



**REPUBLIC OF KENYA**

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

**PROBATE & ADMINISTRATION CAUSE 244 OF 2002**

***RE ESTATE OF EPHANTUS GITHATU WAITHAKA (DECEASED)***

**ESTHER WANJIRU KIARIE.....PETITIONER**

**VERSUS**

**MARY WANJIRU GITHATU.....OBJECTOR**

**FURTHER JUDGMENT**

1. Ephantus Githatu Waithaka (hereafter *the deceased*) died intestate on 9<sup>th</sup> April 2002. He was polygamous. He was survived by two widows, Mary Wanjiru Githatu (hereafter *the objector*) and Esther Wanjiru Kiarie (hereafter *the petitioner*); and, ten children. A dispute has arisen over the *distribution* of his free estate.
2. Earlier, the High Court (Ibrahim J, as he then was); and, the Court of Appeal (by a majority decision) *determined* that the objector and petitioner were *widows* of the deceased: the objector under *Kikuyu* customary law; and, the petitioner by virtue of *presumption* of marriage. The decree in the High Court directed that *further evidence* be taken to determine how the assets would be *distributed* among the two widows and ten children. Hence this *further judgment*.
3. The objector married the deceased in the year 1968. Her case is that *majority* of the assets were acquired between 1968 and 1984 before the petitioner married the deceased. The objector claims that the properties were acquired *jointly* with the deceased; and, that a *resulting trust* evolved. She claims to be entitled to *half* of the estate acquired *prior* to 1984. She thus proposes that she be allocated half of those properties; and, that the balance of the estate be shared equally between the two houses.
4. The petitioner started cohabiting with the deceased in 1986. She strongly disputes that the objector made any contribution towards acquisition of the assets. She contends that the two widows were unemployed housewives; and, that all the assets were purchased by the deceased. She thus proposes that the net intestate estate be shared equally between the two widows and all the ten children in terms of section 40 of the Law of Succession Act.
5. The objector testified that she had eight children with the deceased. One of the children is deceased. The children are:
  - i. George Asaph Waithaka;
  - ii. Jane Wangari Githatu (deceased);
  - iii. Nancy Wanjiku Githatu;
  - iv. Stephen Mwangi Githatu;
  - v. Anthony Mwangi Githatu;
  - vi. Catherine Waitherero Jerusha;
  - vii. Nelly Njeri Githatu; and,
  - viii. John Maina Githatu.
6. The objector relied on her witness statement dated 3<sup>rd</sup> November 2014. She said that throughout

- the marriage, she and the deceased ordinarily resided in Eldoret Municipality. She said she engaged in commercial farming; and, that she was running her husband's butchery-cum-hotel. She said that between 1968 and 1984 she and the deceased jointly acquired the following properties-
- i. Eldoret Municipality Block 5/249 – (West Indies) in 1968;
  - ii. Location 20/Mirira/1219 in 1970;
  - iii. Eldoret Municipality Block 6/109 in 1971;
  - iv. LR 37/2444/19 (Nairobi West) in 1972;
  - v. Uasin Gishu/Illula/223 in 1982;
  - vi. Uasin Gishu/Illula/195 in 1982; and,
  - vii. Eldoret Municipality Block 21/365 (Kapyamit) in 1984.
7. She said the income from the businesses was ploughed back into acquisition of other family properties. Since the properties were registered in the name of the deceased, she claimed that a trust arose; and, that she has a right to half of them before distribution to other beneficiaries.
8. She testified that after 1985 up to the time of his demise the deceased acquired the following properties:
- a) Eldoret Municipality Block 5/502;
  - b) Lorry registration KAA 348D;
  - c) Saloon car KAH 887Z; and
  - d) Lorry KAC 804H.
9. The objector opined that she was entitled to half of the immovable properties acquired prior to 1984. She testified that the remainder of the estate should be divided equally between her, the petitioner and the children of the deceased. When cross-examined, she conceded that the landed properties are all registered in the name of the deceased; and, that there was no formal agreement between her and the deceased giving her half of the property. She said that under *Kikuyu* customary law, it was not necessary that both spouses be registered as proprietors. She testified that the motor vehicles are broken down but serviceable.
10. She also conceded that she has been collecting rent from some of the properties. She did not have the figures or records in court. She said she had not seen the valuation obtained by the petitioner through *Highland Valuers*. She said that the deceased had instructed her to take care of all the children of the 2<sup>nd</sup> house. She said that for two years she took care of Edgar Githatu, a son of the petitioner. The petitioner was however hostile. At some point she gave an offer for distribution of the property to the petitioner but no agreement was reached. Some elders tried, unsuccessfully, to reconcile the two widows. The petitioner also refused to sign an agreement brokered by their lawyers.
11. The objector's second witness was John Waweru Makenye (PW2). He relied on a witness statement filed on 3<sup>rd</sup> November 2014. He knew the deceased and the objector from 1974 when he moved into Eldoret. He said the deceased and the objector ran a business styled *Makadara Butchery* from the 1970s. It later became a hotel. PW2 would get hides and skins from the business for sale in Thika. He said the couple also engaged in commercial farming. He claimed the objector was actively involved in the management of the businesses. He testified that the petitioner married the deceased in 1986; and, that she was not involved in running the businesses. He was of the opinion that under *Kikuyu* customs, it was not necessary that the objector be registered jointly with the deceased as proprietor of the landed properties.
12. Upon cross-examination PW2 said he was not involved in the management of deceased's business. He said the deceased used to buy cows for slaughter, while the objector would run the butchery. PW2 only used to get the skins and hides for sale in Thika.
13. PW3 was Stephen Irungu Asaph. He is a younger brother of the deceased. He relied on a witness statement filed on 3<sup>rd</sup> November 2014. He said he lived with the deceased and the objector in the 1970s and 1980s. He confirmed that the objector was running the butchery or hotel-cum-lodging; and, commercial farming. After PW3 completed primary education, he was employed by the deceased and the objector in the businesses.

14. PW3 did not recognize the marriage of the petitioner to the deceased; or, that the children belonged to the deceased. As far as he was concerned, the deceased had only one wife, the objector. He said he was unaware of the decision of the High Court or the Court of Appeal on the matter. Upon cross-examination, he conceded that he had testified at the High Court earlier. I found him less than candid on that aspect. Even the objector herself conceded that the petitioner was a co-wife. PW3 did not have the statements of accounts to show the income from the businesses. He said he was only an employee. That marked the close of the objector's case.
15. The petitioner then took the stand. She relied on her witness statement filed on 23<sup>rd</sup> March 2015. She testified that she was married to the deceased. They were blessed with three children: *Kelvin Kiarie Githatu, Edger Waithaka Githatu and Angela Wangare Githatu*. She said that in addition to the properties cited by the objector, the deceased also owned the following-
- a. Eldoret Municipality Block 8/2206
  - b. Motor vehicle KTT 287
  - c. Shares in British American Tobacco Company Limited
  - d. Shares in Standard Chartered Bank Limited
  - e. Shares in Embakasi Ranching Company Limited
16. The petitioner denied that the objector contributed towards the acquisition of all the properties. She also denied that the objector was involved in management of the businesses ran by the deceased. She testified that the property ought to be distributed equally between the widows and the children. She said that the objector has been managing the entire estate and should account for the rent she has collected to date. She said that she (petitioner) is not in control of any the properties. In her view, the originating summons for distribution of half of the estate to the co-widow has no legal basis.
17. The petitioner testified that she and the objector were housewives; and, that the deceased used to say that all the properties were for the children. She said her children are young. She had sought assistance from the objector in 2013. She had also requested for an account. The petitioner had filed valuation reports in court. She said the objector is in possession of the two farms.
18. When cross-examined, she conceded that she had never written formally to the objector. They had tried to resolve the matter. She claimed that the deceased told her that he had established the business before he married the objector. She was unaware of the business relationship between PW2 and deceased. When she married the deceased, he already had majority of the properties specified above. The deceased did not put up a house for her. They lived in a rental property in West Indies, Eldoret. The objector was living in another house in West Indies owned by the deceased. That marked the close of the petitioner's case.
19. The petitioner has filed submissions dated 2<sup>nd</sup> November 2015. The objector's submissions were filed on 17<sup>th</sup> November 2015. The petitioner's further reply was filed on 15<sup>th</sup> February 2016. I have considered the pleadings, witness statements, oral evidence and the written submissions.
20. It is not contested that the deceased died intestate on 9<sup>th</sup> April 2002. The petitioner sought a grant of letters of administration. The objector *protested*. She also lodged a *cross-petition*. The High Court (Ibrahim J, as then was) rendered partial *judgment* in this matter on 13<sup>th</sup> May 2008. He found that both the objector and petitioner were *widows* of the deceased: the objector under *Kikuyu* customary law; and, the petitioner by virtue of *presumption of marriage*. He decreed that the two be joint administrators of the estate. The objector was aggrieved and lodged an appeal in the Court of Appeal at Eldoret in Civil Appeal 20 of 2009. On 23<sup>rd</sup> April 2010, and by majority (Bosire and Tunoi JJA), the Court of Appeal upheld the decision of the superior court. Nyamu JA *dissented*. He was of the view that the concept of *presumption of marriage* was inconsistent with *Kikuyu* customary law.
21. Thereafter the objector lodged an originating summons dated 20<sup>th</sup> September 2010. In a synopsis, the objector claims that the properties were acquired *jointly* with the deceased; and, that there is a *resulting trust*. She claims to be entitled to half of the estate acquired prior to 1984. She thus proposes that she be allocated *half* of those properties; and that the balance of the estate be shared equally between the two houses. The narrow issue for my determination is whether she is entitled to *half* of the estate *before* distribution; or, whether the entire estate should be distributed *equally*

- to the two houses and all the children of the deceased. Concomitant with that is whether there is need for a *valuation*; and, whether the objector, who has been in control of the estate, should render an *account* to the estate.
22. From the judgments of the High Court and the Court of Appeal in this suit, I find that both the objector and petitioner are entitled to a share of the estate. By dint of the two judgments, it follows as a corollary that *all* the ten surviving children of the deceased that I named earlier are entitled to inherit the deceased. As decreed by the High Court and affirmed by the Court of Appeal in the decisions above; and, for the avoidance of doubt, the *objector* and the *petitioner* shall be the *joint administrators* of the estate.
23. The elephant in the room is whether the objector should first get half of the estate acquired prior to 1984; or, whether the entire estate should be distributed in terms of section 40 of the Law of Succession Act. The deceased was polygamous. The starting point is section 40 of the Law of Succession Act which provides-

*“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 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 within each house shall be in accordance with the rules set out in section 35 to 38”.*

24. Section 40 does *not* however take away the discretion of the court to distribute the estate *fairly*. By dint of sections 27, 28 and 35 of the Act, the court has been clothed with wide *discretion* to provide for dependents or beneficiaries. This point was succinctly captured by Omollo J A in *Rono v Rono & another* [2008] 1 KLR (G&F), [2005] 1 KLR 538 at 553-

*“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”.*

25. I am satisfied from the evidence of the objector and PW2 that majority of the landed properties were acquired between 1968 and 1984 during the marriage of the deceased and the objector (first widow). The only properties acquired after that date were Eldoret Municipality Block 5/502; and, three motor vehicles registration KAA 348D, KAH 887Z and KAC 984H. It is not clear *when* Eldoret Municipality Block 8/2206 and the shares in British American Tobacco Company Limited, Standard Chartered Bank Limited and Embakasi Ranching Company Limited were purchased.
26. It is not contested that the petitioner (2<sup>nd</sup> widow) started cohabiting with the deceased in 1986. She was obviously *not* in the picture when the majority of immovable properties were acquired. From the evidence of PW2 and PW3, I entertain no doubt that the objector was assisting the deceased in running *Madaraka* butchery-cum-hotel; and, in the farming enterprises. PW3 was employed in the business. PW2 would get hides and skins from there. I thus find that the objector made *non-financial contribution* to the acquisition of those properties. They were matrimonial properties. The petitioner's evidence that the objector made no such contribution or did not manage the business is weak on two fronts. First, she was *not* there during the acquisition; and, secondly, she did not contribute to their purchase or development in any manner.
27. Granted that evidence, it would lead to serious injustice to apply section 40 blindly in this case. The section does not completely tie the hands of the court. See *Rono v Rono & another* [2005] 1 KLR 538, *Rael Vulekani Musi v Rachael Edagaye Akola*, Eldoret, High Court P&A 5 of 2013 [2016] eKLR. I am also fortified by the decision of Koome J (as she then was) in *Re Mwangi*

Gitire (Deceased) High Court at Nairobi, Succession Cause 1033 of 1996 [2004] eKLR cited by Mr. Momanyi, learned counsel for the petitioner. The learned judge lamented that section 40 of the Act led to *inequality* by relegating the 1<sup>st</sup> widow to the same position as the youngest child of the subsequent widows. The learned judge stated-

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

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

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

29. Learned counsel for the petitioner, Mr. Momanyi, cited Rono v Rono [2008] 1 KLR (G&F) for the proposition that the estate should be divided strictly in terms of section 40 of the Act. But from the judgment of Omollo JA in that case, there is no *“requirement [in the Act] 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”*. There has also been some law reform in the area and most recently in the Matrimonial Property Act 2013 (which repealed The Married Women Property Act of England as applied in Kenya). Although learned counsel for the objector, Mr. Kigano, invited me to apply section 8 of the Act (which provides that the property acquired by the husband and first widow should be shared in half first before distribution to the subsequent houses) I find the Act, which only came into force on 16<sup>th</sup> January 2014, *cannot apply retrospectively* in this case.

30. However Article 45 (3) of our Constitution now speaks *strongly to equality* of parties to a marriage. I am alive that the Constitution is not *necessarily subject to the same principles against retroactivity as ordinary legislation*. I am also guided by the Supreme Court that in order to re-engineer the social order, a constitution must *look forward and backward, vertically and horizontally*. See Samuel Kamau Macharia and another v Kenya Commercial Bank Nairobi, Supreme Court, Application 2 of 2011 [2012] eKLR. In interpreting the Constitution, the court must pay due regard to the language of the Constitution.

31. The properties here are all *registered* in the name of the *deceased*. I am alive that under the repealed land regime, including the Registered Land Act, one of the *overriding* interests was a trust including a spousal interest. Learned counsel for the petitioner, Mr. Momanyi, submitted that the originating summons is incompetent because it should have been brought *during the life time* of the deceased. There is little merit in that submission. The cause of action *survived* by virtue of section 2 of the Law Reform Act. By dint of Rule 41 of the Probate and Administration Rules under the Law of Succession Act, proceedings should be taken out by an originating summons. The procedure is laid down in order 37 of the Civil Procedure Rules 2010. See Dorcas Wangari Macharia v KCB & 2 others, Nairobi, High Court, Civil Case 18 of 2003 (O.S) (unreported).

32. Furthermore, the 1<sup>st</sup> widow was *not seeking to terminate* her marriage to the deceased at any time. An originating summons for division of matrimonial property can only be presented in the course of dissolution of a marriage. The marriage between the parties here has been dissolved by *death*. I agree with Mr. Momanyi that it leads to a muddled situation where the summons by the *objector* is partly against *herself* as an administrator. But her claim falls in the genre of a *cestui que trust* and can be maintained against the estate of her late husband. See Dorcas Wangari Macharia v KCB &

- 2 others, Nairobi, High Court, Civil Case 18 of 2003 (O.S) (unreported). Accordingly, her rights have to be determined *before* distribution under the Law of Succession Act. Our Constitution in Article 159 (2) (d) also frowns against technical justice.
33. The 1<sup>st</sup> widow was married under *Kikuyu* customary law. The burden to prove the *trust* fell squarely upon her shoulders. See sections 107 and 109 of the Evidence Act. See also Evans Nyakwana v Cleophas Ongaro, High Court, Homa Bay, Civil Appeal 7 of 2014 [2015] eKLR. I have already found the objector made *non-financial contribution* to the acquisition of all the properties *prior to 1984*. I stated earlier that the petitioner was ill-placed to *rebut* the presumption of the trust. She was simply not there between 1968 and 1984. From the evidence of the objector, PW2 and PW3, I readily find that there was a *resulting trust*. It follows that questions 1, 2 and 3 as framed in the originating summons are answered in the *affirmative*. In answer to question number 4 in the originating summons, the joint interest of the deceased and the objector cannot be easily *partitioned*. I apply the maxim that *equality is equity*. It must follow that the objector is entitled to *half* of the properties acquired prior to 1984.
34. The other half of the immoveable properties acquired prior to 1984; and, all the properties acquired by the deceased thereafter shall constitute the *free estate* of the deceased to be divided under the Law of Succession Act. By dint of section 40 of the Act, they shall be divided among the *two* houses according to the *number of children* in each house, but also adding the *two* widows as units to the number of children. However, and subject to valuation reports, the distribution shall as much as possible ensure that *each* house gets a fair spread of urban, rental and agricultural land.
35. In order to give full effect to this further decree, I order that there be valuation of *all* the *immoveable* assets registered in the name of the deceased. The valuation shall be done by a registered valuer to be agreed upon by the administrators *within 30 days* of today's date. In default, the court shall appoint an independent valuer. The findings of the valuer so appointed shall be *final* for purposes of distribution of the estate. Secondly, the objector *must* render a current, full and true *account* of all the rents and other income from the properties from 9<sup>th</sup> April 2002 to date. The account shall be under the hand of a *Certified Public Accountant*. The report shall be filed *within 60 days* of today's date. The costs of the valuation and accounts shall be made out of the estate. There shall be a mention after *60 days* of today's date to receive the two reports and for final orders on distribution.
36. The Court of Appeal awarded the *petitioner* costs in the superior court and in the Court of Appeal. I decline to re-open the matter of costs.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 8<sup>th</sup> day of March 2016.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Further judgment read in open court in the presence of:-**

Mr. Momanyi for the petitioner instructed by Anassi Momanyi & Company Advocates.

Mr. Kigano for the objector instructed by Kigano & Associates Advocates.

Mr. J. Kemboi, Court clerk.