



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NUMBER 764 OF 2014
IN THE MATTER OF THE ESTATE OF GEOFFREY GIOCHE KAMAU (DECEASED)
JUDGMENT

1. Before court is the summons for confirmation of grant dated 12/8/2016 which was canvassed by way of written submissions.
2. The deceased died intestate and left the following beneficiaries.

1st house

- i) GEORGE KANGETHE GIOCHE
- ii) MARTHA WAIRIMU MUGO
- iii) JANE WANJIRU IRUNGU
- iv) SIMON KOMO GIOCHE
- v) ANN WANGARE NGANGA
- vi) SERAH WAMBUI GIOCHE

2nd house

- i) GEORGE KANGETHE GIOCHE
- ii) MARTHA WAIRIMU MUGO
- iii) JANE WANJIRU IRUNGU

3. The deceased left behind the under listed properties;

- (a) LONDIANI/JOUBERT/KENDOWA BLOCK 18/4 & 8
- (b) NAKURU MUNICIPALITY BLOCK 27/503 MWARIKI
- (c) NAKURU MUNICIPALITY BLOCK 27/505
- (d) GICHUA TRADING CENTER PLOT NO. 65
- (e) LOC. 19 GACHARAGEINI 19/1449 MATHIOYA
- (f) SHARES IN LONDIANI BUILDING COMPANY LIMITED, SHARE CERTIFICATE NO. 14
- (g) SHARES IN CENTUM INVESTMENT COMPANY LIMITED

(h) SHARES IN EAST AFRICAN BREWERIES LIMITED

(i) SHARES IN KENYA COMMERCIAL BANK

4. Ruth Nyambura Gioche, one of the administrators of the estate (hereinafter the applicant) has proposed that the estate be shared out as follows;

a) LONDIANI/JOUBERT/KENDOWA BLKC 18/4 & 8 (27.5 ACRES) – Be divided equally between RUTH NYAMBURA GIOCHE & GEORGE KANGETHE GIOCHE and each administrator to hold his/her share in trust for their respective houses.

b) NAKURU/MUNICIPALITY BLOCK 27/503 – to be inherited by RUTH NYAMBURA GIOCHE to hold in trust for her children.

c) LOC 19 GACHARAGEINI 1449 (1.295 Ha) MATHIOYA be divided equally between RUTH NYAMBURA GIOCHE & GEORGE KANGETHE GIOCHE and each administrator to hold his/her share in trust for their respective houses.

d) Two hundred (200) shares at Londiani Building Company Limited to be sold and the proceeds to be shared equally among all the beneficiaries.

e) One thousand five hundred and twenty eight (1528) shares at Centum Investment Company Limited to be sold and the proceeds to be shared equally among all the beneficiaries.

f) Forty eight (48) shares at East African Breweries Limited to be sold and the proceeds to be shared equally among all the beneficiaries.

g) PLOT NUMBER 505 MWARIKI to be sold and the proceeds to be shared equally among all the beneficiaries.

5. In an affidavit of protest, George Kangethe Gioche, the joint administrator (hereinafter the protestor) has opposed the proposals by the applicant and has proposed distribution as follows:-

NAME	DESCRIPTION OF PROPERTY	SHARE
SIMON KOMO GIOCHE	LONDIANI/JOUBERT/KENDOWA BLOCK 18/4 & 8	9.13 ACRES
GEORGE KANGETHE GIOCHE	”	9.13 ACRES
EPHANTUS MWANGI GIOCHE	”	1 ACRE
MARTHA WAIRIMU MUGO	”	1 ACRE
JANE WANJIRU IRUNGU	”	1 ACRE
ANN WANGARI NGANGA	”	1 ACRE
SERAH WAMBUI GIOCHE	”	1 ACRE
RACHEL WAITHERA	”	1 ACRE
RUTH NYAMBURA GIOCHE	”	1 ACRE
GEORGE KANGETHE GIOCHE	”	1 ACRE
SIMON KOMO GIOCHE	”	1 ACRE
NAKURU MUNICIPALITY BLOCK 27/503 MWARIKI	To be sold and shared equally by all	
NAKURU MUNICIPALITY BLOCK 27/505	To be sold & shared equally by all	
GEORGE KANGETHE GIOCHE	GICHUA TRADING CENTRE	WHOLE SHARE

PLOT NO. 65

LOC. 19 GICHARAGEINI 19/1449 MATHIOYA 3 ACRES – To be sold & shared equally

SHARES IN CENTUM INVESTMENT CO. LTD, SHARES IN EAST AFRICAN BREWERIES LTD, SHARES IN KENYA

COMMERCIAL BANK - To be sold and shared equally by all the beneficiaries

SHARES IN LONDIANI BUILDING CO. LTD. To be sold and shared equally by all

6. In a further affidavit, the applicant disagrees with the proposal to have the protestor and his brother get 9.13 acres of land out of property Londiani/Joubert/Kendowa Block 18/4 & 8. She asserts that the distribution fails to recognize that, she has been in possession of 9 acres of land out of the whole parcel. She adds that the proposed arrangement disinherits other beneficiaries.

7. The applicant urges that she should not be made to account for what she has always used during the deceased's lifetime.

8. The applicant is further opposed to the sale of property Nakuru Municipality Block 27/503 where she asserts she has always lived. It is a small plot measuring $\frac{1}{4}$ acre and she depends on rental premises thereon in her old age.

9. She proposes that land Londiani/Joubert/Kendowa Block 18/4 & 8 be allocated to all beneficiaries in equal shares. She proposes that she be allocated property L.R. Nakuru Municipality Block 27/503 where she is in occupation. She states that the protestor sold property Nakuru Municipality Block 27/504.

Finally, she seeks that property Loc. 19 Gacharageini 1449 (1.295 Ha) Mathioya be divided into equal shares to be held in trust for each of the houses by herself and George respectively.

10. On his part the protestor avers that the family of the deceased held a meeting on 27/3/2004 attended by all beneficiaries including the applicant and the deceased in minutes that were recorded bequeathed land Londiani/Joubert/KENDOWA/18/4 & 8 to Simon Komo Gioche, George Kangethe Gioche and Geoffrey (deceased) who were to get 9 acres each. The protestor urges that the minutes are evidence of a gift *inter vivos* and in the alternative the minutes are evidence of wishes of the deceased.

11. The protestor clarifies that he has no intention of having the residence of the applicant sold. In the same property are four (4) shops and seven (7) bed sitters which are rented out.

12. The protestor proposes that the applicant be given a life interest in respect of the main house and she takes two (2) shops and three (3) bedsitters. He seeks that the other house gets two (2) shops and four (4) bedsitters. He also seeks accounts for all rent collected since the death of the deceased which should be shared equally.

13. I have had occasion to consider the summons for confirmation of grant, the affidavit evidence and the learned submissions by counsel.

14. The deceased died intestate leaving a widow and children from two (2) houses as he was in a polygamous marriage. There are no disputes over the beneficiaries and/or the properties available for distribution.

15. Of determination is the mode of distribution of the deceased's estate and the respective shares of the beneficiaries.

16. The law governing the distribution of an intestate estate in a polygamous setting is spelt out under **Section 40** of the **Law of Succession Act**. That section provides;

“S. 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.”

17. That section is couched in no uncertain terms. In our instant case, I have to determine, first, whether 18 acres out of property Londiani/Joubert/Kendowa/18/ 4 & 8 was a gift *inter vivos* to Simon Komo Gioche and George Kangethe Gioche or in the alternative whether the wishes of the deceased were that the two (2) get the 18 acres (each getting 9 acres).

18. For reasons not explained, the protestor suggests that between him and Simon Komo Gioche, each should get 9.13 acres. The 0.13 acre above is not explained since the minutes he relied on read 9 acres.

19. I have carefully considered the minutes marked “GKG 1” annexed to the further affidavit sworn by the protestor. The minutes are written in clear language, are unambiguous and have been signed by all present including the applicant.

20. There is no evidence challenging the existence of the minutes and/or the contents therein. I am satisfied that the minutes do exist.

21. Looking at the minutes, I am far from convinced that the same amount to a gift *inter vivos*. Such a gift must be complete. The gifts here were not.

22. I am, however, persuaded that the minutes exhibited herein are a clear indication of the wishes of the deceased. With a discernable clarity of intent, the deceased gave 9 acres each to Simon and George and he left 9 acres to himself.

23. Though this wish was not reduced to a written will, the deceased's intent is clear. It was his wish that each of the two (Simon and George) were to get 9 acres of land from Londiani/Joubert/Kendowa Block 18/4 & 8.

24. It follows then therefore that the 18 acres under reference cannot be subject to distribution under **Section 40** of the **Law of Succession Act**.

25. Faced with a similar situation in **PAUL KIRUHI NYINGI AND ANOTHER vs. FRANCIS WANJOHI NYINGI [2016] eKLR**, this court (*Makhandia J* as he then was) had this to say:

“Unless it can be demonstrated that those wishes of the deceased as captured in the black book were illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected in my view. Nothing has been brought to my attention that remotely suggests that the deceased's was biased, unfair and or discriminatory against any of the beneficiaries in the manner he wanted his estate shared out on his demise. In any event, it would appear that some of the beneficiaries were aware of the contents of the black book during the deceased's lifetime. If they were despatched with the distribution they should have taken it up with him.”

26. The sentiments by *Onyancha J* in **MARTHA WANJIKU WANDERU vs. MARY WAMBUI WAWERU [2016] eKLR** further buttress the fact that the wishes of the deceased ought to be respected. The Judge stated;

“The deceased divided his three pieces of land.... Without any uncertainty. His intention was clear – that 928 should go to the Petitioner/Respondent; 929 to appellant; and 930 to his two sons of opposite houses in the shares of 1.6 and 1.6 acres. There is evidence that all the members of the family accepted deceased's decision as none, including the respondent/petitioner, as admitted protested. The two sons took possession and continued cultivation for more than seven years after the deceased's death, without dispute.....

In this case the deceased had in his lifetime distributed his estate as he wished. He had power to do so. His family members did not protest or change his mode of distribution which they had opportunity to do so during his lifetime. He fixed clear physical boundaries which no one interfered with at any stage even after his death. In my view his wishes should have been respected....”

27. The wishes of the deceased in respect of the 9 acres he gave Simon Komo Gioche and George Kangethe Gioche each must be respected. The court must give effect to the wishes and resist any attempt to substitute the wishes of the deceased with those of any other person as the deceased had the power to distribute his estate as he wished.

28. Having so found, and putting into account the benefit to Simon and George, to subject the remainder of the estate to a distribution under a strict interpretation of **Section 40** of the **Law of Succession Act** would in my considered view result into an injustice to some of the beneficiaries.

29. I am persuaded that in the circumstances of this case, I ought to distribute the remainder of the estate in an equitable if not necessarily equal manner. This will allow for the taking into account that some beneficiaries have already enjoyed substantial bequests. This court has discretion so to do. This is a court of law and equity. I am guided by the words of *Omollo JA* (retired) in **RONO vs. RONO Civil Appeal Number 66 of 2002** where at **page 15** he stated;

“I had the advantage of reading in draft form the Judgment of 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 deceased died 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.”

30. Because of the bequests during the lifetime of the deceased to some and not to all the beneficiaries, the distribution of the estate herein will entail a delicate balancing act, a hybrid mix of application of statute and equity and of doing what is fair and just to all the beneficiaries. This court has inherent powers and discretion so to do.

31. It is selfish and unjust for the protestor to propose that from the remaining 9 acres (should be (9.5 acres) he and Simon Komo Gioche should also get an acre therefrom despite already benefiting from a bequest of 9 acres.

32. The distribution by the protestor in respect of the remainder of Londiani/Joubert/Kendowa Block 18/ 4 & 8 is in my view inequitable and unjust. By allocating himself and Simon Komo Gioche one (1) more acre from this land, the protestor seeks double portion from the estate. This is not equitable noting that the protestor and Simon have already benefitted from 9 acres.

33. I would adjust the proposal by the protestor to provide that the remainder of the property Londiani/Joubert/Kendowa Block 18/ 4 & 8 be as per the consent to confirmation of grant filed in court on 18/2/2016 save to adjust the share of Ephantus Mwangi Gioche to 4.5 acres or thereabouts. The shares of Simon and George are to read 9 acres as per the wishes of the deceased in the minutes exhibited.

34. As regards the distribution of Nakuru Municipality Block 27/503 Mwariki, I note the applicant seeks that she gets the whole share of this property. The protestor proposes that the same be sold and proceeds shared out equally.

35. I have considered the rival propositions. It is clear that the applicant resides on this property and there are some rental properties thereon.

I take note of the fact that the applicant who is a widow is now over 70 years old. She lives on this property. The proposed sale and sharing out of the proceeds from this property would certainly visit untold hardship, misery and inconvenience to the widow to the point of rendering her a destitute. Doing the best I can, I am of the view that justice will be served by giving the applicant a life interest on the house she resides.

36. As regards the four shops and the seven (7) bedsitters on the same plot, the shops and bedsitters sit on the same title as the residence of the applicant. It has not been brought to my attention that it is possible to sever the residence from the shops and bedsitters. The total area is said to be ¼ of an acre.

37. It is obvious that a sale and transfer would be impractical without affecting the applicant's residence for which a life interest has been given.

38. In the circumstances of this case, I will order that the applicant shall have a life interest over the entire Nakuru Municipality Block 27/503. This, when putting into account the need to give her sustenance in the remaining days that her maker may shower her with.

39. Property Loc. 19 Gacharageini 1449 is only 1.295 Ha. It is impractical and indeed uneconomical to subdivide this property among the many beneficiaries. The suggestion by the applicant that the land be held in trust by both administrators for the benefit of each of the houses would be inappropriate as all beneficiaries are adults and the same would be tantamount to creating an indeterminate trust as the land would never expand so at no time would the beneficiaries be in a position to enjoy their shares.

40. This land should be sold and proceeds shared out equally among all beneficiaries.

41. As regards the other properties, I will distribute the same equally to all the beneficiaries taking each of the children as a unit and the widow as a unit. Where land is concerned and owing to the small sizes there will be orders to sell the same and distribute the proceeds equally. For the shares in the various listed companies, the shares shall be sold and proceeds distributed equally to all beneficiaries.

42. Finally, the protestor seeks that his co-administrator (the applicant) accounts for rents collected in respect of Nakuru Municipality Block 27/503 and proceeds from the leasing of 9.13 acres at Londiani/Joubert/Kendowa Block 18/ 4 & 8.

43. This application coming from the co-administrator is in my view too little too late. The protestor appears oblivious of the fact that since his appointment as a co-administrator pursuant to a grant of letters of administration intestate dated 9/2/2015, he assumed the duty to collect, preserve and account to court on the status of the estate whenever required so to do. This was a duty to be undertaken jointly with the co-administrator.

44. The protestor failed the estate by failing to take appropriate action timeously to protect it. He cannot ask the court this late in time to reward him for his inaction. Allowing that prayer at this stage would be tantamount to re-opening these proceedings and giving them a longer lease of life. The estate and the beneficiaries need closure. I decline to grant this relief.

45. With the result that the grant is confirmed and the distribution shall be as hereunder;

NAME	DESCRIPTION OF PROPERTY	SHARE
SIMON KOMO GIOCHE	LONDIANI/JOUBERT/KENDOWA BLOCK 18/4 & 8	9 ACRES
GEORGE KANGETHE GIOCHE	"	9 ACRES
EPHANTUS MWANGI GIOCHE	"	4.5 ACRES
MARTHA WAIRIMU MUGO	"	1 ACRE
JANE WANJIRU IRUNGU	"	1 ACRE
ANN WANGARE NGANGA	"	1 ACRE
SERAH WAMBUI GIOCHE	"	1 ACRE
RACHEL WAITHIRA GIOCHE	"	1 ACRE
RUTH NYAMBURA GIOCHE	NAKURU MUNICIPALITY BLOCK 27/503 MWARIKI	Life interest
NAKURU MUNICIPALITY BLOCK 27/505	To be sold and proceeds shared equally among all the beneficiaries	
GICHUA TRADING CENTER PLOT NO. 65	To be sold and proceeds shared equally among all the beneficiaries	
LOC. 19 GACHARAGEINI 19/1449 MATHIOYA	To be sold and proceeds shared equally among all the beneficiaries	
SHARES IN CENTUM INVESTMENT CO. LTD.	To be sold and proceeds shared equally among all the beneficiaries	

SHARES IN EAST AFRICAN BREWERIES LTD. To be sold and proceeds shared equally among all the beneficiaries

SHARES IN KENYA COMMERCIAL BANK To be sold and proceeds shared equally among all the beneficiaries

SHARES IN LONDIANI BUILDING CO. LTD. To be sold and proceeds shared equally among all the beneficiaries

Dated and Delivered at Nakuru this 11th day of December, 2018.

A. K. NDUNG'U

JUDGE