



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CITATION CAUSE NO.45 OF 2017

IN THE MATTER OF THE ESTATE OF MAA(DECEASED)

SA.....1ST CITOR

FA.....2ND CITOR

VERSUS

TTA.....1ST CITEE

L MA.....2ND CITEE

JUDGMENT

1. The 1st citors (Sofia Ali) and the 2nd citor (FA) filed this citation in their capacity as daughters of the deceased from his first marriage stating that the citees were beneficiaries of the estate of the late MAA who had died domiciled in Eldoret and Kitale. In the affidavit in support of the petition for letter of administration the citors stated that the deceased died intestate on the 25.1.2016. He had left the following as the persons surviving:

- i. J MA-deceased**
- ii. SMA-daughter**
- iii. FMA-daughter**
- iv. NK-grandson**
- v. TTK-wife**
- vi. LMA-daughter**
- vii. DMA-daughter**

2. The full inventory of all the assets and liabilities known to them were:

- i. Kitale Municipality-LR NO.[...] (dwelling house)-[...]**
- ii. A share of eldoret Municipality Block [...]. The total estimate value was Ksh.60.000.000/=. There was no known liability.**

3. Upon receipt of the citation, the 1st citee TTK entered appearance on 30.7.2018. The interested party SR made an application to be joined as an interested party for the sole reason that she had been married to the deceased on 13.7.1980 under the Islamic law but got separated in 1994- they eventually divorced.

She only wished to participate in the proceedings to ensure her children benefited from the estate of the deceased. In her supporting affidavit she deposed that they jointly acquired property number **LR NO.[...] Kitale in 1992 and West Pokot/Siyoi/[...](later known as West Pokot/Siyoi/[...])**. The transfer of the land was effected on 19.3.1993 and they built a house. In addition to this they had various businesses

including a hardware shop called [particulars withheld] Company Limited which is in existence to date.

4. Her marriage to the deceased was dissolved on **24.2.2003** by the Kadhi's court at Eldoret. The 1st citee moved in with the deceased in 1999 as his wife, although technically she was still married to **HNK** as evidenced by the affidavit of marriage sworn on 9.11.1996. In a ruling dated 8.5.2019 the court found that the 1st citee was legally married to the deceased despite the interested party's allegation.

5. The 1st citee made a reply to the citation stating that she was the surviving widow to the deceased and together they had two issues namely **DMA and LMA**. She pointed out that the citors had made an application for letters of grant in the ELC court which was later abandoned. Further, that the deceased had other issues namely **KMLM and NPSA**. It was citee's contention that the deceased left a will in the custody of **Kidiavai & Co. Advocates** which ought to have been read before filing this citation. She also maintained that the deceased bought the contested Kitale property long after his separation from the interested party and the house was constructed and finished after they had separated.

6. In addition the 1st citee alleged that the citors had a forged death certificate since there was no surrender of the deceased identity card or passport. Further, the citors had gone to a different location (Kibomet location) to obtain letters they used to get letters of administration *ad litem*, yet the deceased was domiciled at Milimani location.

7. The matter proceeded by way of *viva voci* evidence.

Evidence

The citors case

8. SMA explained that she petitioned for grant of letters of administration and cited her step-mother T who she described as unco-operative. It was her contention that her late father and mother had built a house in the year 1993/1994 and in which she and her siblings grew in. Initially, the father, mother and her siblings moved to the servant quarters, and when the house was completed they moved into the main house.

9. Later her mother moved to her own father's home which was within the neighbourhood in 1994 since they used to fight a lot. They had a house help though their mother used to come and check on them, parental responsibility was shared. Her step-mother moved in, and gave birth to her first child **LM** in 1999, this created friction between **T** and her siblings.

10. The late father owned a hardware store and her brother **J** was to oversee it, however **T** was put there and this strained their relationship even more. Her father and T had moved to the servant quarters so that they could rent out the main house, he had taken out a loan at Co-operative bank which had to be serviced. The main house was rented out at Ksh.60.000/=. She asked the court to allow the house to be sold and the amount received be distributed equally.

11. In cross-examination she stated that her father paid fees but it's the mother who visited her in school. She denied knowledge of her father taking out a loan of 2.5 million. In re-exam she stated that she was not aware who established the second shop.

12. **SCR (PW2)**, was married to **MA** on 30.7.1980 under Islamic law, and they were blessed with three issues namely: **J, S and F**. It was her evidence that during her 14 and 1/2 years in marriage she played a big role in contributing to the acquisition of wealth. She testified that initially they lived in **Nambale, Busia**, where they had a wholesale shop, and together they bought a lorry, tractor and saloon car. They then moved to **Makutano in Kapenguria** and opened a hardware shop by the name **[particulars withheld]**.

They bought a plot number **2116/XVI/90 within Milimani estate in Kitale**, which they later purchased. They would travel to Kapenguria every morning. The servant quarters was completed in 1993 and they moved in first before moving in to the main house in 1994. Her divorce was finalized in July 2002 but the same took effect on 11.6.1994 when she moved out of the matrimonial house.

13. She explained that she could not petition for the division of the matrimonial house since her children were still living in the house. She stated that she was entitled to a half share in the main house since it was constructed with her help. The other half could be distributed to her two daughters, T and her children.

14. She still cared for her children even after she had moved out, though her son **J** was thrown out of the house by his step-mother. That despite the estrangement, she was called back to the ex-husbands house for **J's** burial.

15. She acknowledged that **T** started living in the home in 1999, and was aware a tenant lived in the main house. However, it was her daughter **S** who used to send money for the deceased medical bills.

16. **Rashid Kipkemoi Kitur (PW3)** was employed by the deceased as a driver in 1989 while in Kapenguria. He would use the canter to transport materials from Kisumu and Kakamega to the hardware. He would deliver the building materials to the site during construction of the Kitale residence, and it was Susan and the deceased who were in control and oversaw the construction.

17. This was the same version given by Hamisi Tabuchi (PW4) who was then employed by M(deceased) as a turnboy.

All this is intended to demonstrate that the Interested Party had made a contribution towards acquisition of the property registered in the deceased's name, and is entitled to a share, or at least her children ought to get her share!

18. Defence case

TTK(DW1), and the deceased met in 1997, and they lived together for 17 years before he passed on. She was a nutritionist, but quit her job when she delivered their first child **L** in 1999 and the second **D** in 2004. **T** confirmed that she had been married to one **H** with whom she had two children, it was a come-we-stay relationship but they later separated.

19. She admitted that by the time she moved to live with the deceased, he already had a house where he was living, and she was told the title was in his name. He also had a hardware shop in Kapenguria, known as **[particulars withheld] Shop**. The same was closed as it was doing poorly and he opened a shop in Kitale which was operated by Jamal his son. She had been told he (deceased) had built a school on Susan's father's land.

20. On cross examination she testified that she had her own land in **Nakuru/Nessuit Settlement Scheme/1774 acquired in 12.10.2005 and Kitale Municipality Block .../Koitogos /(...)**, but denied suggestions that she used proceeds from the deceased's business to purchase the properties. She acknowledged that she rented the main house at a rent of Ksh.60.000/= per month, explaining that she needed the money to sustain her young children. She was aware Jamal had a son called Norman, and maintained that she did not have a problem with the entire family on distribution of the estate, as she was ready to talk to them.

She denied having barred her step-daughter from accessing the home. She urged the court to consider that the deceased had expressed his wishes in a will that was in the custody of an advocate in Kitale

Submission

Citor's and interested party's submission

21. It was their submission that the court had overruled the purported written will.

Counsel submitted that the matrimonial home had been constructed long before the 1st citee moved in with the deceased, so the 1st citee could only benefit from the share of the deceased as a dependant. Further, that the 1st citee had already benefited from the relationship with the deceased by purchasing two properties namely **Nakuru/Nessuit Settlement Scheme/1774 acquired in 12.10.2005 and Kitale Municipality Block (...)/Koitogos /(...)** **acquired on 4.1.2007**. Further the 1st citee had not accounted for the rent she collected from the main house.

22. The citors contend that the interested party by virtue of section **29(a) of the Law of Succession Act** is entitled to her share of the property which she contributed towards contracting as part of the matrimonial property. It is argued that being a former wife she became a dependant to the deceased pursuant to **section 29 of the Law of Succession Act**.

23. That in any event, a blanket application of **section 40 of the Law of Succession Act** would imply that the property be shared equally between houses, yet the interested party contributed to it way before the 1st citee came in. To support this position the citors rely on the case of **Re Mwangi Giture(2004) eKLR**, where the court observed that that section 40 led to inequity. However, she prefers that her share be given to the citors and **NK the son of JM**. In addition since the property was registered in the deceased name, a trust had been created over it and the interested party was entitled to her 50% share of the property.

24. The citors further rely on the provisions of **section 6 of the Matrimonial Property Act 2014**, which recognizes the place of property jointly acquired as was held in **PWK v. JKG(2015) eKLR**. Also that in **BNM v. GMK (2018) eKLR** is applicable where the acquisition of a house was on mortgage and the woman substantially contributed to its acquisition.

25. The interested party lackluster role is defended on grounds that she could not have filed for division of property since **JM** lived in the matrimonial home and the deceased suffered from blood pressure and chronic diabetes which led to his blindness.

26. Further, that the interested party had not ceased to be a partner of **[particulars withheld]**, as the alleged notice of change of names had not been filed at the Company's registry. The court was referred to various cases in support of the interested party's case in her share of the property acquired during her subsistence of the marriage with the deceased. **Re estate of Stephen Kiburi Muciarria(2018) eKLR**, **Jane Wambui Ngeru v. Timothy Mwangi Ngeru(2015) eKLR**, where Nyamweya (J) stated:

“In addition section 93(2) of the said Act states as follows:

“If land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered .”

27. Finally in the court of appeal in *Esther Wanjiru v. Mary Wanjiru Githatu* [2019] eklr opined that non-monetary contribution was equivalent to financial contribution towards the purchase of the matrimonial property.

Citee's submission

29. The contention is the deceased property located in Kitale Municipality L.R No[...] situated within Milimani Estate in Kitale Township. The 1st citor had proposed that the property be sold and proceeds divided amongst each dependant, however the interested party was of the opinion that after sale, she be given her 50% proceed then the rest be shared equally among the dependants and the 1st cite proposed if the same is sold then her children ought to get a larger share since her children were minors as opposed to the other children.

29. The citees insist that the deceased died testate, there being a will in custody of **Kidiavai & Co. Advocates**, which could not be read during the Edat period lasts for 4 months and 10 days. Saying that Section 62 of the Law of Succession ought to be applied in this case, the citees contend that it would have been prudent the will be opened to find who the executor was as well as the intentions of the deceased and thus section 62 of the Law of succession was applicable.

30. The interested party's quest for a share from the deceased's estate is faulted on grounds that she ought to have filed a separate suit for division of matrimonial property after the divorce. That once a person has died then the applicable law was the Law of Succession. That the deceased was a polygamous man thus section 40 was applicable. In their view the ratio of distribution should be **2:3:3 as follows**

a. First House-two units

KM LM

NPSA

b. Second house-three units

SA

FA

NK

c. Third house-three units

TTK

LMA

DA

31. The court was urged to refer to **section 28 of the Law of Succession Act** which provides for the circumstances to be taken into account by court in making orders. The interested party did not have any right over the property in question since it was not a matrimonial property. The property was solely purchased by the deceased in 1993 when the interested party had divorced the deceased. The deceased and interested party had separated in 1991, divorced in 1993 with the Kadhi's court effecting the same on 11.6.1994.

The citees submit that if the court finds the same was matrimonial property **Section 2 of the Matrimonial Property Act** ought to be heeded to, and in any case, the interested party was bound to prove her contribution towards purchase of the house or its construction as was provided in **PWK V. JKG(2015) eKLR**, stated:

“ ..where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property..”

This court was urged to look at the interested party's conduct, she left the deceased when he was very sick and needed care and medical attention, thus the property be shared amongst the deceased beneficiaries as proposed, but to her exclusion.

Analysis and determination.

32. The following issues arise for determination:

i. Whether the deceased died intestate

ii. Whether the property is matrimonial property governed by the matrimonial property law, or an asset belonging purely to the deceased's estate and falling under probate and administration regime

iii. If so, is the interested party entitled to claim a share, and how much share should the interested party get

iv. What is the best mode of distribution for the beneficiaries and deceased.

33. The cite position is that the deceased died testate, and there was a will in the custody of Kidiavai & Co. Advocates. That the citors should

not have filed suit but waited for the Eda period to have the will read. The will would encompass the mode of distribution of the properties to the dependants and beneficiaries. This was opposed by the citors and the interested party.

34. The 1st Citee has been consistent of this position all through since she started defending this cause and all her pleadings reflect the same, where applicable, that the deceased died testate, it would have been prudent to read the will first to find out who the deceased had appointed as the executor(s) of his estate before any application for citation can be instituted. I agree that the intentions of the deceased in so far as how he wants his property to devolve to his dependents and beneficiaries should be complied with as much as is reasonably practicable. **Section 62 of the Law of Succession Act, Chapter 160** provides that:

When a person who has been appointed by a will is an executor thereof has not renounced the executorship, the letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to renounce his executorship or apply for a grant of probate of the will...

35. The citees argue that deceased's will was never read because the Citors and the interested party engaged in so many sideshows and theatrics including premature litigation making it impossible for a meeting to be convened for purposes of reading the said will. In addition to the theatrics employed by the Petitioners, they also failed to disclose to this honorable court that they had already filed applied for letters of administration in Kitale Succession Cause No. 13 of 2016 wherein they failed to obtain the consent of the 1st Respondent knowing all too well she ranked higher in priority and that there were other dependants of the deceased whom they excluded.

36. If there was a will, then of course even if the parties were deferring to Edat, the period lapsed many times over. However of greater significance is this court's ruling dated 8.5.2019 at page 10 which found no proof as to the allegation of there being a valid will. I will therefore on the premise that the deceased died intestate

37. Whether the property on L.R no.(....) was matrimonial property

The issue that needs to be resolved is whether the interested party should have filed a separate suit for division of matrimonial property if the divorce did not deal with the same rather than waiting for the deceased's death to raise the same. The Law of Succession Act at section 4:

4. Law applicable to succession

(1) Except as otherwise expressly provided in this Act or by any other written law—

(a) succession to immovable property in Kenya of a deceased person shall be regulated by the law of Kenya, whatever the domicile of that person at the time of his death;

(b) succession to the movable property of a deceased person shall be regulated by the law of the country of the domicile of that person at the time of his death.

(2) A person who immediately before his death was ordinarily resident in Kenya shall, in the absence of proof of domicile elsewhere, be presumed to have been domiciled in Kenya at the date of death.

38. The citors and the interested party on the other hand, cling to the court's ruling which had found that the property was acquired in 1992 and by then the interested party was a legal wife to the deceased.

The land in question was purchased during the subsistence of the marriage. The witnesses PW2 and PW3 averred that during their employment with the deceased and the interested party, they would transport building materials to the site for construction, a servant quarters was the first to be put up then the main house. That she could not file suit to recover a share of the matrimonial property since her children were still living in the house.

39. Section 2 of the **Matrimonial Property Act, 2013** defines matrimonial home as:

Any property that is owned or leased by one or both spouses and occupied or utilized by the spouse as their family home, and includes any other attached property.

Matrimonial property of the other hand is defined under **section 6** as follows:

1. For the purposes of this Act, matrimonial property means—

a. the matrimonial home or homes;

b. household goods and effects in the matrimonial home or homes; or

c. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

2. Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

3. Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

40. The Matrimonial Property Act at section 2 defines contribution to mean monetary and non-monetary contribution and includes— (a) domestic work and management of the matrimonial home; (b) child care; (c) companionship; (d) management of family business or property; and (e) farm work; “family business” means any business which— (a) is run for the benefit of the family by both spouses or either spouse; and (b) generates income or other resources wholly or part of which are for the benefit of the family;

From the evidence presented I have no doubt about the interested party’s contribution, not necessarily monetary, but in helping to run the business, supervising the construction, and taking care of the children while the marriage lasted.

41. Refuge is sought in Section 29(a) of the Law of Succession Act provides for a dependant as follows:

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

I hold and find that although the interested party, qualifies as a dependent by virtue of section 29 of the Act, she has clearly stated she does not wish to participate in the proceedings as a beneficiary, but as an owner of some assets which form part of the estate.

42. Would this than entitle the interested party was entitled to a share of the deceased property in terms of a contributor to acquiring matrimonial property, or purely a beneficiary? The interested party submits that she was the first to be married then came in the citee who testified that she knew the deceased in 1997.

43. The citees submit that the deceased in his lifetime was in a polygamous relationship and thus section 40 of the Law of Succession Act applies. The same thus provides:

40. Where intestate was polygamous

(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.

In light of the above cited provision, the citees propose that the deceased’s estate should devolve to his beneficiaries in the ratio of 2:3:3 respectively as follows:

a. First House- two units

KMLM

NPSA

b. Second House- three units

SA

FA

NK

c. Third House-three Units

TTK

LMA

DA

44. The citors poke holes at the provisions of Section 40 of the Law of Succession Act terming it as retrogressive against the women who married first.

45. It is contended that the said provision implication is that when a wife largely contributed to acquisition of the property and the property is to be shared equally amongst the wives, then first wife may get less than what she had contributed to. This was discussed in **Re Estate of the late George Cheriro Chepkosiom (deceased) [2017] eKLR**. That in the present circumstances the citee did not show or demonstrate how she contributed to the acquisition of the property in question. It is for this reason she prefers the court to rely on section 40 absolutely.

46. With the greatest of respect, I think that would be a misapplication of the law, and a misrepresentation of facts. The deceased was not polygamous, as at no time did he have more than one wife sharing in his relationship. He however had several different women at different stages of his life, with whom he got children. It would be improper to treat the children as forming different units, in my view, his survivors were all dependant.

47. However, two elephants remain in the room- one being:

a. which law should apply in distributing the estate? Is there room to apply both the Law of Succession and the Matrimonial property Act?

b. what mode of distribution should this court adopt?

48. As regards which regime of the law to apply, I take into account the approach adopted by Kimondo (J) in **Re: Estate of Ephantus Githau Waitheka**,

“that where a widow files requisite application under the Matrimonial Property Act, against the estate of the deceased husband, she will be entitled to a favourable consideration on that property she participated in acquiring with the deceased”

49. The symbiotic approach was approved by the Court of Appeal in **Esther Wanjiru Githatu v Mary Wanjiru Githatu[2019] eKLR** where the second wife insisted on equal distribution of all assets saying they belonged to and were acquired by their late husband, while the first wife urged the court to consider her contribution to acquisition of property acquired prior to the 2nd wife’s entrance into the relationship. It is important to note that even in that instance there was no monetary contribution.

The court pointed out that the deceased’s free property must be identified before distribution can be done. The court recognized the 1st wife’s contribution to the property acquired by the deceased prior to the 2nd marriage, despite the same being registered in the deceased’s name. That her participation in the family business and farming amounted to contribution, and there was a resulting trust. The court approved the apportionment of her share at 50%, which was to be removed from the net value available for distribution. The Interested Party’s claim to the Kitale house as matrimonial therefore has a basis.

50. The citees point out that the children of the first and second houses, save for the grandchild, **NK** are all adults, and are since done with school. Consequently, their needs are not the same as those of the children of the third house who are still in school and are yet to clear their education.

51. Reference has been made to Section 28. Circumstances to be taken into account by court in in considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

(a) the nature and amount of the deceased’s property;

(b) any past, present or future capital or income from any source of the defendant;

(c) the existing and future means and needs of the dependant;

(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;

(e) the conduct of the dependant in relation to the deceased;

(f) the situation and circumstances of the deceased’s other dependants and the beneficiaries under any will;

(g) the general circumstances of the case, including, so far as can be ascertained, the testator’s reasons for not making provision for the dependant.

52. Whereas the citees lament about her fragile situation may hold some water, it is not lost to me that she has solely benefitted from the rental proceeds relating to the Kitale property, to the exclusion of all other beneficiaries, and has not rendered any accounts. It is therefore not too far-fetched to conclude that she has used those proceeds to acquire the properties referred to, and this shall then be subjected to the criteria applicable under section 82 (ii) b of the Law of Succession. This will therefore reduce her share in the Kitale property and other assets. The interested party is entitled to a claim in the matrimonial home in Kitale and I consider her contribution at 30%.

53. The deceased is said to have left behind 6 children and one grandson who are entitled to the estate of the deceased. Yet there seems to be another set of dependents who are not mentioned by the citors –these are the children from the 1st marriage. I therefore direct that the 1st citors and 1st citee take out letters of administration of the estate, jointly, and within 7 days from today, they must set out a proposed mode of distribution on all the assets of the estate rather than singling out only one prime property, and they must also include all the beneficiaries. In

the event of failure to agree, the court will have the final say on mode of distribution.

Delivered, Signed and dated this 12th day of February 2020 at Eldoret

H. A.OMONDI

JUDGE