



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO.130 OF 2017**

**IN THE MATTER OF THE ESTATE OF DOCTOR FRANCIS WARUINGI KANGETHE alias FRANCIS WARUINGI  
KANGETHE DECEASED**

**NICHOLAS KANGETHE.....PROTESTOR**

**JUDGMENT**

1. The Protestor in this case NICHOLAS KANGETHE WARUINGE filed an affidavit of Protest dated 9.10.2018 against the Summons for Confirmation dated 23.7.2018.
2. The Summons for Confirmation was filed by the Protestor's co-administrator SUSAN NJOKI WARUINGI seeking that the grant issued to the Protestor and her on 27.1.2018 be confirmed.
3. The Protestor has deposed in this affidavit of Protest that the Deceased had no capacity to marry the co-administrator as his second wife since he was not divorced from the 1<sup>st</sup> wife PAULINE NJOKI KANGETHE whom he married on 4.12.1971 at Holy Basilica Church.
4. Further that the Estate of the deceased is indebted to the 1<sup>st</sup> wife in the tune of Kshs.1,271,284 being unpaid maintenance after the deceased defaulted in payment of Ksh.1,000/- monthly maintenance which was ordered effect from 31.8.,1982 which order was not varied.
5. The Protestor also deposed that Susan Njoki Waruingi and her household already received several gifts intervivos as follows:
  - (i) LR NO. 13537/345 in Juja which comprises 30 units
  - (ii) KIAMBU/KANUNGA 2165 (0.5097 Ha)
  - (iii) ½ Share of KIAMBU MUNICIPALITY BLOCK II/119 comprising of about 10 units of two bedrooms each and 4 shops fetching a monthly income of about or over 200,000/-.
6. It was further deposed that the deceased never gifted the 1<sup>st</sup> wife with any gifts intervivos and that the deceased was the main contributor to the acquisition of the properties as SUSAN NJOKI was earning a salary of Ksh.1,070 when she got employed and the salary increased to 22,482 by the time she retired.
7. The Respondent filed a further Affidavit dated 28.1.2019 in response to the protest in which she deposed that she got married to the deceased under Kikuyu Customary Law and that under Section 3 (5) of the Law of Succession she is entitled to inherit notwithstanding that the deceased had a previous monogamous marriage.
8. The Respondent further deposed that the 1<sup>st</sup> wife Pauline Njoki did not enforce the maintenance order for over 30 years while the deceased was still alive and the said maintenance order has been conjured as an afterthought in an effort to forestall the process of administration of the estate.
9. The Respondent also deposed that the properties purportedly gifted to her were jointly acquired by herself together with the deceased and they do not form part of the estate of the deceased.
10. On the issue of the Bank Accounts, the Respondent deposed that the said Bank Accounts were held jointly by the deceased and herself and upon his demise, the ownership of the accounts devolved to her under principal of survivorship. She rejected the proposed mode of distribution by the protestor and argued the court to adopt her mode of distribution.

11. The case proceeded by viva voce evidence and the parties filed written submissions which I have duly considered. I find that it is not in dispute that the deceased got married to his first wife who is the mother of the protestor on 4.12.1971 at Holy Family Basilica under the marriage Act Cap 150 Laws of Kenya.

12. It is also not in dispute that the deceased separated with the 1<sup>st</sup> wife in 1982 and on 13.8.1982, the Court gave a separation and maintenance order of Ksh.1,000 per month for the 1<sup>st</sup> wife and her three children namely:

(i) NICHOLAS KANGETHE WARUINGI

(ii) RITA WANGUI

(iii) ANDREW MWAURA KANGETHE

13. I also find that there is no dispute that the deceased subsequently started cohabiting with the Respondent until his demise and that on 29.3.1983, they got twins namely:

1. PATRICK KANGETHE WARUINGE

2. ANTONY KIBIGO WARUINGE

14. The deceased died on 28.11. 2016 and the Protestor and the Respondent were issued with grant of letters of administration on 27.1.2018. The Respondent filed the summons for confirmation on 23.7.2018 to which the protestor filed the Affidavit of Protest dated 9.10.2018.

15. The issues for determination in this case are as follows:

(i) Whether the Respondent is a beneficiary of the estate of the deceased.

(ii) Whether properties which were transferred to the Respondent by the Deceased as gifts *intervivos* form part of the estate of the deceased.

(iii) How should the properties be distributed?

16. On the issue as to whether to Respondent is a beneficiary of the estate of the deceased, I find that at the time the Respondent and the deceased started cohabiting the deceased had parted way with his 1st wife who is the mother of the protestor.

17. The deceased and the 1<sup>st</sup> wife got an order of Judicial separation and maintenance dated 31.8.1982.

18. There is evidence that on 29.3.1983, the Respondent and the deceased got twins namely, Patrick Kangethe Waruingi and Anthony Kibigo Waruingi.

19. I find that there is no evidence that the deceased divorced the 1<sup>st</sup> wife but it is not in dispute that he cohabited with the Respondent until his demise on 28.11.2016 and that the two got children and acquired property together and they were for all intents and purposes regarded as husband and wife.

20. The Respondent said the deceased married her under kikuyu customary law and I find that the long period of cohabitation, the undisputed fact that they got and raised children together and acquired property raises a presumption of marriage.

21. I find that under **section 3 (5)** of the Law of Succession Act, the Respondent is a beneficiary of the estate of the Deceased. The said section states as follows;

*(5) Notwithstanding the provisions of any other 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 this Act.*

22. In the case of **Irene Njeri Macharia vs. Margaret Wairimu Njomo & Another [1996] eKLR, Omolo, Tunoi, & Bosire JJ A** held that:

*“Our understanding of section 3(5) of the Act is that it was 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 undissolved at 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 recognizes polygamy. Josephine was, nevertheless, a wife for the purposes of the Law of Succession Act, and in particular sections 29 and 40 of the Act.”*

23. I therefore find that although the deceased had not divorced his 1<sup>st</sup> wife at the time he started cohabiting with the Respondent, the law recognizes her as a beneficiary by virtue of **Section 3(5)** of the Law of Succession Act.

24. On the issue as to whether properties which had been transferred to the Respondent *intervivos* form part of the deceased's estate, I find that the deceased was at liberty to transfer his properties while still alive. Such properties do not form part of the estate as ownership had already passed before demise of the deceased.

25. Gifts *intervivos* must be established by evidence. See the case **of In re Estate of The Late Gedion Manthi Nzioka (Deceased)[2015] eKLR** where it was held that:

*“For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 32 to 51.”*

26. In **Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67** it is stated as follows with respect to incomplete gifts:

*“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”*

27. On the issue as to who are the beneficiaries of the estate, I find that the 1<sup>st</sup> wife and her three children and also the 2<sup>nd</sup> wife and her two children comprise the estate of the deceased. The said beneficiaries are as follows:

**1<sup>st</sup> Wife – Pauline Njoki**

**Nicholas Waruingi Kangethe-son**

**Rita Wangui Waruingi- Daughter**

**Andrew Mwaura Waruingi – son**

**2<sup>nd</sup> Wife-Susan Njoki Waruingi**

**Patrick Kangethe Waruingi-son**

**Anthony Kibigo Waruingi.- son**

28. On the issue as to how the estate should be distributed amongst the beneficiaries section 40 of the Law of Succession Act provides that the estate be shared equally amongst the houses with the wives forming a unit.

29. **Section 40** of the Law of Succession Act deals with the issue of polygamous families and stipulates as follows:-

**Section 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 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.”*

**Section 40 (2):-**

*“The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in sections 35 to 38.”*

30. In the case of **FRANCIS MWANGI THIONG'O and 4 OTHERS -V- JOSEPH MWANGI THIONGO (2015) eKLR** it was stated:-

*“Section 40 aforesaid states that it is any wife surviving the deceased that would be considered as an additional unit in the number of children.....That ground of appeal therefore succeeds as the judge should have found that the first house had four units and the second comprising the respondents, had five units, the land should have been subdivided in the first instance along the ratio of 4:5.”*

31. According to Maraga, J (as he then was) **in Benson Njoroge Gitau vs. Peter Mwangi Gitau Nakuru HCSC No. 330 of 2003:**

*“Section 40(1) of the Law of Succession Act provides that 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, and also adding any wife surviving him as an additional unit to the number of children...Taking all circumstances into consideration, it is important that when the subdivision is effected over the main property, the portions occupied by respective beneficiaries should revert to them. The developed portion of the plot should also be valued and shared equally among the beneficiaries, thus it may be easier to sell the plot and share the proceeds. But if the plot is divisible the beneficiaries can group themselves in a way that they can be registered as tenants in common...Under sections 42 of the Law of Succession Act, previous benefits should be brought into account during distribution.”*

32. According to Musinga, J (as he then was) in **In the Matter of the Estate of Silvester Ouko Gichana Kisii HCSC No. 3 of 2004:**

*“Section 40(1) of the Law of Succession Act states that 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...A house is defined as a family unit comprising a wife, whether alive or dead at the death of the husband, and the children of that wife...In applying the provisions of section 40 of the Law of Succession Act, it was not intended that there must be equality between houses and neither was it the intention of Parliament that each child must receive the same or equal portion...The court may have to consider for example, the interests of the young beneficiary who is still being maintained or in need of more resources because of peculiar or specific circumstances. That notwithstanding, the court must try to distribute the deceased’s estate as equitably as possible. In this case the petitioner and the objectors have lived separately for over thirty years. The two parcels of land are more or less the same acreage. It appears that the intention of the deceased was that they stay where they are...In distributing the estate of a deceased person under the provisions of the Law of Succession Act, no distinction should be made between male and female children...In this case, all the children of the deceased, sons and daughters, whether married or not, are entitled to a share of the deceased’s estate. If any of the married daughters decide to forego their lawful entitlement, it will be up to them to so choose.”*

33. Section 29 of the Law of Succession Act provides:

*“For the purposes of this Part, “dependant” means –*

*(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, grandparents, 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;*

34. The protest dated 9.10.2018 be and is hereby dismissed and this court directs as follows:

**(i) THAT the Respondent SUSAN NJOKI WARUINGI is a beneficiary of the estate of the deceased by dint of the Section 3(5) of the Law of Succession Act notwithstanding that the deceased’s marriage to Pauline Njoki had not been dissolved.**

**(ii) THAT the properties registered in the name of the Respondent are not available for distribution. It is the properties which are in the name of the deceased that are available for distribution.**

**(iii) THAT the beneficiaries of the estate are as follows:**

**1<sup>st</sup> Wife – Pauline Njoki**

**Nicholas Waruingi Kangethe-son**

**Rita Wangui Waruingi- Daughter**

**Andrew Mwaura Waruingi – son**

**2<sup>nd</sup> Wife-Susan Njoki Waruingi**

**Patrick Kangethe Waruingi-son**

**Anthony Kibigo Waruingi.- son**

**(iv) THAT the estate should be distributed equally amongst the beneficiaries with each wife forming an extra unit.**

**(v) THAT this being a family matter, each party to bear its own costs.**

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 18<sup>TH</sup> DAY OF OCTOBER, 2019**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.**