



REPUBLIC OF KENYA



**In re Estate of Late Josephat Irungu Kanyi alias Josephat Kanyi (Deceased) (Succession Cause 25 of 2014) [2024] KEHC 15397 (KLR) (3 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15397 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
SUCCESSION CAUSE 25 OF 2014  
RM MWONGO, J  
DECEMBER 3, 2024**

**IN THE MATTER OF THE ESTATE OF LATE JOSPHAT  
IRUNGU KANYI ALIAS JOSEPHAT KANYI .....(DECEASED)**

**BETWEEN**

**MARGARET WAMBUI IRUNGU ..... PETITIONER**

**AND**

**ANNROSE WANJIRA IRUNGU ..... PROTESTOR**

**RULING**

1. By a Chamber Summons dated 13<sup>th</sup> July, 2021 the protestor seeks the following orders:
  1. There be a stay of execution of Judgment issued by this Honourable Court on 19<sup>th</sup> October, 2019.
  2. The cost of this application be provided for.
2. The application is based on the grounds on the face of the application and the supporting affidavit of Annrose Wanjira Irungu in which she makes the following major averments:
  1. That I am the biological daughter of the deceased [who was husband of the deceased protestor Agnes Wanjiru Kanyi].
  2. That the judgment in this case was delivered on 18<sup>th</sup> October, 2019.
  3. That the case was wrongly filed under succession as the widow of the deceased, Agnes Wanjiru Kanyi (my biological mother) who had jointly bought the suit property while the deceased was still alive.
  4. That my parents jointly bought the suit property but, as the head of the house my father was registered as the owner.



5. That my father died on 16<sup>th</sup> July, 2012 so the provisions of *Land Registration Act* which was enacted into law on 2<sup>nd</sup> May, 2012 is applicable.
6. That the law-*Land Registration Act* 2012-clearly provides that the suit property is not subject to succession but devolves to the surviving widow.
7. That the above law which was later copied into the Matrimonial Properties Act clearly provides that the deceased was a joint tenant with my late father since they jointly acquired the suit property.
8. That my nieces amongst other defendants who were being supported by the late couple have been left with no means of survival and hence the urgency of this case.

### **Petitioner's Reply**

3. There is no replying affidavit by the Petitioner on record.
4. The parties filed written submissions as directed.

### **Protestor's Submissions**

5. The protestor's submissions were made under two prongs as follows:  
The applicable law governing the estate of the deceased
6. The deceased died on 13<sup>th</sup> July, 2012 so the provisions of the *Land Registration Act* which became law on 2<sup>nd</sup> May, 2012 are the ones applicable. That Act provides at Section 93 that:  
  
"Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses and all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the *Matrimonial Property Act*."
7. Under the Matrimonial Properties Act, Section 14(a) provides:  
Where matrimonial property is acquired during marriage-
  - a. In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse."
8. The late couple had celebrated a Christian monogamous marriage on 13<sup>th</sup> December, 1975 and jointly as a couple had acquired the suit properties. The suit properties were acquired before the petitioner got into the marriage, if she ever got in the marriage at all. In fact, after her getting into this union nothing else was acquired and if it was indeed acquired it is not listed in the estate of the deceased herein.

### **How should the suit property be distributed?**

9. The protestor submits that the suit property should form part of the estate of the deceased protestor since the deceased died in July, 2012. His death was followed by the wives on 22<sup>nd</sup> September, 2021.
10. From the foregoing, it's clear that the suit property forms part of the deceased protestor's matrimonial property and should be dealt with as such. Since the patriarch died before the deceased protestor whilst the law on Land Registration had been repealed, then it follows that the suit property should form part of her estate and not the estate of the late husband.



## Petitioner's Submissions

The petitioner's submissions are as follows:

### What laws are applied in the distribution of the deceased estate?

11. The distribution of a deceased person's estate without a will is governed by the *Law of Succession Act* (Cap 160). This law outlines the rules of intestacy, which determine how the estate of a person who dies without a valid will should be distributed among their heirs.
12. In the present case, the deceased had two wives and each of the properties under his name was supposed to be distributed equally amongst the surviving spouses and his children. The only exception was land parcel number Gichugu/Settlement/Scheme/2469 measuring 0.725 Ha which was jointly owned by Margaret Wambui Irungu and Josphat Irungu Kanyi as joint owners. Hence under the doctrine of survivorship, they should be excluded from forming part of the estate of the deceased.
13. Section 91 of the *Land Registration Act* (No.3 of 2012): Defines the forms of co-ownership (joint tenancy and tenancy in common) as follows:
  - Joint tenancy implies that upon the death of one joint tenant, the property automatically passes to the surviving joint tenant by right of survivorship. Further that: Right of Survivorship: In cases of joint tenancy, the right of survivorship applies, meaning that upon the death of one spouse, the property automatically passes to the surviving spouse.
  - \* Contribution and Presumption: The law presumes joint ownership unless there is evidence to the contrary regarding the contribution of each spouse towards the acquisition of the property.
14. In the case of *Isack M'Inanga Kiebia v Isaaya Theuri M'Lintari & Another* [2018] eKLR, the principles of joint ownership and the right of survivorship in joint tenancies were re-affirmed, clarifying that jointly owned property passes to the surviving joint tenant.
15. The petitioner submits that the protestor has failed to provide sufficient evidence to support her claim regarding the wrongful allocation of land parcels

### Gichugu/Settlement/Scheme/2470 and Gichugu/Settlement/Scheme/727.

16. The court determined that Gichugu/Settlement/Scheme/2469 which was jointly owned by the deceased and the second wife, is subject to the doctrine of survivorship and therefore passes directly to the surviving spouse. Consequently, it was submitted that Gichugu/Settlement/Scheme/2470 remains to be owned by the protestor since it was the property allocated to her late mother Agnes and formed part of the matrimonial home.
17. However, Gichugu/Settlement/Scheme/727 form part of the deceased's estate and should be equitably shared between the two households.
18. Section 40 of the *Law of Succession Act* provides that the estate should be divided among the houses according to the number of children in each house, with each house treated as a unit. Hence the Petitioner Margret should continue to hold in trust one of the halves until it passes on to the children of the sister of the late Josphat Kanyi which was part of his wishes.



## Issues for Determination

19. There is one issue which arises for determination, namely, what law is applicable in adjudicating this matter.

## Analysis and Determination

20. What is before this court is a chamber summons application in which the Protestor seeks stay of the execution of the judgment delivered on 18<sup>th</sup> October, 2019. The application is unopposed despite the petitioner being duly served in time and being ordered by the court to file her replying affidavit.
21. The deceased died intestate on 13<sup>th</sup> July 2012, He was survived by one wife and 3 children. He had married one Agnes Wanjiru Kanyi, with whom he had celebrated a Christian wedding on 13<sup>th</sup> December, 1975 and had three children, all grown up. Together as a couple they had acquired 3 pieces of properties namely Gichugu/Settlement/Scheme 727, Gichugu/Settlement/Scheme 776-which was later subdivided into Gichugu/Settlement/Scheme 2470 and 4269 and a plot at Gathoge.
22. The protestor submits that the deceased died on 13<sup>th</sup> July, 2012 so the provisions of [Land Registration Act](#) which became law on 2<sup>nd</sup> May, 2012 are the ones applicable, and which Act provides that:
23. Section 93 of the [Land Registration Act](#) provides as follows:

“Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the [Matrimonial Property Act](#).”
24. The petitioner submits that the protestor has failed to provide sufficient evidence to support her claim regarding the wrongful allocation of land parcels

## Gichugu/Settlement/Scheme/2470 and Gichugu/Settlement/Scheme/727.

25. In the present case. the trial court allocated Land Parcel Gichugu/Settlement/Scheme/727 to the Protestor. On the other hand, the petitioner was given Land Parcel No. Gichugu/Settlement/Scheme 2469 as it was in her name.
26. Section 42 of the [Law of Succession Act](#) provides that:

“Where—

  - (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
  - (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.
27. Finally, according to the Court’s judgment aforesaid and parcel No. Gichugu/Settlement/Scheme 2470 was to be shared equally among all the beneficiaries listed at paragraph 2 of the affidavit of the petitioner.



### **Distribution of the suit property**

28. The protestor submits that the suit properties should form part of the estate of the deceased protestor since the deceased husband died in July, 2012 and was followed by the wife on 22<sup>nd</sup> September, 2021.
29. However, the trial court allocated land parcel No. Gichugu/Settlement/Scheme/727 to her since her matrimonial home is situated there.
30. Section 14(a) of the Matrimonial Properties Act provides: Where matrimonial property is acquired during marriage-
  - “ a) In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.”

### **Conclusion and Disposition**

31. In the present case, however, there is no evidence that all the deceased's properties were acquired by the deceased and the protestor before the petitioner entered the marriage. That issue was not dealt with in the aforesaid judgment, nor has evidence been taken on the point.
32. What was decided was that land parcel No. Gichugu/Settlement/Scheme 2469 is in the name of the petitioner. It is not in the name of the deceased. It was allotted by the Court to the Petitioner.
33. Thus, Section 93 of the [Land Registration Act](#) will not apply in this case as there is no evidence of joint ownership of the deceased estate between the deceased and the protestor.
34. Further, the deceased subdivided land parcel No. Gichugu/Settlement/Scheme 776 during his lifetime and the protestor did not oppose the subdivision. Hence, it could not form part of the matrimonial property.
35. In light of the foregoing, nothing has been placed before this Court in respect of the application to persuade the court to allow it. The application seeks stay of execution on substantive grounds. There is, however, no appeal or application for review of the judgment sought to be stayed.
36. Accordingly, the chamber summons dated 13<sup>th</sup> July 2021 is dismissed.
37. This being a family matter each party shall bear its own costs.

**DELIVERED AT KERUGOYA THIS 3<sup>RD</sup> DAY OF DECEMBER, 2024**

**R. MWONGO**

**JUDGE**

Delivered in the present of:

1. Kamuga - holding brief for R. Mwangi for Petitioner
2. AnnRose Wanjira Irungu - Protestor Present in Person
3. Murage, Court Assistant

