



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 56 OF 2010**

**IN THE MATTER OF THE ESTATE OF MUCHOKI JOSEPH STEPHEN KANYORO alias  
JOSEPH STEPHEN MUCHOKI alias MUCHOKI STEPHEN JOSEPH KANYORO alias  
MUCHOKI J.S. KANYORO (DECEASED)**

SUSAN WAMBUI MUCHOKI.....1<sup>ST</sup> INTERESTED PARTY/APPLICANT

VICTOR KANYORO MUCHOKI.....2<sup>ND</sup> INTERESTED PARTY/APPLICANT

ISAAC KARANJA MUCHOKI.....3<sup>RD</sup> INTERESTED PARTY/APPLICANT

ANN RUTH NJERI MUCHOKI.....4<sup>TH</sup> INTERESTED PARTY/APPLICANT

MARGARET NAOMI .....5<sup>TH</sup> INTERESTED PARTY/APPLICANT

WANGECHI MUCHOKI.....5<sup>TH</sup> INTERESTED PARTY/APPLICANT

RICHARD MACHARIA MUCHOKI...6<sup>TH</sup> INTERESTED PARTY/APPLICANT

VERSUS

MARY GATHONI MUCHOKI..... 1<sup>ST</sup> PETITIONER/1<sup>ST</sup> RESPONDENT

IRENE NJERI MUCHOKI .....2<sup>ND</sup> PETITIONER/2<sup>ND</sup> RESPONDENT

**JUDGMENT**

1. The deceased MUCHOKI JOSEPH STEPHEN KANYORO died intestate on 3<sup>rd</sup> February 2009. He left the following properties which comprise the estate to be distributed to the beneficiaries:-
  - a. LR NO. NAIROBI/BLOCK 74/235 Buruburu estate, Nairobi;
  - b. LOC. 10/MUKANGU/620 measuring 0.48 Ha;
  - c. LOC. 10/MUKANGU/684 measuring 0.465 Ha;
  - d. 46 shares in Wangu Investments Ltd; and
  - e. Credit balance in A/C [*particulars withheld*] at Barclays Bank.
2. On 19<sup>th</sup> January 2010 the petitioners/respondents filed a petition for the grant of letters of administration intestate. In the affidavit sworn to support the petition it was stated that the deceased had left the 1<sup>st</sup> petitioner as the only widow and the 2<sup>nd</sup> petitioner as the only child

- (daughter). The grant was issued to the petitioners on 19<sup>th</sup> May 2010. It was confirmed and certificate issued on 22<sup>nd</sup> February 2011. The only property subject of the petition was the Buruburu estate house. It was given to the petitioners. An application for rectification was successfully filed with the result that the property was to be equally shared between the two.
3. On 15<sup>th</sup> October 2013 the 1<sup>st</sup> applicant SUSAN WAMBUI MUCHOKI and her children VICTOR KANYORO MUCHOKI (2<sup>nd</sup> applicant) ISAAC KARANJA MUCHOKI (3<sup>rd</sup> applicant) ANN RUTH NJERI MUCHOKI (4<sup>th</sup> applicant), MARGARET NAOMI WANGECHI MUCHOKI (5<sup>th</sup> applicant) and RICHARD MACHARIA MUCHOKI (6<sup>th</sup> applicant) filed summons seeking the revocation and or annulment of the grant. The 1<sup>st</sup> applicant stated that she was the only widow of the deceased, the 1<sup>st</sup> petitioner having been divorced by the deceased before he died. With her, the deceased got five children (2<sup>nd</sup> to 6<sup>th</sup> applicants) and with the 1st petitioner the deceased had got one child (the 2<sup>nd</sup> petitioner). Her case was that the petitioners had not disclosed the existence of this second family whose members had not been notified of the filing of the petition. Further, the petitioners had failed to disclose that the deceased had the four other properties. The result was that the applicants had not been provided for.
  4. On 11<sup>th</sup> March 2014 the advocates of the parties recorded a consent before Justice Kimaru whose terms were that the grant that was issued, confirmed and rectified was revoked, and a new grant issued in the joint names of the 2<sup>nd</sup> petitioner and the 2<sup>nd</sup> applicant. The matter was mentioned severally to allow for the parties to agree on the distribution of the estate. When an agreement was not forthcoming, it was agreed that each side files written submissions which would be used to share the estate. The submissions were filed. I have considered them.
  5. It is not in dispute that the deceased had two wives during his lifetime. He got married to the 1<sup>st</sup> petitioner on 14<sup>th</sup> December 1974 under the now repealed **African Christian Marriage and Divorce Act (Cap. 151)**. Together they got one child (the 2<sup>nd</sup> petitioner). In 1984 the deceased began to live with the 1<sup>st</sup> applicant as husband and wife. In the relationship, they got five children (the 2<sup>nd</sup> to 6<sup>th</sup> applicants).
  6. The petitioners are laying claim to only the Buruburu estate house. Their case is that following the 1<sup>st</sup> petitioner's marriage to the deceased in 1974, the two jointly purchased the Buruburu estate house in which they lived for 26 years. This was their matrimonial home to which the 1<sup>st</sup> applicant made no contribution as she was married after its purchase. The petitioners asked that the applicants do share the rest of the deceased's property. On the other hand, the applicants have asked that all the beneficiaries do equally share all the property of the estate. Their counsel made reference to **section 40 of the Law of Succession Act (Cap 160)**. The 1<sup>st</sup> applicant stated that beginning 1984 she began maintaining the Buruburu house by paying water bills, electricity bills and land rates. It is not in dispute that by the time the deceased died the house had a tenant. The 1st petitioner stated that they got a tenant to rent the house after the deceased lost employment.
  7. The 1<sup>st</sup> applicant stated that from the title deed issued on 19<sup>th</sup> July 1974(VK M2) it was clear that the deceased bought this property before he married the 1<sup>st</sup> petitioner, in which case, she argued, it cannot be true that the petitioner participated in the purchase. That may be so, but it is not disputed that the deceased and the 1<sup>st</sup> petitioner settled in this house as their matrimonial home and that was where the 2<sup>nd</sup> petitioner was born and grew up. There is no evidence that the 1<sup>st</sup> applicant at any time lived in this house, either alone or with the deceased.
  8. Under **section 40(1) of the Act**:

**“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 estate shall, in the first instance, be**

**divided among the house according to the number of children.”**

This is the basis for the argument of the applicants that all the property be shared equally among the beneficiaries. That would mean that the 1<sup>st</sup> applicant’s house, because of the number of children therein, would get a larger share. However a reading of the decisions in **RONO V. RONO [2008] eKLR (G & F) 803** and **DOUGLAS NJUGUNA MUIGAI V JOHN BOSCO MAINA KARIUKI AND ANOTHER [2014]eKLR** would appear to show that the court has a discretion in determining how the estate of a polygamous deceased should be shared. The number of children in each house should be taken into account. Ultimately, however, the case has to be decided on its peculiar circumstances. Where, for instance, a widow shows that she contributed to the purchase of any of the properties that should be considered. Where, like in this case, the second widow has come into the marriage many years after the first widow had been settled in a matrimonial home by the deceased, that has to be taken into account. In any case, under **Article 45(3) of the Constitution of Kenya 2010:-**

**“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.”**

9. Ideally, the petitioners should lodge a claim to share not only on the Buruburu house but also to the rest of the property, but have restricted themselves to the former.

10. I have considered the facts of this case and determine that the petitioner shall get NAIROBI/BLOCK/74/235. I order that the property be registered in the joint names of the petitioners so that each has an equal claim to it.

11. The 1<sup>st</sup> applicant’s house shall get LOC.10/MUKANGU/620, LOC.10/MUKANGU/684, 46 shares in Wangu Investment Limited and the money in A/C No. **[particulars withheld]** at Barclays Bank. Each of the applicants shall have equal share to these properties. Costs shall be borne by the parties.

**DATED and DELIVERED at NAIROBI this 10<sup>th</sup> day of March 2015**

**A.O. MUCHELULE**

**JUDGE**