



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 25 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE JOSPHAT IRUNGU KANYI DCD

MARGARET WAMBUI IRUNGU.....PETITIONER

V E R S U S

AGNES WANJIRU KANYIPROTESTOR

JUDGMENT

1. This matter relates to the estate of Josphat Irungu Kanyi (deceased). A grant of Letters of Administration was issued to Margaret Wambui Irungu.

2. A protest against the confirmation of grant was filed by Agnes Wanjiru Kanyi on 24/6/15 claiming that she is the wife of the deceased. She filed an amended affidavit on 12/7/2016 where she contends that the petitioner has distributed the estate of the deceased without her knowledge and she personally acquired the property(sic) with the deceased. She proposes that Land parcel No. Gichugu/Settlement Scheme 2469 should be given to her as well as Land parcel No. Gichugu/Settlement Scheme 2470 and Gichugu/Settlement Scheme 727.

3. She depones that she acquired the properties with her late husband before he married 2nd wife Margaret Wambui Irungu.

4. The petitioner listed the following as beneficiaries:-

- a) Agnes Wanjiru Kanyi – widow
- b) David Muthukia Irungu - son
- c) Annrose Wanjira Irungu – daughter
- d) Margaret Wambui Irungu – widow
- e) Jane Wanjiru Irungu – daughter
- f) Keziah Mukami Kanyi – daughter
- g) Nancy Wangeci Mwangi – daughter
- h) Sarah Wanjiku Irungu - daughter

5. She proposed that the deceased's estates be determined as follows;

A) Gichugu/Settlement Scheme/2469 – 0.725 ha jointly

Margaret Wambui Irungu

Jane Wanjiru Irungu

Keziah Mukami Kanyi

Nancy Wangeci Mwangi

B) Gichugu/Settlement Scheme/2470 – 0.725 ha jointly

Agnes Wanjiru Kanyi

David Muthukia Irungu

Annrose Wanjira Irungu

Sarah Wanjiku Irungu

C) Gichugu/Settlement Scheme/727 – equal shares

Margaret Wambui Irungu

Agnes Wanjiru Kanyi

6. The protestors evidence is that she got married to the deceased in 1975 and she supported the fact with the production of a marriage certificate and they acquired land Parcels No. Gichugu/Settlement Scheme/776 and Gichugu/Settlement Scheme/727. They built a permanent house on land parcel No. 727 where she lives to date and built rental houses on plot No. 776 and another plot at Gathoge. After they completed the work the deceased married the petitioner.

7. The protestor in her evidence in court stated that she is a teacher by profession but has now retired and is doing farming. The deceased was also a teacher.

8. The deceased sub-divided land parcel No. 776 into two parts. The deceased passed away in 2012. Later in 2015 she was served with court documents and she did not know Margaret Wambui or who had appointed her as the Administrator. The deceased name was given as Josphat Kanyi.

9. The petitioner testified that she had been with the deceased since 1986 but started living with him from 1996. The petitioner testified that the deceased had stated how he wished the properties should be distributed.

10. I have considered the averments in the affidavits of the petitioner and the protestor. I have also considered the evidence which was adduced in court.

11. The issue which arises for determination is the **distribution of the Estate**. The protestor has stated that she contributed to the purchase of the land forming part of the estate of the deceased. It is her testimony that the properties listed above were bought before the deceased married the petitioner. The petitioner has not disputed this but only testified that the land parcels belong to the deceased.

12. I have considered these arguments. What arises is the distribution of the estate of the deceased under **Section 40 of the Law of Succession Act**. The question is whether the court has to consider blatantly that the properties belong to the deceased in which case it has no option to but to apply **Section 40 of the Act** or whether the court has to consider the contribution by the protestor and grant her a larger share of the estate of the deceased. This issue has been considered in various decision by the High Court with a clear line of consensus that they are unfair to the first wife who may have been married for years and not only witnessed the properties being acquired but contributed to their acquisition before a 2nd or 3rd wives comes in and becomes entitled to equal share. Justice Koome as she then was, in **Succession Cause No. 1033/1996 In the Matter of the Estate of Mwangi Gitire – Deceased** while appreciating that the **Section 40 of the Act** applies to estate of deceased persons who were polygamous acknowledged the unfairness of the mode of distribution and stated as follows:-

“Perhaps it is the high time, the commission charged with the responsibility of law reform addressed the issue of the inequality raised under Section 40 of Cap 160. The 1st widow’s entitlement vis vis the 2nd widow or subsequent widow who perhaps come into a marriage much later to find that the 1st widow has worked tirelessly and sometimes denying herself tremendous comfort to enable her husband create and accumulate wealth. The 1st widow is then relegated by virtue of Section 40 of the Law of Succession to the same position as the last born child of the 2nd or subsequent widows. The widow is supposed to be considered as a unit alongside the children.

In this regard the last born child of the subsequent widow who will have contributed nothing is elevated in law because he will have notariy (sic) absolute rights but will be entitled to an equal share with the 1st widow. The 1st widow is only entitled to a life interest and after the life interest the property devolves to her children in equal shares absolutely. I agree with counsel for the protester 1st widow that this state of affairs bleeds inequalities and inequities in our law and ought to be addressed urgently to enable our courts dispense justice that meets the provisions of the Constitution of Kenya and give due regard to the principles of nondiscrimination on the basis of sex which are also the principles of nondiscrimination provided for under the International Conventions especially the Convention Against all forms of Discrimination against women (C.E.D.A.W.) which Kenya has signed and ratified. If the principles laid down in the International conventions were to be applied, the 1st widow would get a share of the property acquired during her marriage to the deceased, leaving the other half share to be shared by all the deceased heirs. If the distribution is of a polygamous intestate, each widow would get a share of what she contributed to.”

13. Makau J expressed similar sentiments in his decision in Succession Cause No. 110 of 2010- In The Matter of The Estate of Samwel

Miriti (Deceased) M M M'M vs A I M which Counsel for the 2nd petitioner has referred this court to. The question before the court was whether the estate of the deceased should be distributed in accordance with section 40 of the Law of Succession Act, or whether the first widow should get a larger share. The court expressed the following view:

“In the instant application the 1st petitioner is opposed to equal distribution while the interested party/2nd petitioner seeks and favours distribution according to Section 40 of the Law of Succession Act. This court is bound by Section 40 of the Law of Succession Act and has no discretion. The section clearly provides that the estate be divided between the houses taking into account the number of children in each house. It is fortunate that the two houses have equal number of children. However this court shall not shut its eyes to unfairness meted on a deceased’s widows who are not allowed to take an extra share and whose efforts in acquisition of the properties are ignored and treated merely like children of the deceased notwithstanding having been equal partners with the deceased. It is further unfortunate when the first wife who sacrificed a lot of her energy and who participated in the acquisition of the greater part of the deceased estate and even in situation where the properties are solely acquired by the first wife but registered in husbands have ended up being shared equally among all the wives not taking into account of less contribution by the younger wife who is married after acquisition of the bulk of the properties if not all the estate and who has contributed very little or nothing towards the acquisition of the estate. It is the court’s hope that the unfairness to widows, and discrimination on first wife as reflected under Section 40 of the Law of Succession Act will soon be corrected so that the distribution of the deceased estate takes into account the contribution of the first wife and that of the 2nd wife or any other wife and the shares of the wife or wives is calculated differently from that of children who are treated as the same as their mother. (Emphasis added).”

14. The issue also came up in **Probate & Administration Cause No. 244/2002, High Court Eldoret Re- Estate of Ephantus Githatu Waithaka. (deceased) Ester Wanjiru Kiarie –v- Mary Wanjiru Githatu**. The contention by the objector was that the bulk of the properties comprising the estate of the deceased were acquired between 1968 and 1984 before deceased married the deceased and she was therefore entitled to the half share and the balance be shared equally. The petitioner claimed that they were both unemployed house wives and the estate should be provided under **Section 40 of the Act**. The court stated that the issue to be considered was whether the objector would get half share of what was acquired before 1984 or whether the estate should be distributed as provided under **Section 40 of the Act**. The Judge was of the view that considering the Judgment in **Rono –v- Rono Section 40** does not take away courts discretion to distribute the estate of the deceased fairly.

In the words of Omollo J A in Rono vs Rono:

“I had the advantage of reading in draft form the judgment prepared by Waki, JA, and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned judge to be laying down any principle of law that the Law of Succession Act, Cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr. Gicheru. I can find no such provision in the Act”. (Emphasis added).

14. Justice Kimondo after considering the evidence by both parties in **Re-Estate of Ephantus Githatu Waithaka** stated:-

“Granted that evidence, it would lead to serious injustice to apply section 40 blindly in this case. The section does not completely tie the hands of the court. See Rono v Rono & another [2005] 1 KLR 538, Rael Vulekani Musi v Rachael Edagaye Akola, Eldoret, High Court P&A 5 of 2013 [2016] eKLR. I am also fortified by the decision of Koome J (as she then was) in Re Mwangi Giture (Deceased) High Court at Nairobi, Succession Cause 1033 of 1996 [2004] eKLR cited by Mr. Momanyi, learned counsel for the petitioner. The learned judge lamented that section 40 of the Act led to inequality by relegating the 1st widow to the same position as the youngest child of the subsequent widows....” (Emphasis added)

“I agree with those sentiments. The judge however felt her hands were tied by the Act and called for law reform. But Rawal J (as she then was) in Dorcas Wangari Macharia v KCB & 2 others, Nairobi, High Court, Civil Case 18 of 2003 (O.S) (unreported) had a more progressive approach. She held as follows

“If a widow is an owner as a tenant in common with the deceased or a joint tenant along with the deceased in respect of a property, her rights and liabilities in law over the said property shall survive even after the demise of her husband. This position should be recognized and cannot be ignored as per the law and principles of equity”.

16. The Judge eventually proceeded to hold that the objector was entitled to half a share of the estate which was acquired before the 2nd wife got married to the deceased.

17. Again this issue was considered by Justice Mumbi Ngugi **In Re-estate of the Late George Cheriro Chepkosiom (deceased) 2017 eKLR**. The question which the Judge had to determine was whether the petitioner should get a larger share of the Estate. In the case, the objector who was the 1st wife of the deceased protested at the mode of distribution of the estate proposed by her co-petitioner who was her co-wife. 1st petitioner argued that the land parcel comprising the estate of the deceased was acquired jointly by herself and the deceased and she substantially contributed towards the payment of the loan until completion in 1976 when the land was registered in the name of the deceased. The 2nd petitioner got married in 1976 and she came to the picture long after the land had been acquired and the loan fully paid off. It was the petitioner’s contention that she should get 10 acres in recognition of her substantial contribution towards the acquisition of the land.

18. Justice Mumbi Ngugi in holding that the demand by the 1st petitioner was fair and reasonable demand stated as follows:-

“I agree in substance with the reasoning and final decision of my brother Kimondo J in the Estate of Githatu Waitthaka decision. I am of the view that the unfairness and discrimination that their Ladyship and Lordship, Justices Koome and Makau J decried in their respective judgments, can only be properly addressed by considering the contribution of the widow to the acquisition of property, and taking this contribution into account when determining what she is entitled to in a succession cause to the estate of a polygamous deceased person who dies intestate.

33. To equate the widow to children, or the first widow to widows who enter the home decades later, who may be the age of the first widow’s children and made no contribution to the acquisition of the estate registered in the name of the deceased, is to perpetrate an injustice against women that cannot be justified under any circumstances. For the courts to perpetuate the perpetration of the injustice on the basis of section 40 of the Law of Succession Act is to abdicate their constitutional responsibility to do justice. The principle of equality and non-discrimination is at the core of the sovereign law of this land, the Constitution. For a court, therefore, to apply any law in a manner that is discriminatory on the basis of sex, or any of the prohibited grounds of discrimination, or to apply a provision of the law that is discriminatory, as section 40 admittedly is, or to consider itself bound by such discriminatory law, is to fail to meet the constitutional demands imposed on it.”

19. I am inclined to agree with my Brother and Sister’s Judges Kimondo, Koome (as she then was), Mumbi Ngugi and Makau in the cases cited above that the distribution under **Section 40 of the Act** is unfair and discriminatory. For failing to consider the contribution by the 1st wife who has been married for many years and contributed to the acquisition of the property only to be equated with the children including those of the 2nd or 3rd wife and the wives who have come to the property long after they were acquired. For the court to apply **Section 40 Act** strictly and fail to address the cry for justice by windows who have contributed to acquisition without giving an extra-share in recognition of their contribution is to perpetrate an injustice from the seat of justice on the basis of **Section 40 of the Act**. Hallmark of decision making is the exercise of unfettered discretion. The discretion of the court must be exercised fairly. As Justice Ngugi stated courts should not abdicate their constitutional duty to do justice. I am of the view by considering the contribution by the 1st wife in the distribution of the estate of a deceased who was polygamous the court would be able to address the unfairness, injustice and discrimination which would result from applying **Section 40 of the Act** strictly.

20. A lot has been stated in the above cited cases to show that **Section 40 of the Act** is unfair to windows who are not supposed to get an extra share and are equated to children without giving any consideration to their contribution. I echo the sentiments by my brothers and sisters Judges that the **Act** should soon be corrected so that the distribution of the estate of the deceased takes into consideration the contribution of the window(s) so that their shares are considered differently from that of the children. Before that happens there is no harm in the court exercising discretion while considering the contribution by the window depending on the circumstances of each case.

21. In this case the petitioner filed the petition without even involving the protestor who was a lawfully wedded wife of the deceased. The protestor ought to have been a co-petitioner.

22. The protestor testified that she got married to the deceased in 1975 and they bought land parcels No. 727 & 726. The petitioner was not candid as to when she got married. What she stated was that she stated that she was with him from 1986 but she came to live at Murindiko in 1996. This means she came into the union 21 years after the protestor and the deceased married. The protestor was a Teacher and there can be no doubt that she contributed into the acquisition of the two properties. She is entitled to a bigger share of the estate. She has lived on Land Parcel No. Gichugu/Settlement Scheme/727 and is where her matrimonial home is. I find that it is fair and reasonable that she gets the whole share of this property Gichugu/Settlement Scheme/727.

23. It would seem land parcel No. Gichugu/Settlement Scheme was sub-divided and a certificate of official search and title deed shows that the deceased is registered on Land Parcel No. Gichugu/Settlement Scheme/2470. While Parcel No. 2469 is in the name of the petitioner. The land parcel is not in the name of deceased. It should go to the petitioner Margaret Wambui Kanyi under **Section 42 of the Law of Succession Act** which provides that:-

“Where -

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

24. **Parcel No. Gichugu/Settlement Scheme/2470** be shared equally among all the beneficiaries listed at Para 2 of the affidavit of the petitioner in support of application for confirmation of grant. The grant be confirmed on those terms. The protestor shall be joined in as co-petitioner/administratrix together with the petitioner.

Each party will bear its own costs.

Dated at Kerugoya this 18th Day of October, 2019.

L. W. GITARI

JUDGE

Read out in open court

Petitioner - Margaret Wamboi - Present

Protestor - Absent - Served i.e Agnes Wanjiku Kanyi

Court clerk - Gichia

L. W. GITARI

JUDGE