



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**PROBATE AND ADMINISTRATION DIVISION**  
**SUCCESSION CAUSE NO. 2086 OF 2013**  
**IN THE MATTER OF THE ESTATE OF MICHAEL WARUI GICHARU (DECEASED)**

**MARGARET WANJIRU.....PETITIONER**

**VERSUS**

**SUSAN WANUNA WANDERI.....OBJECTOR**

**R U L I N G**

1. The deceased whose estate is the subject of the protest is Michael Warui Gicharu who died intestate on 6<sup>th</sup> June, 2013. Margaret Wanjiru Warui the widow of the Deceased (hereinafter the Petitioner), applied for and was granted letters of Administration intestate on 15<sup>th</sup> May 2014. Before the grant was confirmed Susan Wanuna Wanderi (hereinafter the Objector), filed an affidavit of protest dated 24<sup>th</sup> June 2014.

2. The Objector disputed the Grant on grounds that she is a Daughter of the Deceased from his first wife Mary Njeri Njoroge, who has since passed on as well and is therefore a beneficiary to the estate. That the Petitioner obtained the Grant without seeking the consent of all the beneficiaries of the estate. That the Deceased gave the Objector's son, his grandson a, parcel of land as a gift before the former's death. It is therefore her contention that it would be in the interests of justice to be enjoined with the Petitioner as an administrator. The Deceased was survived by the following children from his first wife Mary Njeri who died on 31<sup>st</sup> May 2003:

- a. Robert Gicharu Warui
- b. Susan Wanuna Wanderi
- c. Monica Wambui Kamau

The children of the second wife (the Petitioner) Margaret Wanjiru comprise:

- a. Sophia Wanuna Warui
- b. Mary Watiri Warui
- c. John Njihia Warui

3. The estate of the deceased comprises the following properties:

- i. L.R. No. Dagoretti/Riruta 2709
- ii. L.R. No. Dagoretti/Riruta 5237
- iii. L.R. No. Muguga/Muguga 1840
- iv. L.R. No. Muguga/Muguga 2755
- v. L.R. No. Muguga/Muguga 2926
- vi. L.R. No. Muguga/Muguga 2927
- vii. L.R. No. Muguga/Muguga 2928
- viii. L.R. No. Muguga/Muguga 2929
- ix. L.R. NO Laikipia/ Kinamba Mwenje Block 1/3131
- x. Motor Vehicle Registration No. KAQ 824 X
- xi. Equity Bank Account No. 0570191372445

4. The Petitioner filed an application for confirmation of grant of letters of administration on 25<sup>th</sup> June, 2015 and suggested division of the disputed properties as follows:-

The house of Margaret Wanjiru (Petitioner) to receive:

- i. L.R. No. Muguga/ Muguga 2926
- ii. L.R. No. Muguga/Muguga 2927
- iii. L.R. No. Muguga/Muguga 2928
- iv. L.R. No. Muguga/Muguga 2929
- v. L.R. No. Dagoretti/Riruta 2709
- vi. L.R. No. Muguga/Muguga 2755
- vii. 60% of all the money collected from the properties and Motor
- viii. Vehicle Registration No. KAQ 824 X

The House of Mary Njeri to receive:

- i. L.R. No. Dagoretti/Riruta 5237
- ii. L.R. No. Muguga/Muguga 1840
- iii. L.R. No. Laikipia/ Kinamba Mwenje Block 1/3131
- iv. 40% of all the money collected from parcel properties

5. The dispute regarding most of the properties was disposed of by way of oral orders of consent recorded between the parties on various dates. The first consent was recoded on 19<sup>th</sup> January 2016 in which the

parcel of land known as L.R. No. Laikipia/Kiamba Mwenje Block 1/3131 and motor vehicle registration No. KAQ 824 X were distributed to the 2<sup>nd</sup> House of Margaret Wanjiru. The second consent was recorded on 15<sup>th</sup> February, 2016 in which distribution was done as follows:

1<sup>st</sup> House of Mary Njeri

i. Plot No. Muguga/Muguga 2929

ii. Plot No. Muguga/Muguga 2755

iii. Plot No. Muguga/Muguga 1840

iv. Half of Plot No. Muguga/Muguga 2927

2<sup>nd</sup> House of Margaret

v. Plot No. Muguga/Muguga 2926

vi. Plot No. Muguga/Muguga 2928

vii. Half of Plot No. Muguga/Muguga 2927

6. By that consent also, the proceeds in account No. 0570191372445 at Equity Bank, Kwangware branch, amounting to Kshs.3,270,455.61 were shared equally between the two houses subject to the liquidation of an outstanding loan on the estate. An amount of Kshs. 2 Million was to be paid out of the rent account No. 0630163902720 Equity Bank Kawangware branch to the four Advocates on record.

7. The third consent order dated 12<sup>th</sup> July, 2016 further stipulated that after the amount of Kshs. 3,270,445.61 in Account No. 0570191372445 at Equity Bank, Kwangware Branch was shared equally between the two houses, the share awarded to the 1<sup>st</sup> House would be shared equally among the three beneficiaries therein, Robert Gicharu, Susan Wanderi and Monica Wambui, with each receiving an amount of Kshs. 545,075.

8. What therefore remains in contention is the mode of distribution of the two plots Dagoretti/Riruta No. 2709 and No. 5237 (hereinafter subject properties), and mother Susan Wainaina Wanderi should be a co-administratrix in the estate.

9. By a further consent dated 14<sup>th</sup> July, 2016 the parties agreed to have the dispute disposed of, by way of submissions. In the submissions dated 15<sup>th</sup> November, 2016 learned Counsel Mr. Katunga Mbuvi on behalf of the Objector, argued that prior to the parties agreeing to jointly collect rent from the two subject properties; the Petitioner had solely collected rent from the subject properties for a period of more than three years after the death of the Deceased.

10. Counsel urged that more than Ksh. 19,000,000/= had been collected in that period and had not been accounted for. He submitted that plot No. 5237 attracts a rental income of Ksh. 225,000/= per month while plot No. 2709, where the Petitioner also resides attracts a monthly rental income of 750,000/= per month.

11. It is his submission that the Petitioner should account for the rental income collected prior to the setting up of the joint account and have the amount distributed equally between the two Houses. Counsel premised this argument on the provision of the **Law of Succession Act. Cap 160**, that distribution of the estate of a deceased person should promote equity and fairness in its execution. Counsel asserted that it was unjust for the Petitioner to collect the rental incomes of the subject property to the exclusion of the other beneficiaries of the estate.

12. Counsel submitted that the Deceased was polygamous and the court should be guided by **Section 40** of the **Law of Succession Act** in the distribution of the properties in question. He urged the court to divide the properties equally between the two houses first and thereafter further divide the properties between the units in each House.
13. Counsel placed reliance on **Succession Cause No.209 of 2012; In the Matter of the Estate of Magiri Mukindia S/O Mukindia alias Magiri Mukindia (Deceased)** and **Succession Cause No. 986 of 2010 In the Matter of the Estate of John Gicheru Wambugu (Deceased)** to compound his argument. He submitted further that since the Petitioner resides in plot No. 2709, the same should be apportioned to her.
14. In the submissions dated 5<sup>th</sup> December, 2016 filed by learned Counsel Mr. Kimani Githongo on behalf of the Petitioner, he argued that the estate had been distribute equitably by the Petitioner vide her Application for Confirmation of Grant. That her Supporting Affidavit proposed that plot No.2709 be given to the House of the Petitioner while plot No. 5237 should go to the House of the deceased Mary Njeri.
15. Counsel submitted that all parties to the suit were in agreement with the proposal of the Petitioner and her residence in plot No. 2709. He asserted that plot No. 2709 was the matrimonial home of the Petitioner and the Deceased before his death and that the Petitioner's family is solely dependent on the income from this property as opposed to the beneficiaries of Mary Njeri who have since married and obtained other sources of income.
16. Counsel further argued that the beneficiaries of Mary Njeri have never resided at any of the two premises and that Monica Wambui is not the biological child of the Deceased as she was born after the separation of Mary Njeri and the Deceased. He contended that the Petitioner has been the lone contributor to construction and maintenance of both properties without assistance from the other beneficiaries and that this should strongly guide the court in its decision on the distribution of the subject properties.
17. Counsel elucidated that the Petitioner suffers from a medical condition that requires constant medical attention, whose treatment is expensive. That the Petitioner is quite advanced in age and has children that depend on her for upkeep, and that the income from the property was necessary in the financing of these obligations.
18. According to Counsel plot No.5237 could further be developed by the beneficiaries of the 1<sup>st</sup> House in order to match up to and eventually generate more income than plot No.2709. He opined that the beneficiaries of the 1<sup>st</sup> House are in a better position to take on these proposed developments as they would be too taxing for the Petitioner in her old age. He thus prayed that the distribution of the properties be done as proposed by the Petitioner in her Application for Confirmation of Grant.
19. In the Submissions dated 5<sup>th</sup> December, 2016 filed by learned Counsel Mr. James Njoroge on behalf of John Warui Njihia, a beneficiary from the house of the Petitioner, Counsel submitted that plot No. 2709 is fully developed with rental flats and has no room for improvement, or re-development. That it has a monthly rental income of Ksh. 550,000/=. He also agreed that this property be retained by the Petitioner as it had been the matrimonial home of the Deceased and the Petitioner and is the current residence of the Petitioner.
20. Counsel argued that the property was acquired and improved with the financial and non-financial support of the Petitioner and that as the Deceased and the Petitioner both depended on the rental income for maintenance, the latter is entitled to a life interest in the property as a spouse of the Deceased. He submitted that the division of the rental houses would cause the Petitioner severe financial strain, necessitating her move from her matrimonial home. Further that the Petitioner has two daughters Sophia Wanuna Warui and Mary Watiri Warui for whom she provides maintenance.
21. Counsel observed that plot No. 5237 is partially developed with room for expansion and that the beneficiaries from the House of Mary Njeri have received a substantial amount of money that could be

put towards the development of the said property since they have received an equal share of the rent income paid into the joint account from the rental properties.

22. Counsel argued that none of the beneficiaries from the House of Mary Njeri have made any contributions towards the maintenance and hospital costs of the Petitioner, while the distribution of the properties has been shared equally without regard to the life interest of the Petitioner.

23. He relied on the findings of Gikonyo J and Musyoka J in **High Court Succession Cause No. 421 of 2014 In the Matter of the Estate of M'nchebere M'naituri (Deceased)** and **Succession Cause 399 of 2007 In the Estate of John Musambayi Katumanga eKLR** to compound his arguments. He thus urged the court to distribute the properties along the proposal in the Application for Confirmation of Grant by the Petitioner.

24. In his submissions dated 5<sup>th</sup> December, 2016 Robert, argued that it had been the Deceased's wish that his properties be distributed according to Kikuyu customary law. To this effect Robert argued that as the Deceased's daughters were married and had never contributed to the acquisition or maintenance of the properties, they should be excluded from the distribution of the property as he, the Petitioner and John Njihia the Petitioner's son were the rightful heirs under Kikuyu Customary law.

25. Robert relied on **Succession Cause 26 of 1985** in the **Matter of the Estate** of the late **Josiah Mwangi Karikui** to support his arguments. He contended that the court's distribution of the property in accordance with **Section 40** of the **Law of Succession Act. Cap 160**, would occasion injustice to the widow and the male heirs of the Deceased.

26. Robert therefore urged the court to:

- a. Order that the rooms be counted and valued and/or that the rooms be counted and the monthly rent payable to all the specific houses be determined upfront before the same are distributed to them in the following quantum; 40% to the Petitioner and 30% to Robert Gicharu Warui and John Njihia Warui each.
- b. That the court find in the distribution of the properties that each of the above beneficiaries get sectional units whose payable rent is equal to the proposed centum.
- c. That the court finds that the commercial properties of the Deceased be registered under a trust fund arrangement with John Njihia Warui and Robert Gicharu Warui, the sons of the Deceased as directors.

27. Robert submitted that in the alternative should the court opt to be guided by, Section 40, the properties in dispute should be divided as follows:

- a. 30% of the sectional units or proceeds of the sale to the widow.
- b. 20% to each of the two sons John Njihia Warui and Robert Gicharu Warui.
- c. 10% of the section units or proceeds of the sale to each of the married and duly recognized daughters of the Deceased, Mary Watiri Warui, Sophia Wanuna Warui and Susan Wanuna Wanderi.

28. Robert argued that Monica Wambui is not an issue of the Deceased as she was born out of wedlock in an association between the deceased Mary Njeri and another man after separating from the Deceased in 1972. That the said Monica Wambui had illegally benefited from the estate of the Deceased and should thus be barred from further benefitting from the Deceased's estate as she is not a child of the Deceased as provided for in **Section 3(2) of the Law of Succession Act**.

29. The answer to Robert's contention that Kikuyu Customary Law should be used in the court's

distribution of the property can be found in **Section 2(1)** of the **Succession Act**, which provides that:

**(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.**

The Deceased having passed away in 2013, after the commencement of the Act, the administration of the Estate must be governed by the provisions of the Succession Act.

**30.** The alternative proposals by Robert on the division of property cannot be entertained by this court in so far as they are inconsistent with **Clauses (3) (4) and (5) of Article 27 of the Constitution, 2010** which emphasize the principle of equality before the law and the right to equal protection by the law and equal benefit of the law. Men and women have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

**31.** Any law including customary law, which is inconsistent with the **Constitution, 2010**, is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid. The exclusion of the female heirs from the inheritance of the estate as proposed by Robert is patently discriminatory. It is an action which belongs to the dark ages and which this court cannot condone.

**32.** I also observe that all witnesses are unanimous in their testimonies that all the listed issues are children of the Deceased save for Ms. Monica Wambui, whose step-brothers Robert and John have asserted is not the biological child of the Deceased. Paternity is a matter of fact. Despite their claims, the two brothers have not demonstrated to the satisfaction of the court the paternity of Monica Wambui so as to exclude her as a beneficiary of the estate. The rest of the family has not objected to her inclusion. I therefore find that Ms. Monica Wambui is a beneficiary of the estate of the Deceased.

**33.** On the question as to the mode of distribution to be adopted, the court notes that the mode of distribution proposed by the Petitioner was supported by Mr. John Njihia Warui vide his application of 8<sup>th</sup> December, 2015. It was also supported by the Objector vide her application dated 15<sup>th</sup> December, 2015 save for the fact that it was her desire that Robert be included in the list of beneficiaries of plot No. 2709, in the 2<sup>nd</sup> House for this purpose only. Robert himself also urged that the property in question being the matrimonial property of the Petitioner should remain in her possession as she has a life interest in it under **Section 35 of the Law of Succession Act**.

**34.** In her Affidavit of Protest dated 14<sup>th</sup> January, 2016 Monica Wambui Kamau disputed the Petitioner's mode of distribution, stating that it should instead be done on a 50:50 basis. In the submissions on behalf of the Petitioner Counsel argued that the basis of distribution suggested by Monica Wambui had already been achieved with respect to all the other assets as set out in the consent agreements. That an equal division of these subject properties cannot be achieved in this instance as they comprise built up properties.

**35.** *Section 35 to which Robert referred the court provides that:*

**(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-**

**(a) the personal and household effects of the deceased absolutely; and**

**(b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.**

**(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way**

*of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.*

*(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.*

36. All the parties are in agreement with the proposal put forward by the Petitioner on which of the two properties should go to which House save for the objection of Ms. Monica Wambui. I note that it is not disputed that the Petitioner suffers from a medical condition requiring expensive medical treatment, as evinced by the medical records attached to her submissions. She is also advanced in age.

37. From the evidence Mary Njeri abandoned the marriage sometime before or about the year 1972. There is no evidence that at that time any of these two properties had been acquired nor has it been submitted that she contributed to the acquisition and development thereof in any way. On the other hand, it has been submitted that the Petitioner contributed in cash and kind to the acquisition and development thereof.

38. Ideally therefore going by the decision of Kimondo J in **Eldoret P&A 244 of 2002 Esther Kiarie v Mary Githatu eKLR**, half of the property in the estate should devolve to the Petitioner. It is the remaining half which should be distributed between the two houses in accordance with **Section 35 Law of Succession Act**.

39. I note that the proposal by the beneficiary Mr. Robert Gicharu (hereinafter Robert) from the 1<sup>st</sup> House, that the Deceased's commercial properties should be held in trust by himself and his step brother John Njihia is not supported by any of the other beneficiaries. It is important for each of the houses to hold separate plots to void the bitterness and acrimony that has been evident throughout the subsistence of this matter.

40. I observe however that there is a significant variance in the amounts claimed to be the monthly rental income collected from the subject properties as shown below:

Parties:	Plot No.2709	Plot No.5237
John Njiha Warui	Ksh. 550,000	Ksh. 270,000
Margaret Wanjiru	Ksh. 500,000	Ksh. 231,000
Susan Wanderi Warui	Ksh. 750,000	Ksh. 225,000

From the above, it is difficult to tell what the true state of affairs is, as each party states different amounts, especially regarding plot No. 2709. The figures stated by the objector and the petitioner regarding the two properties greatly vary. None has attached a financial statement to support their assertion.

41. I have therefore considered the law applicable in this matter and all the proposals on the mode of distribution of the estate that have been placed before me. For the reasons set out above and for equity to be achieved it is my considered view that the mode of distribution that does commend itself to the circumstances of this cause and which I hereby order is as set out below:

i. The Land Parcel No. Dagoretti/Riruta 2709 shall devolve to Margaret Wanjiru for her life interest. Thereafter it shall devolve to her children Sophia Wanuna, Mary Watiri and John Njihia or such as shall survive her.

ii. The Land Parcel No. Dagoretti/Riruta 5237 shall devolve to the House of Mary Njeri to be

divided among the three beneficiaries Robert Gacharu, Susan Wanuna Wanderi and Monica Wambui Kamau in equal shares.

There are no orders as to costs.

**SIGNED DATED** and **DELIVERED** in open court this **13<sup>th</sup>** day of **February 2017**.

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**L. A. ACHODE**

**JUDGE**