



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 223 OF 2014

IN THE MATTER OF THE ESTATE OF ISAACK KARANJA KAGEKA (DECEASED)

HANNAH WAIRIMU KARANJAPROTESTOR

- Versus -

JANE WAMBUI KARANJA1ST ADMINISTRATOR

ESTHER MUTHONI KARANJA2ND ADMINISTRATOR

RULING

1. Isaac Karanja Kageka died on 29th October, 2013 while domiciled in Kenya. He was survived by two widows, Jane Wambui Karanja (hereinafter the Administratrix) and Hannah Wairimu Karanja (hereinafter the Protestor). Letters of Administration intestate of all his Estate were issued to Jane Wambui Karanja and her daughter, Esther Muthoni Karanja on 13th May, 2014.

2. On 4th December, 2014 the Protestor, filed an Affidavit of Protest against the summons for confirmation of grant dated 27th November, 2014 filed by the Administratrixes of the deceased. She protested that the mode of the distribution filed by the Administratrix did not comply with the wishes of the deceased set out in a document dated 16th November 2013.

3. The Protestor also swore a supplementary affidavit dated 25th May, 2015 in which she made a case to be named as a co-administratrix in the deceased’s estate in place of the second Administratrix and for the 1st Administratrix to be cited for perjury for having listed one Isaac Kageka Karanja a grandson, as one of the deceased’s sons.

4. The Protestor averred that one month prior to his demise, the deceased had made his wishes known pending preparation of a formal will, which wishes were read on 16th November, 2013 after his demise in the presence of all family members. The deceased’s brothers and his parents were said to have been in agreement on the mode of distribution in which they appended their signatures.

5. In order to accord with the wishes of the deceased the Protestor proposed that the estate of the deceased be distributed as follows:

NAME	DESCRIPTION OF PROPERTIES	SHARE OF HEIRS

<p>Jane Wambui Karanja</p>	<p>Langata Dev. Co. Ltd</p> <p>Thika Scheme Munyu share certi. No. 12671</p> <p>Plot No. Block K.87</p> <p>Gabwel Ltd each wife 50%</p> <p>Mbirika West Each wife 50%</p> <p>Amamen Each wife 50%</p> <p>Vehicles:</p> <p>Saloon Toyota KBS 646 J</p> <p>Githurai 45</p> <p>Plot No. 200 Dev. Flat</p> <p>Plot No. 69 Dev. Home</p> <p>Juja Plot Deep Blue Enterprises</p> <p>Plot No. 13 (empty)</p> <p>Naivasha/Mwichiringiri (Naivasha Amamen)</p> <p>Plot No. Blc 4/16485</p> <p>Shamba in Kangema</p> <p>Two acres</p>	<p>To be registered in her name to hold in trust for herself and the children</p>
<p>Hannah Wairimu Karanja</p>	<p>Ruaraka Dev. Co. Ltd</p> <p>Plot No.336/218</p> <p>Patrick Kimeu, Zaverio & Isaace</p> <p>Kariobangi Mathare Valley Plot No. E7/2</p> <p>Mugai-Inn Waroma Investment</p> <p>Two Plot No. 76 & 77 Home Developed</p> <p>Juja Plot DeepBlue Enterprises Plot No. 14(Empty)</p>	<p>To be registered in her name to hold in trust for herself and the children</p>

	Naivasha/Mwichiringiri (Naivasha) Amamen Plot No. 4/1648	
	Vehicles	
	Toyota Pickup KBD 253P	
	Amamen Shares Each wife 50%	
	Mbirika West Each wife 50%	
	Gabwel Ltd each wife 50%	
	Investment	
	Lions Group Investment	

6. From the 1st Administratrix's Affidavit in support of the Summons for confirmation of grant and in reply to the Protestor's affidavits dated 4th December, 2014 and 25th May 2015 respectively, she married the deceased in 1980 under Kikuyu Customary Law. They were blessed with five issues of the marriage.

7. The Administratrix denies that the deceased ever made a formal will or made any proposal on the mode of distribution of his estate in her presence and /or his family and as such, the purported mode of distribution attached by the Protestor in her supporting affidavit is strange and mere fabrication to mislead the court. She argued that the court has the discretion to appoint an administrator, and it is not necessary that an administrator should be related to the deceased.

8. The Administratrix further stated that the Protestor has not demonstrated any reasons why her co-administrator should be substituted. That the Protestor began cohabiting with the deceased on or about the year 2005 and together with the deceased were blessed with three issues.

9. The Administratrix contended that during her coverture with the deceased from 1980 to 2005 when the Objector begun cohabitation with the deceased, the Administratrix and the deceased worked hard and managed to acquire the following properties:

- i) L.R. Loc 9/Kanyanyeini/2633 their first matrimonial home, which was originally registered in her father-in-law's name but was later transferred to the deceased in 2009.
- ii) That the Administrator and the deceased re-located to Nairobi where she worked as businesswoman and together they acquired Mukinyi Plot No. 69 (1998) which is the matrimonial home in Nairobi.
- iii) Ruiru Kiu Block 5/2004, where she has erected rental houses, and,
- iv) Block K/87 Munyu Shares (a property that is subject to court dispute).

10. According to the Administratrix from the year 2005 the period in which the deceased and the Protestor started cohabitation, upto the time of the demise of the deceased the family acquired the following properties:

- (i) Muigai Inn Waroma Plot No. 76 which is the Protestor's matrimonial home while plot No. 77 which is undeveloped but in the Protestor physical possession of the Protestor.
- (ii) Naivasha Mwichiringiri Plot No. 4/16486 – controlled by the Protestor

- (iii) Naivasha Mwachiringiri Plot No. 4/16485 – controlled by the Administrator
- (iv) Share certificate for Deep Blue Plot No.13 & 14 – controlled by the Administrator
- (v) Ruaraka 336/218 - controlled by the Administrator
- (vi) Kariobangi Mathare

11. Counsels on record filed brief submission. Mr. Ng'ang'a for the Administratrix reiterated that the 1st Administratrix was married to the deceased in 1980 under the Kikuyu Customary law. Counsel stated that at no time did the deceased make a formal will or a proposal to the mode of distribution of his estate in the presence of the administratrix or the family.

12. Counsel contended that the Protestor had not demonstrated reasons to warrant the substitution of the co-administratrix and her appeal was based on sheer jealousy. That she should have made her objection when the gazette notice was issued. He did not dispute the assertion that the Protestor and the deceased had cohabited from the year 2005 and had been blessed with three issues of the marriage.

13. Counsel asserted that the Administratrix had acquired properties as stated in her affidavit before the Protestor came into the marriage and that after 2005 she continued to work hard with the deceased to acquire the remaining listed properties. According to counsel it is only this second list of properties that should be subjected to distribution between the 1st and 2nd Houses.

14. Counsel urged that Gabwel Limited, Mbirika Investments, Amamen Group and Patrick Kimeu Group were merry-go-round Self-help Groups/Societies which hold no savings for the estate. He urged that even if the court were to adopt the mode of distribution provided for a polygamous family, it should be considered that the first House has six beneficiaries while the second House has four beneficiaries only.

15. Mr. Wakahu Mbugua for the Protestor filed submissions to contend against the mode of distribution, the exclusion of the Protestor from the administration of the estate and the inclusion of a grandchild in the list of beneficiaries. Counsel stated that the Protestor has as much right as the Administratrix since they were both wives of the deceased and the Protestor has minor children.

16. On the foregoing grounds counsel urged for the revocation of the grant issued to the Administratrix stating that, it had been acquired fraudulently by the making of a false statement and by concealment from the court of material facts, when they misrepresented the grandchild of the deceased as his son. To fortify his position Counsel cited the case of **Lucia Wangechi vs Francis Mburu Njii [2014] eKLR**, in which the grant was revoked for reasons inter alia that a grandson of the deceased was deliberately misrepresented as his son.

17. Counsel urged that the Protestor had acquired the legal title of wife of the deceased after having cohabited with deceased for 12 years before his demise. He referred to the cases of **Hotensia Wanjiku Yawe vs Public Trustee Civil 13 of 1976** and **Moses Ole Senja vs William Ole Senja [2016] eKLR**, in which the court found that long period of cohabitation gave rise to a presumption of marriage.

18. On the mode of distribution counsel submitted that the court should consider equal distribution since the Protestor has minor children depended on her compared to the four children of the 1st House who are adults. Further that Protestor has expressed willingness to share the estate in equal proportions.

19. From the pleadings and submissions of counsel therefore I note that the Administratrix has not disputed that the Protestor is a co-wife and is entitled to a share of the estate together with her three children just as the Administrator and her children are. Form P&A 5 which was filed by the Administrator lists the surviving beneficiaries of the deceased as follows:

- i) Jane Wambui Karanja - widow

- ii) Hannah Wairimu Karanja - widow
- iii) Esther Muthoni Karanja - Daughter – adult
- iv) Florence Nduta Karanja - Daughter – adult
- v) Jecinta Wanjiku Karanja - daughter – adult
- vi) Ruth Waithera Karanja - daughter – adult
- vii) K K - son – 7 years
- viii) C K K - son – 8 years
- ix) L N K - daughter – 15 years
- x) P R K - son - 3 years

20. The important question is whether or not the Administratrix should first have the half of the estate acquired in the period prior to 2005 or the entire estate should be distributed in terms of **Section 40** of the **Law of Succession Act**.

21. Section 40 of the Law of Succession Act provides that:

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

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.”

22. Under **Section 27, 28** and **35** of the **Law of Succession Act** the court has wide discretion to provide for dependants or beneficiaries. See the Court of Appeal decision in **Rono vs Rono and another [2005] 1 KLR** in which Omollo JA stated as follows:

“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”.

23. From her proposal the Protestor did not dispute that the properties set out by the Administratrix were acquired before the Protestor came on to the scene. The Administratrix averred that she was a businesswoman and contributed towards the acquisition of these properties. The court also finds that the Administratrix being a wife and the mother of the children of the deceased, made other non-financial contribution to the acquisition of those properties and they were therefore matrimonial properties.

24. I agree with the decision of Kimondo J in **Esther Wanjiru Kiarie v Mary Wanjiru Githatu[2016]eKLR**, that to apply Section 40 blindly would lead to serious injustice. Further that the section does not completely tie the hands of the court going by the decision in **Rono vs Rono & Another** (supra). This is in tandem with sentiments of Koome J, (as she then was) in **Re Mwangi Gitire (deceased) High Court at Nairobi Succession Cause No. 1033 of 1996 [2004] eKLR** where she stated

thus:

“The 1st widow’s entitlement vis-à-vis the 2nd widow or subsequent widows who perhaps come into the 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 to the same position by section 40 of the Law of Succession Act as the last born child of the 2nd widow or subsequent widows. The widow is supposed to be considered as a unit alongside the children”.

25. Whereas Koome J found that section 40 had placed a fetter on her discretion, in the distribution of the estate of the deceased not so Rawal J (as she then was). In her decision in the case of **Dorcas Wangari Macharia vs KCB & 2 other Nairobi Civil Case No. 18 of 2003 (OS)** Rawal J found 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”.

Article 45(3) of the Constitution recognises the equality of the spouses in marriage. It provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

26. Indeed as observed by Kimondo J in the case of **Esther Wanjiru Kiarie** referred to above, the claim of the 1st widow falls in the genre of a *cestui que trust* and can be maintained against her late husband. In the case of **Njoroge v Ngari [1985] KLR pg. 480**, the plaintiff applied to the High Court under **section 17 of the Married Women’s Property Act 1882**, for a declaration that half the subject property registered in the name of her husband be declared to be held in trust beneficially for her. Butler Sloss J held *inter alia* that:-

“if property is held in the name of one person, even if that property is registered in the name of one person, but another contributed towards acquisition of the property, then both persons have proprietary interest in that property. If legal ownership of such property is registered in the name of only one of them, that one is deemed to hold the land in trust beneficially for himself and the other person.”

Accordingly the right of the first widow must be determined before distribution under the law of succession act.

27. Guided by the mode of distribution in **Esther Wanjiru Kiarie** case it is my considered view that the Administratrix is entitled to half of the properties acquired prior to commencement of the Protestor’s cohabitation with the deceased. The other half of the immovable property acquired in the same period together with all the property acquired thereafter shall constitute the free estate of the deceased to be divided among the two Houses according to the number of children each widow has and adding the two widows as units to the number of children.

28. On whether or not the grant issued on 13th May 2014 should be revoked, the court is of the view that indeed there was concealment of material facts that the Protestor had not been made aware of the proceedings in court.

29. Further that the Administratrix included her own grandchild whose mother is alive as a beneficiary of the estate. Grandchildren whose parents are alive are not to be included in the distribution, as their shares come through their parents who are the children of the deceased.

30. I note that the parties opted to go by way of submission instead of *viva voce* evidence. There is therefore no evidence of specific contribution by either widow to any of the immovable properties. They

have also not filed valuation reports to signify the value of each of the properties.

31. The foregoing being the matrix of this cause the order which commend themselves and which I hereby give are as follows:

i) The grant issued herein on 13th May 2014 be and is hereby revoked and a fresh grant is issued in the names of the two widows, Jane Wambui Karanja and Hannah Wairimu Karanja.

ii) There shall be valuation of all immovable assets registered in the name of the deceased.

iii) Valuation shall be done by a registered valuer to be agreed upon by the Administratrixes within sixty days of this date. In default the court will appoint an independent valuer. The cost of valuation shall be made out of the estate.

iv) There shall be a mention after sixty days on a date to given in court to receive the valuation report and for final orders on distribution.

SIGNED DATED and **DELIVERED** in open court this **6th day** of **February 2017**.

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L. A. ACHODE

JUDGE