



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 32 OF 1991

(IN THE MATTER OF THE ESTATE OF KARURU MUNYORORO ALIAS FRANCIS KARURU MUNYORORO (DECEASED))

JOYCE WAMBUI WOTO.....APPLICANT

VERSUS

FAITH WANJUGU KARURU.....1ST PROTESTER

FRANCIS WANJOHI NDIRANGU.....2ND PROTESTER

FRANCIS NDERITU MAINA.....3RD PROTESTER

JOSEPH WACHIRA MUNYORORO.....4TH PROTESTER

JUDGMENT

This judgment is delivered in rather unfamiliar and unprecedented circumstances. The entire world has been hit by a respiratory disease known as COVID-19 or corona virus. It is viral in nature spreading mainly through human contact although, lately, it has been suggested that it could be airborne as well. So far, it has no known cure but its spread can be contained if human contact or interactions can be restricted. Measures have been taken the world over towards this end in what is now popularly referred to as 'social distancing'. It is for this reason that this judgment is delivered via skype communication or video conferencing.

In exercise of the powers vested in it by section 66 of the Law of Succession Act, cap. 160, this Honourable Court made a grant of letters of administration intestate of the estate of Francis Karuru Munyororo (the deceased) in the joint names of the applicant and the 1st protester; this was on 21 February 1991.

As the grant itself suggests, the deceased died intestate; he died on 3 May 1990 at Consolata Hospital in Nyeri. He was domiciled in Kenya and his last known place of residence was Kiambogo village, Endarasha location in Nyeri County.

The grant was made upon the petition of the applicant; this petition was filed on 25 March 1991 and in it the applicant described herself as the wife of the deceased. The 1st protester objected to the petition and contested the applicant's relationship with the deceased; she contended instead, that she was deceased's only wife. For this reason, on 30 September 1991, she filed an objection to the making of the grant and on 9 October 1991 she filed her own petition for the grant of letters by way of cross-application. It is against this background that the grant was made in the joint names of the applicant and the 1st protester.

In making the grant, the court directed further that either of the joint administratrixes were at liberty to file summons for confirmation of the grant. The applicant took the initiative and filed the summons on 14 March 2008, almost 18 years after the grant had been made. In the affidavit in support of the summons, she listed herself and her two children as the deceased's only survivors.

Listed as the assets comprising the deceased's estate were properties described as Title No. Nyeri/Endarasha/ 612 and Title No. Nyeri/Endarasha/613; the two titles were subdivided from Title No. Nyeri/Endarasha/410. She proposed to have these properties devolve upon her absolutely.

If the objection against the petition is anything to go by, it was always inevitable that the 1st protester would contest such scheme of distribution of the estate. Indeed, on 22 April 2008, she filed an affidavit of protest in which she deposed that she was the deceased's only wife and her customary marriage to the deceased had been blessed with three children.

She agreed with the applicant though that the two parcels described as Title No. Nyeri/Endarasha/ 612 and Title No. Nyeri/Endarasha/613 were initially one parcel registered as Title No. Nyeri/Endarasha/410. She explained that when this latter parcel was subdivided, Title No.

Nyeri/Endarasha/ 612 was registered in the name of Joseph Ndumia Murage while Title No. Nyeri/Endarasha/ 613 was retained in the deceased's name. However, the Court of Appeal had in Civil Appeal No. 149 of 1986 (Nyeri) invalidated the subdivisions and ordered that the original title, Title No. Nyeri/Endarasha/410, reverts to the deceased.

The 1st protestor further swore that the applicant had all along lived with her parents, in their land. Contrary to the applicant's proposal, she was of the position that the deceased's entire estate ought to devolve upon her absolutely.

It turned out that the dispute on the devolution of the deceased's estate was not just between the applicant and the 1st protestor alone; other protestors also joined the fray claiming a share of the estate, for one reason or the other. The 2nd protestor, for instance, filed an affidavit of protest on 25 September 2013 claiming that in 1989 he had purchased 4 acres of land, to be excised from Title No. Nyeri/Endarasha/410, from the deceased. The agreed purchase price, according to him, was Kshs. 140,000/= out of which he had paid Kshs. 100,000/=. The balance of Kshs. 40,000 was to be paid upon completion of the agreement.

The 3rd protestor, on the other hand, swore an affidavit of protest on 5 May 2016 claiming that he was a son of the deceased. According to him, his mother, whom he identified as Veronica Wanjiru Maina, was the deceased's first wife and together, they had been blessed with two children, the protestor himself and one Jane Waigumo Theuri.

Unlike the applicant and the 1st protestor, he acknowledged that the two were also the deceased's wives and their respective children were the deceased's children.

He swore that his own mother had separated from the deceased, at the time of the latter's demise but that, that in itself, couldn't deny them a share of the deceased's estate. In his view, the deceased's estate should be distributed equally, amongst the deceased's children in the three houses; as a matter of fact, he swore that each of the deceased's children and his wives should get 0.37 hectares of Title No. Nyeri/Endarasha/410.

Like the 3rd protestor, the 4th protestor also deposed that the deceased was survived by three wives each of whom had three children. But he swore further that besides the deceased's wives and children, he also survived the deceased as a dependant. His mother, so he deposed, was the deceased's sister and upon her death, he always depended on the deceased for upkeep and maintenance. He deposed that he has lived on Title No. Nyeri/Endarasha/410 all his life and knows no other place he could call home. He proposed the estate be distributed as suggested by the 3rd protestor.

When the protests came up for hearing, the parties largely reiterated their positions in their respective affidavits.

The 1st protestor added that she married the deceased in 1988 and that the deceased never had any other wife before or after she married him. She denied knowing the applicant or Veronica Wanjiru Maina. She also denied knowledge of the 2nd and the 3rd protestors. But she acknowledged that the 4th protestor was the deceased's nephew, a son to the deceased's sister; contrary to his depositions, he only came on the deceased's farm after his demise. She had attempted to have him and his children leave the deceased's estate without much success.

As far as the registration status of the land comprising the estate is concerned, Title No. Nyeri/Endarasha/410 had initially been sub-divided into two parcels but that the deceased moved to this court in High Court Civil Case No. 95 of 1988 to have the two parcels consolidated and revert into its original parcel; however, he died before the conclusion of the case.

She was at one time sued with regard to ownership of the suit property in High Court Civil Case No. 167 of 2009 but the suit was withdrawn.

Besides the case against her, she was aware of another suit being Chief Magistrates' Court Civil Case No. 77 of 1989 in which the applicant's father had sued the deceased for the return of his cows apparently after the breakdown the marriage between the applicant and the deceased.

At some stage, the dispute between her and the applicant, apparently on the question of who between them was validly married to the applicant, was arbitrated by the elders; the award, according to her was made in her favour. The record, however, shows that the award was set aside by this court because the dispute was arbitrated by a land disputes tribunal rather than by a panel of elders as ordered by the court.

As far as the 2nd protestor's claim is concerned, it was her testimony that she was not aware of any agreement between the 2nd protestor and the deceased in which the latter sold part of his land to this particular protestor. She denied knowing the 3rd protestor.

The 1st protestor also testified that she had four children with the deceased and that the entire estate should devolve upon herself and these children exclusively; she was married with two of these children while the other two were born during her marriage with the deceased. She produced a certificate of official search showing that the applicant has her own land registered as Title No. Nyeri/Endarasha/1902.

When she was referred to the case in which the applicant was substituted in place of the deceased, she insisted, despite the evidence to the contrary, that she was the one who was substituted and not the applicant.

The 1st protestor's witness, Stephen Nderitu Ndegwa, testified that he was related to the deceased because the deceased's father was his cousin. To his knowledge, the 1st protestor was the deceased's only wife. Although he stated that he had known the deceased throughout his life, he testified that the first time he had been on his land was in 1988, the same year the 1st respondent is alleged to have been married to the deceased.

Again, the witness denied knowing the applicant but, at the same time, he admitted having met her at the District Officer's office in the course of the dispute between the applicant and the 1st protester.

The 2nd protester's witness, was Kuria Huria who, I noted, was relatively aged. He testified that he knew the deceased and, in particular, he knew that he married several wives but they would always leave him. Contrary to the 1st protester's testimony, he admitted that he knew the applicant and that the applicant used to live with the deceased; however, she had left by the time the deceased died.

The 2nd protester's case was simply that he purchased part of the deceased's land from the deceased himself in 1989; he paid Kshs. 85,000/= leaving a balance of Kshs. 37,500/=. They again entered another agreement, in the same year, for an additional one acre at the price of Kshs. 35,000/=. According to him, the only outstanding balance was the sum of Kshs. 40,000/=. The transaction could not be completed because the deceased fell sick and also because of a pending court dispute over the same land.

The 3rd protester testified that the basis of his claim was that he was the deceased's son; as a matter of fact, he was the eldest child having been born of the deceased and his first wife, Veronica Wanjiru Maina. His mother was still alive but she was already married elsewhere at the time the deceased died. He lived with his maternal grandfather but he was aware that the applicant lived with the deceased. He could not, however, tell when the latter died.

Jane Wangechi Wa Gatiba testified in support of the 3rd protester's case; it was her testimony that she was the deceased's sister and that she knew of the 1st protester and Veronica Wanjiru as the deceased's only wives. As a matter of fact, she introduced the 1st protester to her deceased brother. She recalled that the 3rd protester to be one of the children the deceased had with his first wife. The 4th protester was her sister's son and that he started living with the deceased while he was young. She couldn't tell when the first wife left because she was living in Nakuru and as from 1974 to 1990's she was living in Tetu, away from the deceased. She couldn't therefore tell whether the applicant was ever married to the deceased during this time.

The 4th protester testified that the deceased was his uncle and that he took him in while he was still young. He knows of the applicant as having leased the deceased's land. At the moment he lives on the land together with the 1st protester. His mother was a single and she died while he was young. It was his evidence that he was now 51 years old and that he has four children, the youngest of whom is 25 years old. In answer to questions put to him during cross-examination, he testified that his mother is entitled to a share of her father's estate and he is, in turn, entitled to his mother's share.

On her part, the applicant testified that she got married to the deceased in 1979 and at the time, he did not have any other wife. The marriage was solemnised in accordance with Kikuyu customs. Out of their marriage they were blessed with two children. They had settled on Title No. Nyeri/Endarasha/410 for the entire period she lived with the deceased.

She was aware that as early as 1980 there was a dispute between her late husband and Joseph Ndumia Murage over the ownership of this parcel of land. Although the deceased lost the case in the High Court, he eventually prevailed in the Court of Appeal; this was in Court of Appeal case No. 149 of 1986. Following the Court of Appeal's decision, the deceased filed another case in the High Court being High Court Civil Case No. 95 of 1988 to have the land restored to his name; however, he died before the conclusion of the case.

Except for the 4th protester, she denied knowing any of the three others. The 4th protester lived at his grandfather's home and only came to the deceased's land after his death. On why she left the deceased, the applicant testified that she went back to her parents because the deceased used to physically abuse her. She started relating with the deceased even before she got married to him; in fact, the two children she went with to the deceased's home were born out of this prior relationship. She got two other children while living with the deceased. She lived with him for ten years before she left and went back to her parents whose home is in the same neighbourhood as her husband's. When she attempted to go back, she was chased away by the 1st protester and her children.

Her witness, Vincent Waweru Muguti, testified that he had known the applicant since 1964. He knew her as the deceased's wife and recalled the deceased having brought beer and money to the applicant's parents in acknowledgement of having married their daughter. He admitted, however, that the 1st protester was too married to the deceased. He testified also that the 4th protester had lived with the deceased until he came of age.

Robinson Warui testified that he was one of the people who took dowry to the applicant's parents. But he also testified that the deceased was married to one Wambui though she had left at the time the applicant was married. He was also aware that the deceased had married another wife after the applicant left; he identified the 1st protester as that person. He also confirmed that the deceased's first wife had a son with the deceased. The 4th protester, according to his evidence, also lived with the deceased.

A peep through the background of the deceased's acquisition of the property that now forms the substratum of his estate, the subject of this cause, should go a long way in clarifying the testimony of some of the witnesses and, perhaps, help to unravel answers to some of the questions that have emerged, the fundamental of which is whether there was any relationship between the deceased and the applicant, the 1st, 3rd and 4th protesters and if so, the nature and extent of that relationship. The answer to this question is in turn material to whether the applicant and these protesters are entitled to the inheritance they are claiming for.

The deceased acquired Title No. Nyeri/Endarasha/410 through the Settlement Fund Trustees Scheme. In order to clear the outstanding loan due to the fund and have the title registered in his name, he sought to sell 4 acres of the land to one Joseph Ndumia Murage for Kshs. 21,000/=. This was way back in 1980. It would appear that the contract between them fell through as a result of which the Joseph Ndumia Murage sued the deceased for, apparently, specific performance of the contract. This suit was filed in this Honourable Court as High Court Civil Suit No. 154 of 1980. The court found for the plaintiff and in execution of its decree against the deceased, Title No. Nyeri/Endarasha/410 was sub-divided into two parcels to wit, Title No. Nyeri/Endarasha/612 and Title No. Nyeri/Endarasha/613. The

deceased retained this latter parcel.

The deceased appealed against the decision of this court in the Court of Appeal as Civil Appeal No. 149 of 1996 (Nyeri); meanwhile, even the parcel he retained was put up for auction apparently to recover the costs he was condemned to pay. An application to set aside the sale was made by the deceased and among the documents filed in support of that application was an affidavit sworn by the applicant on 7 August 1984 and filed in court on 10 August of the same year. In that affidavit there were depositions which I find relevant to the present dispute; she swore, inter alia, as follows:

- 1. That I am the wife of the defendant Karura Munyororo*
- 2. That sometimes in the month of June, 1984 I learnt that my husband's shamba Nyeri/Endarasha/613 was to be sold by public auction.*
- 3. That I consulted my parents and friends and I was willing to pay for the whole land as I live in the land with my 6 children.*
- 4. That I instructed our advocate to inform M/s Mountain Auctioneers that we would pay and we deposited Kshs. 4,000/= with our advocate.*
- 5. That my advocate duly wrote to the auctioneers preparing to pay Kshs. 5,000/= as first instalment and the balance to be payable within two months.*
- 6. That I am informed by my advocate and verily believe the same to be true that by telephone conversation, the auctioneers decided to contact the advocate for the judgment creditor over the proposal.*
- 7. That further my advocate sent to the auctioneer a cheque for Kshs. 2,500/= but the auctioneer refused to accept it.*
- 8. That I am further informed by my advocate that the auctioneers demanded a deposit of Kshs. 8,000/= to stop the sale.*
- 9. That since the notice was short, I was not able to raise the amount of money demanded before the deadline of 30th June, 1984.*
- 10. That I and my husband are poor and helpless and we depend on this for livelihood.*
- 11. That I have six children all in school and there is no other land and I have developments in this land worth Kshs. 20,000/= while the land itself is about 5 acres.*
- 12. That I beg this court to set aside the sale and allow me to pay the whole amount of the costs.*
- 13. That that facts deponed (sic) herein are true to the best of my knowledge, belief and information.*
- 14. That I swear this affidavit in support of my application for the sale of 30th June, 1984 to be set aside.*

These rather relentless efforts to recover and keep the deceased's property are further illustrated by a letter dated 24th September, 1986 from his and the applicant's advocates to the court; in its pertinent part it reads as follows:

24th September, 86

Senior Deputy Registrar,

P.o. Box 30041,

NAIROBI

Dear sir,

RE: NYERI H.C.C.C NO. 154 OF 1980

JOSEPH N. MURAGE -VS-KARURU MUNYORORO

Kindly refer to an application dated 10.8.84 filed in Nairobi Civil Registry.

We deposited a sum of shs. 10,000/= with you as per receipt no: 325301 dated 5.9.84.

I have instructions to withdraw the said application and will be grateful if you will refund the money deposited with you.

Yours faithfully,

Signed

Boniface Njiru Esq.

c.c.

client:

I suppose the application to which this letter makes reference is the same application in support of which the applicant swore the affidavit of 8 August 1984.

The other development that is equally important and which is as much relevant to the present dispute is that the deceased's appeal against the decision of this honourable court was allowed and its judgment set aside; it was substituted with the order that the respondent's suit against the deceased be dismissed with costs.

Buoyed by the decision of the Court of Appeal, the deceased filed another suit against Joseph Ndumia Murage and one Richard Kibicho. This was High Court Civil Suit No. 95 of 1988 in which he prayed for, inter alia, an order for cancellation of the registers of Land Parcel Numbers Nyeri/Endarasha/612 and 613; he also prayed for restoration of the registration of Title No. Nyeri/Endarasha/410 in his name as the absolute proprietor.

Regrettably, the deceased died in May 1990 before the conclusion of this suit.

The relevance of that suit to the present dispute is that upon the deceased's death, the applicant stepped in as the plaintiff and picked up from where the deceased left. This, she did by a chamber summons dated 24 September 1990 in which she sought to be substituted in the deceased's place. The basis of her application for substitution was that she was his wife and that prior to his death, they had made joint efforts to recover and protect what they regarded as their family or matrimonial property. The record shows that the application was allowed by consent on 12 February 1991.

The same record also shows that an attempt was made by one Huria Kagoko, purporting to represent the 1st protester, to set aside the consent order vide a chamber summons dated 20 February 1991, disputing, in particular, the basis upon which the application was granted; the application did not, however, go far for it was dismissed on 3 June 1991. Thus, the applicant prosecuted the suit to its logical conclusion.

The case was determined on 29 January 2009 in the applicant's favour; this court effectively cancelled the registers in respect of Title Nos. Nyeri/Endarasha/612 and 613; in the same breath, the registration of Title No. Nyeri/Endarasha/410 was restored with the plaintiff as its absolute proprietor.

All these developments point to the fact that the applicant may not have been what one would describe as a journeyman in the deceased's life; rather, she had a more distinct role that cannot easily be ignored in the devolution of the deceased's estate.

The 1st protester's objection to the petition filed by the applicant would also suggest that she was not oblivious of the applicant's role in the deceased's life. In her objection she stated, inter alia;

“a) The petitioner was not living with the deceased person at the time of his death having deserted the deceased person 3 years before his death.”

The objection, as noted, was filed in court on 30 September 1991; the 1st protester's contention would suggest that as early as that time, she was aware that the applicant lived with the deceased because, taking her at her own word, the applicant could only have deserted the deceased if she had been living with him in the first place.

The 1st protester's witness' testimony was not very useful to the 1st protester's cause because the only time he was on the deceased's land was in 1988, the same year the applicant is said to have left and which is the same time that the 1st protester is alleged to have been married; he may be forgiven for recognising the 1st protester as the deceased's only wife because he was not aware that the applicant had been in the same home, in a same capacity, for the preceding 10 years.

Her second witness, Huria, who I suppose is the same person as Huria Kagoko Munyororo who attempted to set aside the order substituting the deceased with the applicant in Civil Suit No. 95 of 1988 was more candid in his evidence. It was his evidence that the deceased was known to have several wives. He contradicted the 1st protester's evidence that the applicant was never the deceased's wife; to the contrary, he was categorical that the applicant and the deceased lived together though she left prior to the deceased's death.

I am satisfied that from the evidence available, the applicant was the deceased's wife and as far as these proceedings are concerned, she fits the description of a wife as defined under section 3 (1) of the Law of Succession Act which defines a wife as follows:

“wife” includes a wife who is separated from her husband and the terms “husband” and “spouse”, “widow” and widower” shall have a corresponding meaning.”

As far as the 1st protestor is concerned, there is also evidence that she was the deceased's wife. Going by the evidence of Huria, she was the last of the deceased's wives and her own evidence that she married the deceased in 1988 two years before he died was never contradicted.

The applicant's own witness, Vincent Waweru Munguti, acknowledged that both the applicant and the 1st protestor to be the deceased's wives. Similarly, her other witness Robinson Warui, also testified that the 1st protestor was married to the deceased after the applicant left.

It was also his evidence that apart from the applicant and the 1st protestor, the deceased had another wife who left with a male child. He, however couldn't tell whether the child was the 3rd protestor.

Talking of the 3rd protestor he testified that he was the deceased's eldest son and that his mother was Veronica Wanjiru Maina. The deceased's sister, Jane Wangechi Gatiba, testified in support of his case that indeed he was the son of the deceased and that his mother, Veronica Wanjiru Maina was once married to the deceased. Apparently, the 3rd protestor must have been the male child that the applicant's witness Vincent Waweru Munguti made reference to in his testimony.

Wangechi also testified that she knew the 1st protestor to be the deceased's wife and in fact, she introduced her to him.

In the absence of any contrary evidence I am satisfied that the 3rd protestor was the deceased's son.

Turning to the 4th protestor's case, it was common ground that he was the deceased's nephew; the only dispute was on when he started living on the deceased's land. According to his own evidence, he had lived on that parcel of land throughout his life but the applicant and the 1st protestor were in agreement that he only came to live on the deceased's land after his death.

In his own words, his claim arises from the fact that his own mother was entitled to get inheritance from her father and therefore he was claiming what his mother would have been given.

In my humble estimation, I am satisfied that only three people are entitled to inherit the deceased's estate; and, these are the applicant, the 1st and the 3rd protestors.

The 2nd protestor's claim fails because he is neither a survivor of the deceased nor a beneficiary to his estate. His claim is based on a contract which, subject to proof of, inter alia, its veracity and legality, could only be enforced against the estate; in other words, the appropriate course should have been for the 2nd protestor to sue the estate either for specific performance of the contract or for restitution, amongst other prayers that he could possibly seek against the estate. I suppose it is in such suit that his claim could have properly been determined and not in this cause. Had he commenced such a suit, the court would no doubt invoke rule 41(3) of the Probate and Administration Rules and either stay the confirmation proceedings or set apart such a portion of the estate that would be sufficient to satisfy the protestor's claim in the event it succeeded.

As far as the 4th protestor's claim is concerned, all I can say is that it is misconceived on several fronts; first, although he is seeking what would have been his mother's share in his maternal grandfather's estate, this cause has nothing to do with that estate. The estate we are concerned with is that of his uncle. Secondly, I understood him to suggest that he could possibly have been the deceased's dependant. Here, I am not satisfied with his contention that he was brought up by his uncle and he probably depended on him at the time he died.

Even if he was a dependant as defined in section 29 of the Act the proper course for him would have been to make an application for a reasonable provision under section 26 of the Act; this section reads:

26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.

Assuming the 4th protestor was a dependant as known in law, he has not made an application for reasonable provision under this section of the law. In a nutshell there is no legal basis upon which the 4th protestor can benefit from the deceased's estate.

The distribution of the estate between the applicant and the protestor would ordinarily not pose any major difficulty because under section 3(1) of the Act they are both considered as the deceased's wives for this particular purpose. In which event Section 40 of the Act would come into play in the distribution of the estate as between them; that section reads as follows:

40. (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 intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

It is not in doubt that the applicant and the deceased were separated at the time of the deceased's death but according to section 3(1) of the

Act, she was still his wife, notwithstanding the separation. In these circumstances, the deceased would be considered as having married more than once under a system of law permitting polygamy and therefore the distribution of his estate should be subject to section 40(1) of the Act.

The Court of Appeal decision in **Eldoret Civil Appeal No. 66 of 2002, Mary Rono versus Jane Rono & William Rono (2005) eKLR** has always come in handy whenever the application of this provision of the law has been called into question.

In that case, the Court interpreted the underlying principle to be fairness and equity in the distribution of a deceased's estate and not necessarily equality amongst the houses where he was polygamous; nonetheless, equality as the basis of distribution of the estate may well be adopted as the appropriate scheme if it results in fairness and equity.

The applicant testified that she had four children with the deceased; she got two of these children while she was still living with her parents but the other two were born when she finally settled in marriage with the deceased. Her evidence in this regard was not displaced and I have no reason not to believe her.

The number of children the 1st protestor had with the deceased, on the other hand, is not that clear. At one point she stated these children to be two; she then talked of three and, finally, four children. But it has to be borne in mind that unlike the applicant who lived with the deceased for ten years, the 1st protestor lived with the deceased for two years; she was married in 1988 and the deceased died in 1990. Naturally, she could not have had four children with the deceased in a period of two years. At most she would only have had two children in that period of time.

Related to this fact, is the fact that the applicant left at the same time that the 1st respondent was married; this may have been a coincidence but it is also probable that the departure of the applicant had something to do with the entry of the 1st protestor into the deceased's home.

The available evidence shows that it is as a result of the combined efforts of the applicant and the deceased that the land that now comprises the deceased's estate was secured. They were in court fighting for this land the entire period they lived together. The applicant had to take up the baton and fight the legal battles when the deceased died. She successfully obtained judgment in her favour and were it not for the present dispute the entire parcel would have been registered in her name in execution of the judgment in Civil Suit No. 95 of 1988.

There is the question of the 3rd protestor whom I have held is the son of the deceased. I am satisfied with the evidence that his mother was the first one to be married by the deceased and out of this marriage he was born. His own evidence was that his mother was married elsewhere apparently after she left the deceased. Perhaps it is for this reason that she did not lay any claim to his estate.

As I understood the 3rd protestor, he claims part of the estate in his own right as the son of the deceased and not necessarily as a representative of one of the houses of the deceased. If this was the basis of his claim, it would falter in light of the fact that his mother remarried and therefore she certainly cannot be considered as the deceased's wife in these circumstances. It is simple logic that she could not possibly be married to two people at the same time.

It follows that any share to which the 3rd protestor is entitled cannot be considered a share due to a particular house. He does not represent a house for the simple reason that such a house does not exist. Perhaps, to understand this better, it is necessary to consider what a 'house' is as understood in the Act. It is defined in section 3(1) as follows:

“house” means a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife.

In the 3rd protestor's case, the component of 'a wife' is missing; for reasons I have given there is no wife and therefore there is no 'house' as such.

Taking all these factors into consideration I would distribute the deceased's estate comprising Title No. Nyeri/Endarasha/410 whose approximate area is 3.7ha or 9.1 acres as follows:

- i. Joyce Wambui Woto.....4 acres (subject to life interest)**
- ii. Faith Wanjugu Karuru.....4 acres (subject to life interest)**
- iii. Francis Nderitu Maina.....1.1 acres (absolutely)**

The grant made to the applicant is hereby confirmed in the foregoing terms. Parties will bear their respective costs. It is so ordered.

Dated, signed and delivered on this 9th day of April, 2020

Ngaah Jairus

JUDGE