



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 836 OF 2006

IN THE MATTER OF THE ESTATE OF STANLEY KANYUGI WAKABA (DECEASED)

VIRGINIA NJERI KANYUGI.....1ST PETITIONER

CAROLINE WANJIRU KANYUGI.....2ND PETITIONER

VERSUS

TERESIA NJERI KANYUGI.....RESPONDENT

JUDGEMENT

1. The deceased herein **Stanley Kanyugi Wakaba** died intestate on the 29th of October 2005.
2. **Virginia Njeri Kanyugi** and **Caroline Wanjiru Kanyugi** petitioned for Grant of Letters of Administration on the 11th of April 2006 as widow and daughter of the deceased (hereinafter referred to as Petitioners).
3. The Petitioners listed the beneficiaries of the Estate as follows;
 - a) **Virginia Njeri Kanyugi – wife**
 - b) **Jennifer Njeri Kanyugi – daughter**
 - c) **Kenneth Wakaba Kanyugi – son**
 - d) **Christopher Wakaba Kanyugi – son**
 - e) **Caroline Wanjiru Kanyugi – daughter**
 - f) **PNK – son.**
4. They also provided an inventory of assets and liabilities as follows;

Assets

- a) **2 acres Loc. 2/Kangari/3843 & 3845.**
- b) **3 Plots in Kasarani.**
- c) **Plot Loc. 2/Kangari/T27**
- d) **Plot Loc. 2/Kangari/T56**
- e) **Plot Loc. 2 Kangari/T58**

- f) **L.R 37/762/24 Nairobi**
- g) **Loc 2/Kangari 206**
- h) **Motor Vehicle KAE 777G Range Rover**
- i) **Motor Vehicle KAP 333Y Toyota Rav 4.**
- j) **City Finance Bank**
- k) **Shares at Kenya Commercial Bank**
- l) **Shares in NIC Bank Ltd**
- m) **Shares in Diamond Trust Bank Ltd**
- n) **Shares in National Bank K Ltd**
- o) **Shares in Kenya Airways Ltd**
- p) **Shares in Akuria a Kangari**
- q) **Shares in Gacharage Tea Factory Co. Ltd**
- r) **Pension Fund**
- s) **NSSF Contribution.**

Liabilities

- a) **M School (PNK's school fees).**
- b) **Colombia University South Carolina (Christopher Wakaba Kanyugi's school fees).**
- c) **Doctors' fees.**
- d) **Barclay card.**
- e) **City Finance overdraft.**

5. On her part **Teresia Njeri** filed a citation, cross petition and a petition for special limited grant in a bid to seek recognition as the deceased's second widow and for the school fees for her son **PNK** who Virginia and her children recognize as a son to the deceased and therefore a beneficiary.

6. After several attempts in court, on the 19th of January 2009 the parties by consent had **Peter Muturi Kanyugi** and **George Mwangi Kamau** appointed as administrators of the Estate herein.

7. From the record by consent monies were set aside to cater for the school fees of the two sons namely Christopher and Paul without much resistance from either side. Once in a while the court intervened.

8. Serious differences emerged upon the administrators filing for confirmation of the grant in an application dated 8th October 2009. Accompanying the same were minutes by family (extended) members and the consent of all beneficiaries except for **Teresia**.

9. The proposal was contained in minutes signed by the administrators as follows;

- a) **Nairobi West House - Allocated to the 1st widow Virginia Kanyugi**
- b) **Kiangurue Land -Allocated to Christopher Wakaba**
- c) **Kasarani Plots - Teresia Njeri**

Ken Wakaba

PN

d) Kangari Plots - Ken Wakaba

PN

Christopher Wakaba

e) Kwa Muchuku 2 acres-Ken Wakaba

PN.

f) Wakibugi 5 acres -Teresia Njeri

g) Ruiru House - Teresia Njeri

h) Mairi 5 acres - Virginia Njeri

i) Toyota Rav 4 KAP 33Y -Teresia Njeri

j) Range Rover KAE 776 (was sold off to pay debts)

k) Pension/NSSF to be shared equally amongst wives.

l) Barclays shares - (94,692) to go to PN

m) Akuria a Kangari shares (Kshs 317,280)-

Teresia – 112,280

Carolyn – 200,000

n) NIC Bank shares (Kshs.199,104) – Jennifer

o) Kenya Airways shares (Kshs.34,306/-) – Virginia Njeri

p) HFCK shares (Kshs. 91,912/50) – Teresia Njeri

q) DTB shares (Kshs. 150,000/-) – Ken Wakaba

r) NBK shares (Kshs.27,250) – Ken Wakaba

10. On her part **Teresia Njeri** objected to the proposal in her affidavit dated 2nd December 2009 citing that the estate has several debts totaling Kshs.534,384/- which were not considered and that properties not owned by the deceased had been included in the proposed administration. She made a counter proposal as follows;

a) **Nairobi West**

Plot No. 37/262/324- to go to her for life and thereafter to **PN**.

b) **Kangurueni** – to be divided equally between the 2 homes. Half to be registered in the name of **Virginia** to have a life interest and **Christopher Wakaba** and/or any other child of Virginia's.

The other half in the name of **Teresia** to have a life interest and thereafter to **PN**, both parties to have access to the graveyard.

c) **Toyota Rav 4 KAP 33Y-** be sold to pay up debts. Balance if any to be equally divided between the two houses.

d) **Shares** listed in paragraph 5 (m) – (i) and (m) be sold and equally divided amongst the houses.

e) **Monies** in 5(n) and (o) to go towards **PN's** school fees.

11. Responding to the affidavit in objection **Virginia Njeri** stated that she lived in the Nairobi West house before leaving for the United States of America and she had accompanying affidavits of her niece and cousin who lived there with them at the time

12. The court directed the matter be disposed of by way of *viva voce* evidence.

13. It was Teresia's evidence that she started cohabiting with the deceased in 1991, her son born in 1994 and dowry paid for her in a Kikuyu Customary ceremony in 2003 after which she moved to live with the deceased in Nairobi West until his demise. Further she came to learn of Virginia in 1991 when the deceased mentioned that they had separated. She met Virginia several months after the deceased died as Virginia did not attend the funeral. She had met Virginia's children earlier in 2004. She further informed the court that she was not a party to the proposal filed by the administrators and did not consent. She also opposed the inclusion of properties in her name as she had bought and developed the same.

Further while testifying in court, she suggested distribution as follows;

- a) **Nairobi West house**- goes to her or it be sold and proceeds shared.
- b) **Kiangurue** to go to the 2 homes.
- c) **Kangari T/57, T/58 and T/27** go to the 3 sons.
- d) **Muchuku land** has a legal issue to be followed up and later to go to the girls.
- e) **Kasarani plots** (may be 2 – no title if available) 2 to 1st house 1 to Teresia.
- f) **Shares** – be sold to pay debts.
- g) **Rav 4** be sold to pay off debts.
- h) **Monies** in accounts to be used to pay school fees for Christopher and P.
- i) **Shares** at Akuria a Kangari amounting to 317,800 – 200,000 to go to Virginia and 117,800 to her.

14. On her part Virginia Njeri in her testimony stated that she got married to the deceased on the 30th of August 1969 under the African Christian Marriage Act and they had 4 children together;

- (i) *Jennifer Njeri Kanyugi born on 4/12/1970*
- (ii) *Kenneth Kanyugi Wakaba born on 16th February 1972*
- (iii) *Christopher Wakaba Kanyugi born on 16th August 1973; and*
- (iv) *Carolyn Wanjiru Kanyugi born on 16th October 1974.*

She acknowledged PN as a child the deceased got with Teresia Njeri. She is also aware of the proposal by the administrators She asserted that together with the deceased they bought the Nairobi West property where they took a mortgage of two million which mortgage was redeemed in 1997. At the time both the deceased and herself were in gainful employment and both contributed to the family welfare. Further they resided in the said house initially, as tenants before purchasing the same and when she left for USA the deceased, her children, a nephew and cousin were left in the said house.

She was aware of the relationship between the deceased and Teresia as the deceased called and informed her that he had paid dowry for Teresia in 2003. However, she maintained that they remained married as they never divorced.

It was also her contention that the two discussed and agreed she could go and work in America. On distribution she suggested that:-

- a) Nairobi West is rightfully hers
- b) Ruiru, she contended that the deceased built the same for Teresia.
- c) The ancestral home she would like the 2½ acres to go to Christopher
- d) Mairi to go to Teresia as it was which bought in her name.
- e) 3 acres in Kasarani to go to the boys.
- f) 3 plots in Kangara to the boys.

- g) Kasarani once dispute is over the 2 wives can share.
- h) 4 acres in Mairi in her name to go to Kenneth
- i) Rav 4 was given to Paul - he is still using same
- j) NSSF and pension be divided into 2 to the two widows
- k) Share in Akuria a Kangari be as divided as suggested by the administrators.
- l) NIC shares to go to Jennifer
- m) Kenya Airways (KQ) to her
- n) Diamond Trust and NBK to Ken

15. Counsels Lilian Machio & Wanja Wambugu filed their written submissions which fortified their client's positions as follows; -

Objector's Submissions

She cohabited with the deceased between 1991 to 2003 and out of the union Paul Ndegwa was born on 14th April, 1994. They formalized their relationship under Kikuyu Customary Law in 2003 and when she moved to the Nairobi West house and lived there with their son until the deceased demise on 29th October 2005 and during the time and more so when deceased was sick, she took care of him, administering medicine, cooking, washing his clothes and generally comforting him until his death. Virginia came into the scene long after burial of the deceased.

Further during cohabitation with the deceased, with funds from her salary, businesses, savings and loans she acquired in her names

Ruiru L.R No. 20727/233 which she developed; and

Mairi L.R No. Loc 2/Mairi/1061 (Wakibugi) so that the two properties and any property in Virginia's name ought not to be part of the estate.

As regards the Nairobi West house it was argued that it will be totally unfair to regard the same as having been the matrimonial home of Virginia who separated with the deceased in 1978 before the house was bought. Further even if Virginia lived in the house before leaving for the USA it was only for 3 years. That since giving birth to their son Teresia has lived in that house, took care of the same and continues to be in occupation.

16. Counsel for Teresia suggested that issues for determination are two;

- i. whether the two properties in Teresia's name do form part of the estate**
- ii. whether Nairobi West house should be considered as the matrimonial home of Virginia, if not how should the same be distributed and**
- iii. whether the court should consider the proposal by Teresia.**

Reference was made to **Antar Singh Bahra & Another vs Raju Govindji HCCC No. 548 of 1999, Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others HCCC No. 1243 of 2001, Re Estate of John Musambayi Katumanga (deceased) [2014] eKLR.**

17. Petitioners' Submissions

It was submitted that Virginia remained married to the deceased until his demise. That the two agreed that Virginia could work in the USA and the two visited each other from time to time. Prior to Teresia coming into the picture several properties had been acquired;

- a) Nairobi West house.**
- b) Plot No. Loc 2/Kangari/T.27**
- c) Plot No. Loc 2/Kangari/2067**
- d) L.R No. 20727/233 Ruiru**
- e) National Bank shares**

f) HFCK shares

g) Toyota Rav 4 KAP 333Y.

The following were acquired after 2003;

a) Plot Loc 2/Kangari/T.58

b) Plot No. Loc 2/Kangari/T.56

c) Diamond Trust Bank shares

d) Plot Loc 2/Mairi/1061.

It was further submitted that the deceased had no capacity to marry Teresia as he allegedly did and Section 40 of the Law of Succession Act completely exclude Teresia as an heir, though her child with the deceased is an heir and therefore the court should go ahead to distribute the property as agreed by the heirs.

Further it was urged that there was adequate evidence that the property in Nairobi West was bought by Virginia and deceased and she resided therein before leaving for the USA.

As regards the Ruiru property L.R No. 20727/233 and Loc 2/Mairi/1061 the deceased acquired both and had the same registered the same names of Teresia.

18. It was urged on behalf of Virginia issues for determination are;

i. Whether Teresia is a widow and entitled to inherit.

ii. How should the estate be distributed?

19. Reference was made to; In the Estate of **Johnson Githanga Joshua N'gang'a (deceased) [2019] eKLR**, in the Estate of **James Njenga Gitau [2018] eKLR**, in the Estate of **Lihasi Bidali (deceased) [2019] eKLR**.

20. Considering the evidence on record, documents in support and submissions by counsel, the court is of the view that issues for determination are;

(i) Whether or not Teresia Njeri may be considered as a beneficiary of the Estate of the deceased.

(ii) Whether or not to include properties in names other than the deceased as part of the estate.

(iii) How should the estate be distributed?

21. The 1st Petitioner Virginia is right in holding the view that she was in a monogamous union and therefore the deceased had no capacity to marry another wife. She could succeed elsewhere with the argument. However, the Law of Succession Act(The Act), in an attempt to consider the realities of the Kenyan society where despite being in monogamous unions men still cohabit and engage in other forms of marriages leaving women in the other union and their households destitute provides otherwise, as **Section 3(5) the Act** came about as a means of rescuing the situation women and children finds themselves in . It states

“Notwithstanding the provisions of any written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular Sections 29 and 40 thereof, and her children are accordingly children within the meaning of the Act.”

22. In **Irene Njeri Macharia vs Margaret Wairimu Njomo & Another [1996] eKLR** the Court of Appeal had this to say of Section 3(5) of the Act

“An understanding of Section 3(5) of the Act is that it expressly intended to cater for women who find themselves in the situation in which Josephine found herself. Mutua, previous to his union with Josephine, had contracted a statutory marriage which remained unresolved up to the time of his death. But subsequent to that marriage, he purported to marry Josephine under Kamba Customary Law. Kamba Customary Law recognizes polygamy and Josephine was telling the court that she was a woman married under a system which recognises polygamy. Parliament, in its wisdom, and whatever it might have intended to do provides that: - “Notwithstanding the provisions of section 27 of the Marriage Act” Josephine was, nevertheless, a wife for purposes of the Law of Succession Act, and in particular sections 29 and 40 of the Act.”

23. Therefore, guided accordingly the court finds that Teresia ought for purposes of succession to be considered as a wife and therefore a beneficiary of the estate.

Indeed, both the 'wives' do seem to recognize the fact and, in their proposal, there is an aspect of sharing save for the ancestral home and the Nairobi West Home.

24. Property Law considers proprietary interest of registered owners accept under the Matrimonial Property Act where one spouse is able to prove that the property is held in trust or in situations where that right of sole proprietorship is negated and proved.

25. Both Teresia & Virginia have properties in their individual names. Wives can hold property solo without their spouses, this is not illegal or unlawful. The court has not been persuaded that the widows could not buy or own their individual properties. Both have made statements that remain unchallenged, that they worked for gain. Their individual properties therefore ought not to be included in the estate for purposes of distribution.

26. The **Nairobi West Property L.R No. 37/262/324** was acquired in 1994 long before Teresia was married to the deceased in 2003. To be precise 9 years before. Teresia alleges that Virginia lived in the house for only 3 years as she left for the USA in 1997. However same can be said of Teresia, she lived with the deceased as a wife in that house from 2003 to 2005 when he died; 2 years. Thereafter she has been in possession with a claim hanging over her head, not to be considered as peaceful possession but merely because the case has taken long to conclude. Notable also is that she has within the period benefited either as an occupant and or from the rent.

On the other hand, Virginia who was the only wife at the time the said house was purchased was in gainful employment and as is expected of an urban household, states that she contributed directly or indirectly to the family welfare. She may not have paid the mortgage however the needs of a family are wider. Virginia thereafter relocated and from 2003 to-date Teresia has enjoyed the facility. Based on the above the court is of the view that the same should go to Virginia.

27. As for the Kangurueni, ancestral home both the 'wives' should have a share for life and thereafter to any of their children as they may wish.

28. For the rest of the properties the court finds that the proposal by the administrators was fair and reasonable and would adopt the same with some variations as follows;

i. Kwa Muchuku – once the dispute is resolved to go to the girls Jennifer Njeri and Carolyn Wanjiru.

ii. Toyota Rav 4 KAP 333Y – Teresia Kanyugi

iii. NSSF and Pension Fund to be shared equally between Virginia and Teresia.

iv. Shares at Barclays Bank to go to Paul Ndegwa.

v. Shares at Akuria a Kangari

- Teresia Kshs.117,280/-

- Carolyn Kshs.200,000/-.

vi. NIC Bank shares –to go to Jennifer Njeri

vii. Kenya Airways shares – to go to Virginia Njeri

viii. HFCK shares – To go to Teresia Njeri

ix. DTB & NBK shares – To go to Ken Wakaba

29. Each party to bear their own costs.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 11TH DAY OF NOVEMBER, 2021.

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ALI-ARONI

JUDGE