring 4.5 acres.



18. She also averred that one of the 1st Petitioner's son, Sammy Gikonyo, had intermeddled with the property of the deceased by subdividing, effecting transfer and registering 4 acres out of the Plot No. 54 Kiptoi settlement scheme in the name of Sammy Gikonyo Njenga before confirmation of the grant.
19. The 1st Objector urged the Court to distribute the deceased's properties in equal shares. To that end, she annexed a consent letter duly signed by the beneficiaries from the second house being; Milka Wanjiru, Njunge Njenga, Peter Kithome, Margaret Wairimu Njenga, Kinyanjui Njenga, John Njuguna, Rahab Wanjiku Njenga, Damaris Wanjiku Njenga, Simon Njoroge Njenga and Maria Wanjiru Njenga.
20. In her oral evidence, the 1st Objector reiterated that she was 71 years old and was the deceased's second wife with 12 children having been married in the year 1973. She blamed the 1st Objector for being uncooperative in the running of the affairs of the estate including the distribution. She clarified in cross-examination that she had lived on Plot No. 85 Kiptoi measuring 10 acres for a period of 34 years; that was since the deceased died. She also affirmed that the deceased had Plot No. 54 measuring 4 acres which he used to cultivate, but the 1st Petitioner took it up for purposes of cultivation after the death of the deceased.
21. The 1st Objector further stated that the 1st Petitioner and herself had an acre each in the 2-acre Plot No. 24 (Tongwa Farm). She confirmed that the 1st Petitioner lived on the parcel of land known as Trans-Nzoia Farm measuring 4.5 acres since the demise of the deceased.
22. The 1st Objector further stated that Plot No. Trans-Nzoia/ Kimila/271 was occupied by one Njunge Njenga, the 1st Petitioner's son, and that the 5-acre Gilgil Kikopey farm was equally shared between the two houses.
23. The 1st Objector then proposed the 2-acre land in Rumuruti be equally shared. She claimed a total of 14½ acres of land out of the estate as a fair apportionment to the second house.
24. The 1st Objector conceded that the Plot in Tuwai Farm had three sub-plots out of which each of the houses took one plot each and the third plot was given to one of the 1st Petitioner's son for his effort in consolidating the estate. She also conceded that she agreed with the Petitioner to sell the pick-up vehicle and shared the proceeds. She further admitted that the deceased had only one plots in Meru Farm, but denied any knowledge of the alleged Plot No. 4487 and the land in Mutukario/Gwaramo.
25. In the end, the 1st Objector contended that she was owed Kshs. 8,000/= which was derived from the shares in Kitale Tyres since the 1st Petitioner sold the shares but did not share the proceeds as expected.
26. John Muiru Njenga, testified in support of the 1st Objector's case. He was one of the sons of the deceased and the 1st Objector. He proposed that all the estate of the deceased be distributed equally between the two houses.
27. He averred that the deceased had 4 parcels of land at Kapkoi Settlement scheme being Plot No. 54 [which was 4 acres], Plot No. 24 [which is 2 acres], Plot No.5 [which is 10 acres] and Plot No. 13 [which is 10 acres] as well as land in Kachibora measuring 4½ acres and a plot measuring 50 x 100 at the trading centre. He also stated that there was a plot at Kitale Line Moja, a parcel of land at Kimilia in Kitale measuring 3.4 acres and Plot No. 29, being 2-acres, in Meru farm.
28. It was his further evidence that the deceased had 2 acres and a Plot measuring 50 x 100 at Lokichar in Lodwar, land in Gilgil measuring 5 acres, land in Rumuruti measuring 2 acres, 2 acres in Subukia, 4 acres in Mutukario/Gwaramo and three plots in Tiwani Kitale each measuring 50 x 100. He further stated that the deceased left behind two Toyota lorries, 1 Bedford lorry and a pick-up as well as shares in KGGCU and Kitale Tyres.



29. The 2nd Objector then urged this Court to distribute the foregoing properties equally into two so that each house gets equal shares.
30. In cross-examination, he stated that he did not have any document to confirm that the deceased owned Plot No. 13 Kiptoi. He also conceded that there was an allotment letter in favour of the 1st Petitioner in respect of Plot No. 13 Kiptoi whose title deed was issued on 2nd August 1984. He also admitted that he had not confirmed that the Plot at Mutukario/Gwaramo was owned by the deceased. Similarly, he admitted that he had no evidence that the Plot in Subukia and the one in Lokichar were the deceased's.

Analysis:

31. Having comprehensively captured the pleadings, responses, the evidence and rival arguments and the submissions, the main issue that arise for determination is the identification of the deceased's net intestate estate and how it ought to devolve.
32. As stated above, there is no dispute on the polygamous nature of the deceased in this matter. There were two houses; that of the 1st Petitioner with 11 children and that of the 1st Objector with 10 children. There is also no doubt that there was meeting of minds to the extent that the parties wished to have the net intestate estate be equally shared between the two houses.
33. Generally, in instances where a deceased died intestate and was polygamous, the operative law for distribution of the estate is Section 40 of the *Law of Succession Act* which 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.
34. Section 3 of the Succession Act defines a 'House' in a polygamous setting as 'family unit comprising a wife and children of that wife'.
35. Speaking to Section 40 of the *Law of Succession Act*, this Court in Kitale High Court Succession Cause No. 35 of 2017 In Re Estate of Muiruri Kamau Gichuri (Deceased) [2023] KEHC 21422 (KLR) (31 July 2023) (Judgment) had the following to say: -
126. this Court, therefore, further finds and hold that Section 40 of the Succession Act should apply on a case-by-case basis and subject to considerations including whether the members of the family acted within Articles 53 and 57 of *the Constitution*, whether there are members of the family who are still minors, previous provisions by the deceased among other considerations....
36. In this case, there was no evidence as to the beneficiaries having acted outside the confines of Articles 53 and 57 of *the Constitution*, whether there were members of the deceased's family who were still minors and whether there were any previous provisions by the deceased to any of the beneficiaries. As such, this Court will proceed to settle the net estate and apportion it to the two houses. In doing so, this Court remains alive to the fact that the two houses are separately settled and have all along carried their affairs as such. In such a case, there ought to be very minimum interferences, if any.
37. Whereas there was largely no dispute as to the properties owned by the deceased and forming the estate thereof, there was contestation on Plot No. 13 Kiptoi Settlement Scheme which is registered in the



name of the 1st Petitioner. Further, the 2nd Objector contended that several other properties in various parts of the country belonged to the deceased.

38. Whether a property forms part of the estate of the deceased is an issue of fact. As such, it must be proved within the confines of Sections 107, 108 and 109 of the *Evidence Act*, Cap. 80 of the Laws of Kenya. These provisions state as follows: -
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
39. The above was the reigning onus on the shoulders of the Objectors to prove that the various properties which they alleged belonged to the deceased were truly so owned by the deceased.
40. On Plot No. 13 Kiptoi Settlement Scheme, the evidence on record is that the property was allotted to the 1st Petitioner by the then Commissioner of Lands on 18th December 1978. The deceased herein died on 7th June 1989, that is 11 years later. There was no evidence that the deceased ever contested the allocation of the property in any manner whatsoever. Likewise, there are no proceedings challenging the 1st Petitioner's ownership on this property. As such, the contention that Plot No. 13 Kiptoi Settlement Scheme is part of the estate herein fails and is hereby dismissed.
41. The 2nd Objector went into a spree of allegations that several properties were allegedly owned by the deceased in several parts of the country. However, the 2nd Objector failed to prove any such averments. Such allegations are also dismissed.
42. Having dealt with the foregoing objections, suffice to find that the net estate of the deceased comprised of the following properties: -
- i. Plot No. 54 Kiptoi Settlement Scheme – 4 acres
 - ii. Plot No. 24 in Kiptoi Settlement Scheme – 2 acres
 - iii. Trans-Nzoia/Kimila/271 – 1½ acres.
 - iv. Plot No. 549 Kikopey Gilgil – 5 acres.
 - v. Land in Rumuruti – 2 acres
 - vi. Commercial Plot No. 5 in Kachibora Centre
 - vii. Plot No. 85 in Kiptoi Settlement Scheme – 10 acres
43. With the above being the entire estate, the Objectors posited that they wanted to get 14.5 acres of the land in total as the share which ought to devolve to the second house. Given the total acreage of the deceased's land, [being 24.5 acres], then if the estate is to equally devolve into the two houses, it would not be possible that the second house gets 14.5 acres of land in total. However, the 1st House generously



conceded to the demand by the 2nd House and offered that the following properties devolve to the 2nd House: -

Plot No. 85 in Kiptoi Settlement Scheme – 10 acres

Part of Plot No. 24 in Kiptoi Settlement Scheme – 1 acre

Part of Plot No. 549 Kikopey Gilgil - 2 ½ acres.

Part of land in Rumuruti – 1 acre

Total acreage.....14½ Acres

44. Further to the 14.5 acres of land demanded by the 2nd House, the 1st House offered one-third share of the commercial Plot No. 5 in Kachibora Centre. The above concession by the 1st House, hence, settles this matter. Whereas the 2nd House shall get more than their desired allocation of the estate, the 1st House shall contend with the remainder.
45. With the foregoing, this Court wishes to sincerely thank the members of the 1st House for making it possible that this matter is resolved without acrimony in the family. Their concession should go a long way in fostering cordial relations within the deceased's family.
46. Having so found and held, this matter ought, therefore, to come to the end.

Disposition:

47. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
48. In the end, the following final orders do hereby issue: -
 - a. The estate shall devolve as follows: -

To the 1st House:
Plot No. 54 Kiptoi Settlement Scheme – 4 acres
Part of Plot No. 24 Kiptoi Settlement Scheme – 1 acre
Trans-Nzoia/Kimila/271 – 1½ acres.**
Part of Plot No. 549 Kikopey Gilgil – 2½ acres.
Part of the land in Rumuruti – 1 acre
Two-thirds share of the Commercial Plot No. 5 in Kachibora Centre.

To the 2nd House:
Plot No. 85 in Kiptoi Settlement Scheme – 10 acres.
Part of Plot No. 24 in Kiptoi Settlement Scheme – 1 acre.
Part of Plot No. 549 Kikopey Gilgil - 2 ½ acres.
Part of land in Rumuruti – 1 acre
One-third share of the Commercial Plot No. 5 in Kachibora Centre.
 - b. The respective houses shall agree on further distribution of their respective properties, if need be, and in the event of failure to so agree, they shall be at liberty to apply.
 - c. In the meantime, the properties vested in the two houses shall be held by the widows in trust of themselves and their respective children. For clarity, Veronica Wairimu Njuge shall hold the properties in trust of the 1st House whereas Milka Wanjiru Njenga shall hold the properties in trust of the 2nd House.
 - d. Being a family matter, each party to bear its own costs.



Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 13TH DAY OF NOVEMBER, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Kiarie, Learned Counsel for the Petitioners.

Milka Wanjiru Njenga, the 1st Objector in person.

John Njuguna Njenga, the 2nd Objector in person.

Chemosop/Duke – Court Assistants.

