



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 82 OF 2002**

**IN THE MATTER OF THE ESTATE OF F K N (DECEASED)**

**M W K.....PETITIONER/RESPONDENT**

**VERSUS**

**M W K.....OBJECTOR/APPLICANT**

**JUDGMENT**

**INTRODUCTION**

The deceased to whom the estate relates to died on 7<sup>th</sup> December, 2001. Representation to his estate was sought through a Petition filed in court on 15<sup>th</sup> January, 2002 by M W K (hereinafter '**Petitioner**') being the widow of the deceased. She named the survivors of the deceased as follows:-

- i) J H R K
- ii) H W K
- iii) G G K
- iv) S N K
- v) J K K

Through her Petition she named the following assets and liabilities forming the estate of the deceased:-

- a) Karai/Karai/[particulars withheld]
- b) Karai/Lusigetti/T. [particulars withheld]
- c) Karai/Karai/[particulars withheld]
- d) Karai/Kamangu/[particulars withheld]
- e) Karai/Lusegetti/[particulars withheld]
- f) Karai/Lusegetti/[particulars withheld]
- g) Dagoretti/Kinoo/[particulars withheld]
- h) Dagoretti/Ruthimitu/[particulars withheld]
- i) Kirinyaga Road NR L.R. [particulars withheld]

j) [particulars withheld] PICK-UP 504

k) M/BENZ [particulars withheld]

l) Range Rover [particulars withheld]

m) Barclays Bank of Kenya Nairobi Account No. [particulars withheld]

## **LIABILITIES**

LOAN – 500,000/-

An objection to application for grant was lodged in this court on 25<sup>th</sup> February 2002 by M W K (hereinafter '**Objector**'). Her grounds of objection are as follows:-

a) That F K N (now deceased) was lawfully married to the objector in 1982.

b) That the said marriage had four issues namely;

S C born in 1986

G G born in 1991

R N K born in 1984

J W K born in 2002

c) That the Petitioner has failed to acknowledge the objector and the said issues as surviving dependants of the F K N (deceased) when she petitioned this Honourable Court for the grant of representation.

d) That the petitioner secretly petitioned this Honourable Court for the grant of representation in respect of the above named estate without the consent or knowledge of the objector.

e) That the objector is equally entitled to petition this Honourable Court for a grant of representation.

On 15<sup>th</sup> March 2002 the objector filed an answer to Petition for a grant, Petition by way of cross application for a grant and affidavit in support of petition of letters of administration intestate. In her affidavit in support of Petition of Letters of administration intestate she named the following as the survivors of the deceased:-

i) M W K widow 50 years

ii) M W K widow years

iii) J R K son 34 years

iv) H W K daughter 32 years

v) G K son 31 years

vi) S N K 29 years

vii) J N K son 27 years

viii) R N K son 17 years

ix) S C K son 15 years

x) G G K son 10 years

xi) J W K daughter 1<sup>1</sup>/<sub>2</sub> months

She further listed the assets and liabilities of the deceased as follows:-

a) Land Title Number Karai/Karai/[particulars withheld]

- b) Land Title Number Karai/Lusigeti/[particulars withheld]
- c) Land Title Number Karai/Kamangu/Township/[particulars withheld]
- d) Land Title Number Dagoretti/Kinoo/[particulars withheld]
- e) Land Title Number Kara/Karai/[particulars withheld]
- f) Land Title Number Karai/Lusigeti/[particulars withheld]
- g) Land Title Number Dagoretti/Ruthimutu/[particulars withheld]
- h) L.R. No. [particulars withheld]
- i) Motor vehicle Reg. No. [particulars withheld]
- j) Motor vehicle Reg. No. [particulars withheld]
- k) Motor vehicle Reg. No. [particulars withheld]
- l) Barclays Bank of Kenya Ltd Account No. [particulars withheld]

#### **LIABILITIES**

None.

On 26<sup>th</sup> March 2004 L. J M. Koome, ordered that letters of administration intestate be issued jointly to M W K and M W K. Further on 2<sup>nd</sup> September 2003 the Petitioner filed a Chamber Summons application for orders:-

- (a) ...
- (b) ...
- (c) That the objector through herself, servants, agents, employees or anybody claiming through her be prohibited by an order of injunction from trespassing into, entering or in any other manner intermeddling with the deceased's properties.
- (d) That the objector do show cause why she should not be jailed for intermeddling with the deceased estate on 30<sup>th</sup> August 2003.
- (e) ....

On 16<sup>th</sup> September 2003 the Objector filed an application for the orders-

- i) That the following assets, which were owned by Mr. F K N (deceased), be deemed as part of the estate.
  - (a) Shares in Renguti Gikambura Hotel & Company Limited,
  - (b) Rental houses in Kibera
  - (c) Two dairy Cattle
- ii) That the petitioner do account for the income she has so far received from the estate.
- iii) That the petitioner be compelled to deposit the income so received in an interest earning account.
- iv) That Chrisca Real Estates be appointed the managing agents of the estate.
- v) That costs of this application be awarded *to the Objector*.

The objector based her application on the following grounds:-

- a) Mr. F K owned shares in Renguti Gikambura Hotel & Company Limited which company is actively trading and being managed by the petitioner, the Kibera properties and two dairy cattle.

- b) That the petitioner fraudulently failed to disclose the deceased's interest in the above aforesaid properties.
- c) That the deceased has been collecting rent from the said properties for her own use.
- d) That H G N is a co-owner of L.R. No. [particulars withheld] and has not been receiving his shares of the rents.
- e) That succession to property is governed and should be in accordance with the Law of Succession Act (Cap 160).

On 26<sup>th</sup> March 2004 L.J. Koome, delivered her judgement where she gave the following orders;

- i) That the objector namely M W K is the widow of the deceased and her children are the deceased's children.***
- ii) That the deceased was married under Kikuyu customary law to the petitioner and the objector.***
- iii) That letters of administration herein be issued jointly to M W K and M W K both of whom with their children are survivors and beneficiaries of the deceased estate.***
- iv) That each party to bear its costs.***

The Petitioner appealed the decision of the High Court by Hon L.J. Koome of 26<sup>th</sup> March 2004 to the **Court of Appeal Civil Appeal 23 of 2008** and by the Court's decision of 30<sup>th</sup> May 2014 upheld the decision of the High Court.

#### **HEARING:**

#### **OBJECTOR'S CASE**

The Objector, M W K (PW1); testified before Hon Justice A. Muchelule that she was married to the deceased in 1982. They had 4 children, R N K, S C K G G K and J W K who was born after the deceased's death. With regard to her daughter's birth; she produced birth certificate as Exhibit 1 in Court.

With regard to deceased's estate, she stated that the deceased was owner of Renguti/Gikambura (LR [particulars withheld]) the documents were in the safe, after the deceased died, the Petitioner took these documents. She produced Memorandum from Nairobi City Council on rates arrears addressed to the deceased. For 10 years the Petitioner collected rent from the property. Gikambura property consists of Bar, Hotel and rental rooms. The Children of the deceased and Petitioner are not Directors of the Company.

The Objector said that the Kibera houses belonged to the deceased. The rent was paid to the deceased and each of them were allocated houses to collect rent. She knew the Plots where dwelling houses are built and she accompanied the Petitioner to the site when she was redeveloping the houses since the deceased died, she did not collect rent due to hostility from the 1<sup>st</sup> house. They exclusively collect all rents.

In cross examination, she stated that though at the time the deceased died she was at her parents' home, they had not separated with the deceased and she left so that the deceased could build her, her own home. She denied that she is now living with another man in Kamulu and stated she bought land and lives there.

J K N (PW2) testified that the Petitioner and Objector are widows of his late brother K N. The deceased built the properties in Laini Saba, Kibera in 1980s. He appointed him Estate Agent from 1990- 1995 and he collected rent and took to the deceased at Renguti/Gikambura. The properties were bought and developed during the existence of marriages of both widows of the deceased. The houses are built on Government Land and therefore no title documents are issued. In 2015, these houses were burnt and the Petitioner rebuilt with 1 storey building where she collects rent.

In cross examination, he stated the properties belonged to the deceased but the land belonged to Government. At the time he ran a Bar and collected rent from about 60 tenants and paid the money to the deceased.

On being recalled at Objector's Counsel's request, PW2 stated with regard to Renguti/Gikambura property, the property was owned by 3 parties; the deceased and 2 co owners whom they fell out and resulted in a case in Court. The Company belonged to the deceased, he gave his children/sons shares but they were not paid money from the Company. From the time of deceased's death, the Petitioner moved from her home in Kinoo to the Renguti/Gikambura property which she runs with J K K their last born child.

PW2 stated the Petitioner, 1<sup>st</sup> widow left the deceased and while away, the deceased married the Objector, 2<sup>nd</sup> widow of the deceased. The Petitioner later came back home. The deceased at the time lived at the Renguti/Gikambura property. After the deceased died, the Objector gave birth to her daughter Joyce Wanjiru. She left home and went to her home and she was away during the deceased's illness and she came back after deceased's death.

(PW3) G K N, step brother of the deceased stated that the deceased was allocated land in 1970s and he built the houses in Kibera in 1980s. At this time he had married both wives. They stayed at Kinoo and were farming and kept cows and chicken.

PW3 was recalled at the Objector's Counsel's request and he stated that Renguti/Gikambura was/is a hotel, bar and has lodging rooms and is

situated at Kirinyaga/Grogan Road. The property belonged to the deceased and on many occasions, he spent time with him in the hotel. As his eldest brother, the deceased was younger brother and he consulted him and told him of his decisions.

After the deceased's death, the 1<sup>st</sup> widow, Petitioner took over the business and they had to remove the 2<sup>nd</sup> wife/widow. They tried to resolve the family dispute at home, but the Petitioner refused to attend or participate in the meeting.

In cross examination, PW3 stated that G G K is son to deceased and the 1<sup>st</sup> wife/widow. He does not participate in running of the Company /Renguti/Gikambura property although he was sent by deceased and ran the said Company and property during his lifetime. He confirmed the property belonged to deceased and 2 other Directors but he did not know what happened, the property remained with deceased as the only Director and his sons.

## **PETITIONER'S CASE**

M W K (DW1) is 1<sup>st</sup> widow of the deceased; she stated on the Laini Saba Kibera Plots as follows; she was allocated the Plot in 1973 by Chief Kimani Kariuki and District Officer; Waiteka and she paid the Chief Ksh 200/- and D.O. Ksh 500/-. There were 54 houses and she built them. Later, they burnt down as the owner of the Plot she rebuilt them as follows;

- a) Block A- which had 19 houses and they were burnt down and she built 1 storey building with 30 rooms.
- b) Block B- There were 12 houses which she built.
- c) Block C- There are 20 houses she built.

She referred to the letter from the Chief dated 15<sup>th</sup> January 2003. It is not true that the deceased owned the Kibera Plots as no documents were produced to prove this fact.

The Objector (PW1) and J K (PW2) went to Laini Saba Kibera and claimed rent to be paid to them and the tenants refused and paid to her. She reported to Police and when they came, the Objector and PW2 left. She informed her advocate who wrote letters to the Objector's advocate as shown at Pg 113-118 of Petitioner's bundle.

With Regard to Renguti/Gikambura property she stated that her husband was employed by Mr. Shah who owned the said property. He wanted to sell and relocate to India, he offered the deceased the opportunity to purchase it, they were poor then, the deceased approached her father who refused to give him his title deed to charge it in the bank and get a loan. The deceased approached one Nduta Kamaru and got the title deed lodged in the bank and got a loan of Ksh 300,000/-. He bought the Company but could not buy the building. The deceased teamed up with Gitau Kamondo who was his employer and Harun Gatoho and Njenga Kamaru who provided title deed. After payment of the loan, they bought N K a Plot and built him a house and the deceased bought his shares in the Company. The documents filed in Petitioner's bundle Pg 49 – 52 attest to these facts.

After Harun Gatoho and the deceased were left together to run the Business and Company, Gatoho and his lawyer stole money from the business and the dispute was subject of **HCCC 575 of 1991** and in 2001 it was amicably settled that Gatoho owned  $\frac{1}{6}$  of the Company and the deceased owned  $\frac{5}{6}$ . Meanwhile, the deceased started another Company where the deceased and sons were Directors as shown by documents in the Petitioner's bundle Pg 73-74.

The Petitioner stated that she struggled alone to revive the business, paid off arrears of rates, rents, water and electricity bills and did annual renovation. The deceased was ailing and could not run the business or settle the dues and the business was on the verge of being reclaimed by City Council of Nairobi and she was harassed to pay up in order to secure the business. The documents of the business and payments to Nairobi City Council are from Pg 75-88 of Petitioners bundle.

The deceased left behind the Company with the 3 sons and although she is not director of the Company, she is involved in the Company to safeguard the children's interests. She was employed by the Company to take care of the business but did not produce letter of employment. It is G G, her son and Director of the Company who asked her to run the hotel. She was paid salary for 2 months and then that was it. She argued that the 3 Directors determined payments and she worked selflessly, struggling to keep the business running.

The Petitioner informed Court that the Objector gave birth to J W in 2002 after the deceased died on 7<sup>th</sup> December 2001. The deceased and Objector were not living together at the time. The deceased was sick for a long time and the deceased's ailment did not allow him to exercise conjugal rights. She claimed the Objector lived with another man who married her.

The Petitioner also alleged that the Objector (PW1) and J K (PW2) sold the deceased's **Plot** [particulars withheld] [particulars withheld] [particulars withheld]/**Kamangu** as shown by letter written to PW2 at Pg 113 of the bundle.

The Petitioner stated on the allegation that she deserted the matrimonial home, that she was married to her husband K N in 1967 and they lived together but at times she left home and separated from her husband as it was not possible to live with him and not get annoyed. It is normal in a marriage for parties to disagree.

The Petitioner admitted she fell out with her son G G and she reported him to Police as he allegedly assaulted her and wanted to kill her; and had a panga in his hand missed her but cut his sibling's hand. He was in jail. Although he has shares in the Company he does not run the Company, but she educated his child K G.

The Petitioner further argued, that G G through his advocates Mukaya Ngala Advocates brought Auctioneers to the Company who attached goods from the hotel worth Ksh 20 million in arrears of rent.

The petitioner could not fully account for the business profits; she claimed that occupancy of rooms fluctuated not all rooms were occupied all the time, the business had debts of land rent, rates, utilities arrears and the Company lost funds and property during the auction. The accounts were filed later on 6<sup>th</sup> October 2017 in Court by the Petitioner's advocates on record and declared the Company made losses. But no cross examination on the said documents was done by the parties advocates.

Vennitious Macharia Karanja (DW2) was born and lives in Kibera. He is an elder of Laini Saba Kibera area and he produced his Identification Card as Chief's Appointee. He stated that he witnessed in 1973 when the Petitioner, M W K met Chief Kamau and D.O. Waiteka and the village elders. He was present when allocations of the Plots was done by Local administration. The petitioner was allocated her plot and she brought builders, wood to construct the houses.

In cross examination, he stated that he was 17 years at the time, 1973 when the plots were allocated by the Chief and D.O and elders of the village. He had 1 room from his mother in Kibera but he worked hard was allocated land and is now a landlord in the same area.

He confirmed that there was a letter from the Chief dated 4<sup>th</sup> September 2014 (Pg 134 of Objector's bundle) He stated that if there was a meeting held at Chief's Office in 2014 where the Objector, Petitioner and G G attended, he was not aware and was not present.

He also stated that he was not a broker between M W and M N in an alleged sale of some of the houses that are contested whether they belong to the Petitioner alone or are part of the deceased's estate.

Joel Njiu Mwangi (DW3) testified that he came to Kibera in 1987 and was tenant to M W K, he rented 1 room and paid rent of Ksh 200/- a month. He sold wares and got money, in 1989 he met Chief called Kamau and Kimotho who helped him and he was allocated land and he built 3 rooms where lives near the disputed houses.

In cross examination, he argued he was not brother to the broker one Njenga in an alleged sale of the houses that are in dispute, he was not at the meeting with the Chief in 2014 between Petitioner, Objector and G G.

Charles Mbugua Muniu (DW4) testified that he worked for the deceased from 1985 until his death and he came to inform the Court that the Objector, M W K 2<sup>nd</sup> widow of the deceased is married to and lives with another man in Kamulu. He came by this information following accompanying his friend Wachira Nyambura to purchase land in Kamulu in 2015.

They were led to a certain lady who was selling plots and ran her shop and lived in a house adjacent to the shop. She came and showed them 3 Plots and his friend did not like any of them. They left and came back the following Sunday and found a man at the shop who led them to a lady at the back of the shop. Here they met M W K, the Objector, who introduced the man they met as her husband. She took them to the Plot and gave its sale price at Ksh 800,000/- and they had Ksh 600,000/=. They did not buy the land.

G G K (DW5) son of the deceased stated his mother is M W K (DW1) Petitioner and they are 5 siblings; himself, H W, S N, J K and H R. They are jobless except for S N and J K who run the Hotel at Renguti/Gikambura property. Since 2002, he has never been to the hotel, he lives in Gachie where there is a Posho mill whose motor and generator are missing and this was a Police case reported to Kabete Police Station.

Before his father's death he registered the Company Renguti Gikambura as follows;

- a) Francis Kiarie Ndirangu - 36,500
- b) George Gichanga Kiarie- 10,000
- c) Stanley Ndungu - Nil
- d) Joseph Kibugi Kiarie - Nil

The nominal share capital of the Company is Ksh 930,000/- divided into 46,000 shares of Kshs 20/-. He worked and bought the 10,000 shares from Harun Gatoho Njuguna.

His mother (DW1) did not work at the Company she lived in Kinoo. His step mother (PW1) worked at the Company from 1986-1993. After his father died on 7<sup>th</sup> December 2001 he ran the business. He stated that the Laini Saba houses in Kibera belonged to the Company, the deceased bought them and DW1 was in charge.

He argued that contrary to his mother's claim that he asked to come and run the hotel, it is not true, she came to run the hotel by force after the deceased's death. His mother called Police and reported the hotel belonged to her late husband, he was arrested and was charged with creating disturbance and was in remand for 7 months. He explained to the Police, he was/is director/shareholder/signatory of the Company and they did not listen to him instead he was shot in his hand (showed Court the scar) He was not represented by Counsel at the time.

He was arrested in 2010 and charged with the offence of threatening to kill and he was remanded and was released in 2012. He also had

another case at the Business Tribunal over payment of rent by tenants and the Court stated the rent to be deposited in Court. He stated that the tenants paid rent in Court of Ksh 840,000/- rent from November 2012 – February 2013 but the money was withdrawn by Petitioner and Objector through their advocates.

DW5 informed the Court with regard to the houses in Laini Saba –Kibera, his mother DW1 built the houses from funds at the hotel, which belonged to the deceased. Before the deceased's death, rent was paid to Renguti/Gikambura Company and receipts were issued in the same name. During the pendency of this matter, DW1 tried to sell the Plot at Kibera for Ksh 1.3 m with all the houses. He learnt of this and informed his step mother PW1 and they met at the Chief's office at Kibera as confirmed by letter dated 4<sup>th</sup> September 2014, the sale was rescinded.

DW5 stated that his father left his home in Kinoo in 1993 and lived in the hotel with him. He left his mother in Kinoo and Mary Wanjiku left in 1993 and she took properties from the hotel and she came back after the deceased died. M W, his step mother, took all household items including furniture and she sold the grade cows, chicken, goats

When his father fell ill he took care of him, took him to MP Shah Hospital, he was admitted. He asked him to take him home, they went to Kinoo on the way he was too sick and he took him to Thogoto Hospital where he died. His mother did not take the deceased to Kenyatta Hospital as she alleged and she did not take care of the deceased until he died.

DW5 proposed that the widows' share the deceased's shares and let the Company be run by the rest of the children. Secondly, that he is included as administrator with the Objector's son R N.

### **PETITIONER'S SUBMISSIONS**

On 20<sup>th</sup> November 2017 the Petitioner through her Counsel filed written submissions. She proposed distribution of the estate with regard to both the uncontested and contested properties as follows;

### **PROPOSED MODE OF DISTRIBUTION BY M W K- PETITIONER**

#### **DESCRIPTION OF THE PROPERTY /BENEFICIARY**

- a) KARAI/LUSIGETTI/T. [particulars withheld] - J R K & S N K
- b) KARAI/KARAI/[particulars withheld] - G G K
- c) KARAI/KARAI/[particulars withheld] - M W K
- d) KARAI/KAMANGU. [particulars withheld] - H W K
- e) KARAI/LUSIGETI/[particulars withheld] - J K K
- f) KARAI/LUSIGETI/[particulars withheld] - M W K
- g) DAGORETTI/KINOO/[particulars withheld] - M W K
- h) DAGORETTI/RUTHIMITU/[particulars withheld]-

To be divided equally among:-

- a) J R K
- b) S N K
- c) G G K
- d) J K K
- i) KIRINYAGA ROAD LR No. [particulars withheld] To be divided amongst the Directors/Shareholders of RENGUTI GIKAMBURA HOTEL CO. LTD according to their shareholding in the said company.

On 8<sup>th</sup> July 2015 the Petitioner filed an affidavit on proposed mode of distribution and adduced her reasons as follows:-

- a) The Petitioner uses L.R. No. Karai/Karai/[particulars withheld] for subsistence farming and has been doing so even prior to the deceased's death. She plants crops like maize, yams, beans and napier grass for her cattle. The said property is situated in Kinoo.
- b) L.R No. Karai/Lusigeti/[particulars withheld] was given to the Petitioner's first-born son J R K while the deceased was still alive. The said son stays on the said property and has constructed a house and does subsistence farming thereon.

- c) L.R. No. Karai/Kamangu/[particulars withheld] was given to the Petitioner by the deceased to do subsistence farming when the deceased was still alive. The Petitioner has since leased the said plot to her grandson K K who does subsistence farming thereon.
- d) L.R. No. Dagoretti/Kinoo/[particulars withheld] is the Petitioner's matrimonial home which was given to her by the deceased husband while still alive. She has also built her own houses on the said land. She has built ten (10) rental houses. She has given two (2) rental houses each to her children to manage and earn income. She has also domesticated six (6) dairy cows on the said land which she has given to her daughter H W K to manage. She gets income from the sale of milk for her upkeep.
- e) L.R. No. Karai/Lusigeti/[particulars withheld] was given to the Petitioner's son J K K who lives on the said land and does subsistence farming thereon. The property was given to the son prior to the demise of the deceased.
- f) L.R. No. Karai/Karai/[particulars withheld] is used for subsistence farming by the Petitioner and her family. It was also given to her prior to the deceased's death. The Petitioner has planted trees on the said land.
- g) L.R. No. Dagoretti Ruthimitu/[particulars withheld] is a plot on which the Petitioner and her late husband built one storied building. They later added another storied building which she developed with her late husband. They bought the said property with her late husband. She has given four (4) of her children six (6) rental houses on the property from which they get rental income.
- h) Motor vehicle registration number [particulars withheld] is used by the Petitioner for transport of farm produce and was given to her by the deceased prior to his death.
- i) Motor vehicle registration number [particulars withheld] (Mercedes Benz) was given to the Petitioner by her husband as a gift.
- j) Motor vehicle registration number [particulars withheld] (Range Rover) was also given to the Petitioner by her late husband during his lifetime. The Petitioner had intended to sell it as her property but has not done so to date.
- k) The Petitioner has no information regarding the status of Barclays Bank of Kenya Account Number [particulars withheld] as she was not a joint signatory with her late husband.

The following are the contested properties;

- a) Renguti Gikambura Hotel Company Limited situated on L.R. No. [particulars withheld] Kirinyaga Road in Nairobi.
- b) Laini Saba Properties in Kibera in Nairobi.

#### **OBJECTOR'S SUBMISSIONS**

The Objector through her Counsel gave the following facts;

- a) The deceased herein died intestate on 7<sup>th</sup> December, 2001 leaving behind two widows, the Petitioner and Objector herein; and nine (9) children.
- b) On 15<sup>th</sup> January 2002, the Petitioner applied for a grant of letters of administration intestate of the Deceased's estate; and by her said Petition she conveniently excluded the Objector who is the Deceased's second widow together with her children, who are the Deceased's second family and his surviving dependants.
- c) On 25<sup>th</sup> February 2002 the Objector filed an objection to the making of a grant of representation of the Deceased's estate as sought in the aforesaid Petition, by way of cross application for grant.
- d) The Petitioner vehemently disowned the Objector together with her children as the Deceased's dependants, and incessantly denied any knowledge of the Deceased's second family.
- e) On 24<sup>th</sup> March, 2004 the Honourable Court (Lady Justice Martha Koome) rendered its judgment finding the Objector to be the Deceased's 2<sup>nd</sup> widow and together with her children survivors and dependants of the Deceased.
- f) The High Court's aforesaid sentiments were further affirmed by the Court of Appeal (Hon. W. Karanja, Hon. G.B.M. Kariuki & Hon. P. M. Mwilu, JJA) in its rendition that the Petitioner's evidence was not credible, and that it focused on the properties constituting the estate which she claimed ought to be inherited by her and her children alone on the ground that the Deceased had no other wife except herself.
- g) Further to the foregoing the Honourable Court contended that the denials by the Petitioner about the marital relationship between the Deceased and the Objector were glib and were motivated by her desire to shield the Deceased's estate from the Objector and her children.
- h) It is worth noting that the Petitioner has ever since the institution of this cause engaged in falsehoods and concealment of material facts; and sworn and testified to contradictory information, all of which is aimed at disinheriting the Objector's house.

i) On 26<sup>th</sup> March, 2004 the Honourable Court issued letters of administration intestate of the Deceased's estate jointly to the Petitioner and Objector.

j) Despite the issuance of the aforementioned letters of administration, the Petitioner refused to share control and management of the Deceased's estate with the co-administrators, and has remained in exclusive control and management of the estate to the exclusion of the Objector/Co-administrator.

k) It is worth noting that in so managing the estate, the Petitioner testified that she distributes some incomes of the estate to her children in exclusion of the Objector and her children.

l) On 6<sup>th</sup> October, 2017 the Petitioner filed a statement of accounts relating to Renguti Gikambura Hotel Company, prepared by Bera Accountants. While the company has perpetual succession and operated a bank account where all rents from the rented rooms and profits from the Deceased's bar business were deposited, the Petitioner indicated to the auditors that the company did not own any bank account whatsoever.

m) Despite being dependants of the Deceased, the Objector and her children have not benefited from the Deceased's estate as the Petitioner has declined and/or refused to maintain them or share any benefits accruing from the estate since the Deceased passed on in 2001.

The Objector also made proposal on distribution of the estate as follows;

### **PROPOSED MODE OF DISTRIBUTION BY MARY WANJIKU KIARIE**

The estate should be distributed in line with the two houses comprising the family of the Deceased.

- (i) Kamangu/Karai/[particulars withheld]– to be given to M W K for her family
- (ii) Karai/Lusigeti/[particulars withheld]– to be given to M W K for her family.
- (iii) Karai/Lusigeti/[particulars withheld]– to be valued and sold, and proceeds thereof distributed equally between the two (2) families.
- (iv) Karai/Karai/[particulars withheld] (5.5 acres) – to be divided equally between M W K's family and M W K's family.
- (v) Karai/Lusigeti/[particulars withheld] (22 acres) –to be divided equally between M W K's family and M W K's family.
- (vi) Karai/Karai/[particulars withheld] (9 acres) – to be divided equally between M W K's family and M W K's family.
- (vii) Dagoretti/Ruthimitu/[particulars withheld] – to be valued and sold, and proceeds distributed equally between the two (2) families.
- (viii) Gikambura Building on LR No. [particulars withheld], Kirinyaga Road, Nairobi – to be valued and sold, and proceeds distributed equally between the two (2) families.
- (ix) Dagoretti/Kinoo/[particulars withheld] Plot (1 acre) – the property and premises thereon to be given to M W K.
- (x) Motor vehicle Reg. No. [particulars withheld], Peugeot 504 Pick Up – to be given to M W K
- (xi) Motor vehicle Reg. No. [particulars withheld], Mercedes Benz – to be given to M W K.
- (xii) Motor vehicle Registration No. [particulars withheld], Range Rover – to be sold and proceeds distributed equally between the two (2) families.
- (xiii) Finances/Incomes of the estate from December, 2001 to date approximated at Kshs. 172,879,250.00 unilaterally collected and controlled by M W K to be distributed equally between the two (2) families of the Deceased's household.
- (xiv) Cash at bank; Barclays Bank of Kenya, Account No. [particulars withheld] estimated at Kshs. 10,000,000.00 as of 14<sup>th</sup> March, 2002 to be ascertained and distributed equally between the two (2) families.
- (xv) Cash at bank; Kenya Commercial Bank (Account No. to be ascertained) – to be ascertained and distributed equally between the two (2) families.
- (xvi) Nachu/Ndacha – Plot [particulars withheld] – to be given to M W K.
- (xvii) Karai/Nachu – [particulars withheld] – to be given to M W K.

(xviii) Ruthimitu/Dagoretti – [particulars withheld] – to be given to M W K.

(xix) Shares in Renguti Gikambura Hotel Company Limited to be given to M W K.

(xx) 4 acres parcel of land with a bungalow at Fly Over area long the Nairobi-Naivasha highway acquired by M W K out of incomes of the estate sometimes in mid-2014 – to be sold and proceeds thereof distributed equally between the two (2) families.

(xxi) 1 acre property at Kimana – Loitoktok, Kajiado County, acquired by M W K out of incomes of the estate – to be sold and proceeds thereof distributed equally between the two (2) families.

(xxii) Other properties/assets acquired by M W K out of incomes of the deceased's estate she has managed and had exclusive control over since the demise of F K N to be ascertained and distributed equally between the two (2) families.

(xxiii) Other assets/properties to be ascertained – to be distributed to the two (2) families equally.

## ISSUES

- i) Who are the rightful beneficiaries of the deceased's estate?
- ii) What comprises the deceased's estate?
- iii) How should the estate of the deceased be distributed?

## DETERMINATION:

### LAW:

Section 40 (1) Law of Succession Act Cap 160 provides;

*“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 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) Law of Succession Act Cap 160 provides;

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

Section 71 of Law of Succession Act provides;

*“...provided in cases of intestacy, the grant of letters of administration shall not be confirmed until the Court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”*

**IN RE ESTATE OF EPHANTUS GITHATU WAITHAKA (DECEASED): ESTHER WANJIRU KIARIE vs MARY WANJIRU GITHATU** Justice Kimondo considered the import and effect of distribution of the deceased's estate strictly under Section 40 thus;

*“Section 40 does not take away discretion of the Court to distribute the estate fairly. By dint of Section 27 28 & 35 of the Act, the Court is clothed with wide discretion to provide for dependents and beneficiaries as was succinctly captured by Omollo J.A in RONO VS RONO & ANOR[2008] 1KLR(G&F) as follows;*

*“I had the advantage of reading in draft form the judgment....., 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..., Cap 160 of the Laws of Kenya, lays down a requirement that heirs of a deceased person must inherit equal portions of the estate where such deceased dies intestate and that a judge has no discretion but to apply the principle of equality as submitted....I can find no such provision in the Act.....”*

I am also persuaded by the decision of the case ; **IN THE CASE OF THE ESTATE OF MWANGI GITURE (DECEASED) HC SUCCESSION CAUSE 1033 OF 1996 L.J.KOOME** stated;

*“The 1<sup>st</sup> widow's entitlement vis a vis the 2<sup>nd</sup> widow or subsequent widow who perhaps came into the marriage much later to find that the 1<sup>st</sup> widow has worked tirelessly and sometimes denying herself tremendous comfort to enable her husband create and accumulate wealth. The 1<sup>st</sup> widow is then relegated to the same position by virtue of Section 40 of Law of Succession to the same*

*position as the last born child of the 2<sup>nd</sup> or subsequent widows. The widow is supposed to be considered as a unit alongside the children.....I agree with Counsel for the Protector 1<sup>st</sup> widow that this state of affairs bleeds inequalities and inequities in law and ought to be addressed urgently to enable our Courts dispense justice that meets the provisions of the Constitution...”*

## ANALYSIS

The parties to the matter entered a Consent as follows;

## CONSENT

**“By consent the deceased F K N left two widows (houses) of M W K (Petitioner) and M W K (Objector) both of whom are beneficiaries of the estate. It is agreed that their children are as follows:-**

- a) J H R K
- b) H W K
- c) G G K
- d) S N K
- e) J K K
- f) M W K
- g) R N K
- h) S C K
- i) G G K and
- j) M W K, all of whom are beneficiaries of the estate.

The beneficial status of J W K is in dispute.

The following are agreed to be the property comprising the estate of the deceased:-

- a) **Karai/Karai**/[particulars withheld]
- b) **Karai/Karai/Losigeti**/[particulars withheld]
- c) **Karai/Karai**/[particulars withheld]
- d) **Karai/Kamangu**/[particulars withheld]
- e) **Karai/Lusigeti**/[particulars withheld]
- f) **Karai/Lusigeti**/[particulars withheld]
- g) **Dagoretti/Kinoo**/[particulars withheld]
- h) **Dagoretti/Ruthimitu**/[particulars withheld]
- i) **Vehicle** [particulars withheld]**Mercedes Benz**
- j) **Vehicle** [particulars withheld]**Range Rover**
- k) **Account No.** [particulars withheld] **Barclays Bank of Kenya, Nairobi**

The following properties are in contention:-

- a) **Kirinyaga Road LR No.** [particulars withheld]
- b) **Vehicle** [particulars withheld]**Peugeot 504 Pickup**

**c) Kibera Plots at Laini Saba**

**d) Posho Mill at Dagoretti/Ruthimitu/[particulars withheld]**

**e) Shares in Ringuti/Gikambura Hotel Co. Ltd**

**f) Stock in Ringuti Gikambura Bar at the time of deceased's death**

**g) Monies from the use of deceased's plots rents**

**h) Bank Account at KCB (Kenya Commercial Bank)**

The above consent was adopted as an order of the Court after the parties agreed on the above list of beneficiaries and list of assets that comprise the estate of the deceased and are available for distribution.

Since the list of beneficiaries and list of assets is not contested save for divergent views that hinge on distribution of the estate; this Court has considered the various issues raised by rival parties in aid of their proposals for distribution of the estate.

#### **LIST OF BENEFICIARIES:**

In spite of the Consent; testimony by DW3 alluded to alleged remarriage of the Objector to an undisclosed man since the death of the deceased and therefore she ought to be precluded from benefitting from the deceased's estate by virtue of **Section 35 (b) of Law of Succession Act Cap 160**. This evidence was not sufficient to confirm or deny this fact; the person was not disclosed by name; no one else seemed to have relevant information of the marriage and/or where they reside and for how long. Therefore, the matter remains unproved based on the evidence on record. If and when cogent and tangible evidence of remarriage is tendered in Court then her entitlement to her share of the deceased's estate shall cease and/or be recovered from her to benefit her children only.

DW 5 among other witnesses alleged that J W is not his sister as she was born after his father died; he was with his father and from 1993 he did not meet with M W K.

The matter shall be left in abeyance as per the consent and resolved only through DNA Sibling testing.

This Court considered the law that provides for distribution of the estate amongst beneficiaries and/or dependents from a polygamous family. Although **Section 40** provides for equal distribution of the estate between spouses and children, from a litany of case-law among them those highlighted above; it is not possible /practical to have equal distribution with regard to all beneficiaries and/or dependents of the deceased's estate with mathematical precision; each case is unique in its circumstances and these circumstances ought to be taken into account in determining almost equal but more importantly fair, just and equitable distribution.

In the instant case; the facts as drawn from evidence on record, the 1<sup>st</sup> widow of the deceased; M W K was married to the deceased in 1967 and they had 5 children. They worked hard and amassed wealth as evidenced by copies of titles annexed to the pleadings; most of the land was acquired in 1970s save for 1 registered in 1982. This is when the deceased married the 2<sup>nd</sup> widow; M W K, the 1<sup>st</sup> wife left the matrimonial home and the 2<sup>nd</sup> widow came in, looked after the children of 1<sup>st</sup> widow and had 3 of their biological children. In 1993, the 2<sup>nd</sup> widow left the matrimonial home (allegedly with all household goods and furniture) after the 1<sup>st</sup> widow came back and went to live in Kamulu. The deceased moved from the matrimonial home and lived at the hotel until his death. He lived with and was taken care of by his son G G K (DW5) until his death. DW5 stated that none of the widows visited or took care of the deceased.

From the above facts, most of the properties were acquired during the deceased and 1<sup>st</sup> widow's marriage after she left the 2<sup>nd</sup> widow took care of the home and worked at the hotel until 1993 when she left the matrimonial home. It is not clear from the evidence on record the 2<sup>nd</sup> widow's whereabouts and status of their marriage but by the Court of Appeal's decision in that she was/is wife to the deceased she is entitled to the deceased's estate but not on equal basis as she was also away for almost ten (10) years before the deceased's death.

#### **LIST OF ASSETS AND DISTRIBUTION:**

##### **1. LAINI SABA KIBERA –HOUSES**

The Petitioner stated in her testimony that she was allocated the land by the Chief called Kamau and D.O. in 1973, she built the houses and collected rent. In 2015 after a fire that gutted down the houses she rebuilt them. Her evidence was corroborated by DW2 Macharia a Village elder and DW3 Joel Mwangi her former tenant.

The Objector stated that the houses belonged to the deceased and they were allocated each some houses and he collected rent from these houses. The ownership by the deceased was confirmed by PW3 G K K and DW4 G G K brothers of the deceased. The Petitioner attempted a sale of eighteen (18) houses to one Maina Njengo at Ksh 1.3m and the sale stalled and money was refunded to the buyer.

Since both parties have adduced contradicting evidence this Court relied on the letter from the Chief dated 15<sup>th</sup> January 2003 which states;

***“The above named person hails from my area of jurisdiction. She owned the following Plot as follows; Furaha has 27 rooms***

*and the number in the Register is [particulars withheld]. Plot No A has 18 rooms and the number in the register is 396. Plot number B has 12 rooms and the number in the register is [particulars withheld]. Plot C has 6 rooms and the number in the register is 300 and all are temporary structures in the Government utility.”*

There is no evidence that controverted the contents of this letter.

Therefore the Laini –Saba Kibera houses are not an asset that comprises of the deceased’s estate, the houses belong to M W K.

**2. RENGUTI GIKAMBURACOMPANY LIMITED – Consists of;**

BUSINESS- hotel, bar and lodging

SHARES- F K N 36,500 shares

LAND- a) Kirinyaga Road LR No. [particulars withheld] BUILDING- hotel bar and lodging

The Department of the Registrar General’s letter of 12<sup>th</sup> May 2017 confirmed shareholders and directors of the Company. The deceased was the majority shareholder with 36,500 shares which are available for distribution to the beneficiaries of his estate. The land, business and building are /should be assets of the Company. The shares shall be distributed as follows;

The shares of majority shareholder G G are taken into account and he is added 500 shares only from the deceased’s shares; he ran the Company with the father; he is an institutional memory and has the relevant experience to run the Company. Although he seemed to have rubbed his mother the wrong way and he landed in jail; there is no legal justification to oust him from management of the business as majority shareholding. Therefore he is hereby reinstated forthwith as part of management of the Company as Director, majority shareholder and signatory to the accounts with existing management. He is not to use this opportunity as a revenge mission to settle scores but use this opportunity to revamp the business as a viable profitable business to benefit all beneficiaries. The Central Police Station to supervise enforcement of this order and not harass him anymore without legal basis.

**G G K 10,500**

The widows of the deceased are allocated equal and most shares as follows;

**M W K 8,000**

**M W K 8,000**

Other directors who have run the Company since the demise of the deceased as directors but were not allocated any shares;

**S N K 5, 000**

**J K 5,000**

The other children of the deceased as beneficiaries but are not engaged to run the Company on a day today basis are allocated shares as follows:-

**J H R - 2,000**

**H W K - 2,000**

**R N K - 2,000**

**S C K - 2,000**

**G G K - 2,000**

If it is confirmed that the 2<sup>nd</sup> widow M W K was/is married since the deceased’s death, her shares shall revert to her children named above in equal shares.

The shareholders names and shares shall be entered in the Share Register upon transfer of shares documents are availed and signed and relevant documents filed at Companies’ Registry amended accordingly. In default of the process being undertaken, the Deputy Registrar Family Division shall sign the transfer of shares forms to facilitate the transfer of shares.

**3. MATRIMONIAL HOME- Dagoretti-Kinoo/[particulars withheld]**

This was the matrimonial home of the deceased and 1<sup>st</sup> widow M W K from 1967 until 1981 when she left. The 2<sup>nd</sup> widow was married in 1982 and she lived and brought up children of 1<sup>st</sup> wife and her own until 1993 and she left when the 1<sup>st</sup> widow came back and has been on

the land/property to date despite moving to the hotel. The Objector in her testimony stated that she left the matrimonial home because she wanted the deceased to build her, her own matrimonial home. This property by her own admission in evidence cannot be the 2<sup>nd</sup> widow's matrimonial home. She occupied it when the 1<sup>st</sup> widow left and on her coming back she vacated and since 1993 she has not been on the land to date. She admitted in cross examination that she left because she did not want to live in the same house in Kinoo with the family of M (1<sup>st</sup> widow). She wanted the deceased to build her a separate house from M. The property is occupied by the 1<sup>st</sup> widow and her children. The matrimonial home shall remain with the 1<sup>st</sup> widow as her matrimonial home and not part of the assets for distribution.

#### 4. MOTOR VEHICLES:

Vehicle [particulars withheld] **Mercedes Benz**

Vehicle [particulars withheld] **Range Rover**

These are the vehicles available for distribution of the deceased's estate;

Vehicle [particulars withheld] **Peugeot 504 Pickup is in contention.**

The 1<sup>st</sup> widow argued through pleadings and submissions that the deceased had bequeathed the motor vehicles as part of other property to her as a gift *inter vivos* envisaged by **Section 42 of the Law of Succession Act Cap 160**. During her testimony the Petitioner did not lead evidence to prove or confirm the gift *inter vivos* at all. Whereas the law provides that gifts *intervivos* shall be recognized but taken into account in determination of each party's share; in the instant case no evidence was adduced to prove this fact. Therefore, the 3 motor vehicles shall be shared equally between the 2 houses, both widows, either through acquisition of 1 car each and the 3<sup>rd</sup> car sold and proceeds shared equally or sell all cars and share proceeds equally.

#### 5. BANK ACCOUNTS

**Barclays Bank of Kenya Account-** [particulars withheld] **Bank Account at KCB (Kenya Commercial Bank)**

The proceeds of the confirmed account in Barclays Bank shall be shared equally between 2 houses with each child and widow as a unit in terms of **Section 40 of Law of Succession Act**.

As for the KCB account once any of administrators and/or beneficiaries identify/confirm its details as being the deceased's account, then its proceeds shall be shared equally between 2 **houses with each child and widow as a unit in terms of Section 40 of Law of Succession Act Cap 160**.

#### 6. LAND

- a) **Karai/Karai**/[particulars withheld]
- b) **Karai/Karai/Losigeti**/[particulars withheld]
- c) **Karai/Karai**/[particulars withheld]
- d) **Karai/Kamangu**/[particulars withheld]
- e) **Karai/Lusigeti**/[particulars withheld]
- f) **Karai/Lusigeti**/[particulars withheld]
- g) **Dagoretti/Ruthimitu**/[particulars withheld]

The Petitioner relied on the gift *intervivos* as prescribed by **Section 42 of Law of Succession Act Cap 160** that the deceased gave gifts to all his children in the 1<sup>st</sup> family and they are all settled. Such evidence was not adduced in Court by any of the witnesses to confirm this fact. Therefore it may have been possible for the deceased to point out to his child /children where to put up a house/permanent structure on specific part of the land. Where there are developments and permanent structure and/or occupation, one shall not be evicted /moved away or the permanent structures demolished. Since no subdivision was done, the rest of the land is and shall be available for distribution among all beneficiaries under **Section 40 Law of Succession Act Cap 160**.

This Court allocates the 2<sup>nd</sup> widow M W K if not found to have remarried; **she is allocated Karai/Karai**/[particulars withheld] exclusively with her children by the deceased *in lieu* of her matrimonial home.

The suit property **Karai /Lusingeti** /[particulars withheld] estimated at 30 acres and it shall be divided among the 2 houses according to the number of the children in each house, but also adding the 2 widows as units to the number of children. Subject to valuation reports, the distribution shall be as much as possible to ensure that each house has a fair spread of urban, rental or agricultural land and access.

The rest of the properties outlined above and not distributed due to contrasting evidence by parties on acreage, development, use and settlement, this Court orders valuation and survey of the said properties with a view to equitable distribution of the properties to beneficiaries of the deceased's estate subject to and excluding permanent structures and settlement of certain beneficiaries already in occupation. However, these portions and whatever else one has been allocated shall be taken into account in determining the share of the net intestate estate finally accruing to each beneficiary. These properties be shared equitably amongst all beneficiaries. In the event of a stalemate or deadlock, the parties shall file with the **Court after 90 days the valuation /survey reports for the Court to determine.**

**POSHO MILL AT DAGORETTI/RUTHIMITU/[particulars withheld]**

DW5 G G K testified that the Posho Mill was inoperational as the generator and motor were stolen (taken away by M W K) and were subject of Criminal Case after a report was made to Kabete Police Station. With this evidence it is clear that the Posho Mill is not operational and not intact. Unless and until the outcome of the proceedings with regard to return of the stolen components or there is no tangible evidence that it is intact and /or in use it cannot be available for distribution.

**INCOME FROM THE RENTAL PROPERTIES & BUSINESS OF THE DECEASED**

The Objector filed estimates of income from deceased's properties of Finances/Incomes of the estate from December, 2001 to date approximated at Kshs. 172,879,250.00 unilaterally collected and controlled by M W K to be distributed equally between the two (2) families of the Deceased's household.

The Petitioner through Counsel filed accounts which indicated that the business has been running at a loss as the expenses exceeded the income generated.

At this stage and based on the evidence on record it is not clear to the Court the actual income and profits from the deceased's rental properties and the business. Secondly, the accounts were filed in Court after the hearing and was not subjected to scrutiny and/or cross examination. The Court does not act in vain or in futility; by issuing an order that cannot be effected as no actual profit or income is declared and available for distribution.

**DISPOSITION**

**i) Therefore an audit of the Renguti/Gikambura Company by the Auditor shall be carried out and report presented in Court to confirm monies available for distribution to beneficiaries.**

**ii) From the proceedings, this matter has taken inordinately long to distribute the estate due to non-cooperation between 2 administrators. To facilitate expeditious administration of deceased's estate; the grant issued shall be amended to include G G K and R N K to the widows as joint administrators.**

**iii) Each party shall bear its own costs of the suit.**

**iv) The Parties may exercise their right of appeal.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 8<sup>TH</sup> OCTOBER 2018.**

**M.W.MUIGAI**

**JUDGE FAMILY DIVISION OF HIGH COURT**

**IN THE PRESENCE OF;**

**MR WAWIRE FOR PETITIONER**

**MR MIYARE FOR OBJECTOR**

**MR.KHAMATI FOR INTERESTED PARTY**