



REPUBLIC OF KENYA



**In re Estate of Damiano Murugu M'mugwika (Deceased) (Succession Cause 54 of 2019) [2024] KEMC 106 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEMC 106 (KLR)

**REPUBLIC OF KENYA  
IN THE GITHONGO LAW COURTS  
SUCCESSION CAUSE 54 OF 2019  
AT SITATI, SPM  
JUNE 28, 2024**

**IN THE MATTER OF THE ESTATE OF DAMIANO MURUGU M'MUGWIKA (DECEASED)**

**BETWEEN**

**GLADYS GATABI KIAMBI ..... PETITIONER**

**AND**

**ANNE KARIMI MUGUNA ..... PROTESTOR**

**JUDGMENT**

1. By a Summons dated 17<sup>th</sup> September, 2021 supported by an affidavit of similar date, the Petitioner herein proposed the following mode of distribution of the deceased's Estate Abothuguchi/Kiiija/128 :1 acre to Gladys Gatabi as daughter-in-law 0.24 Acres to Eunice Gaicugi as granddaughter 0.24 Acres to Irene Gatwiri as granddaughter.
2. The Summons was supported by the signed consent dated 11<sup>th</sup> September, 2021 by both Eunice and Irene. In support of the Summons were witnesses' statements of Gladys Gatabi, Samson Kiambi and Rose Kiende which were duly adopted as evidence in the case. Afterwards, Chief Robert Murori attended court upon the application of the petitioner.
3. PW1 Gladys Gatabi told the court that she got married to the deceased Josephat Njuki in the 1980s and gave birth to 2 daughters. She added that she cohabited with the deceased husband till his demise on 22<sup>nd</sup> July, 1998. Her testimony was that the protestor herein never featured anywhere and did not even attend the burial of the said Njuki but her father in-law reinstated her therein. She complained that her husband's relatives evicted her from the matrimonial home after the burial. In cross-examination, the following came to light: PW1 had seen the birth certificate of one of the children of the protestor and had not challenged it; She got married to the deceased Njuki in the 1980s and cohabited with him as his wife before giving birth to her first child with him in 1991. She had contested the chief's letter dated 26/11/2018 which listed the protestor and protestor's children as beneficiaries to the deceased estate. She disowned parcel Abothuguchi/Kiiija/128 saying that it was strange to her.



4. In re-examination, she told the court that the chief wrote the letter of 26/11/2018 under the direction of his bosses since she had protested at the chief's refusal to assist her.
5. PW2 Rose Kiende told the court that she witnessed the marriage of the deceased Njuki to the petitioner herein and lived as their neighbour for many years. Her testimony in cross-examination was that she witnessed the customary law marriage between the deceased Njuki and the petitioner.
6. PW3 Samson Kiambi a retired chief told the court that the petitioner was the sole widow of the deceased Njuki and that he only knew of the 2 daughters born by the petitioner. In cross-examination, the following came to light: The petitioner lived in the rural home of the deceased Njuki while the protestor lived in town with the deceased Njuki. He recognized the petitioner as the sole widow of the deceased Njuki. The deceased's family and relatives would know the relationship between the deceased and the protestor.
7. Mr. Dennis Kithinji Kirigiah Advocate represented the petitioner.

### **The Protestor's Case**

8. The Summons for Confirmation was opposed by the Protestor who lodged an affidavit of protest dated 31<sup>st</sup> August, 2022. Accompanying the protest were the witnesses' statements of Anne Karimi Muguna, Timothy Kiambi and Gilbert Mutembei all filed on 19<sup>th</sup> October, 2022 which were respectively adopted as their testimonies.
9. PR1 Anne Karimi Muguna swore that she was a co-widow with the petitioner herein to their husband Josphat Njuki Muguna (deceased). She told the court that in *Meru High Court Succession Cause No. 700 of 2018* the Judge had determined that the Protestor and the Petitioner herein were both widows of the deceased Josephat Njuki. She prayed that the deceased share namely Abothuguchi/Kijja/148 should be shared equally between herself and the petitioner. She produced the following exhibits in support of her protest: Proceedings in *Meru High Court Succession Cause 700 of 2018*. Chief's letter dated 26/11/2018. Certificate of the Confirmation of Grant dated 18/07/2018. Birth certificate of 2 minors showing that the deceased Njuki.
10. In cross-examination, PR1 affirmed that she got married to the deceased Njuki in 1992 under Meru Customary law but the dowry was not paid at all. She admitted that the deceased Njuki never introduced her either to his father Damiano or to his other relatives. She admitted that on the one hand the Petitioner used to live in the matrimonial home of the deceased Njuki while on the other hand the protestor admitted that she used to live away at Kijja in a rented house and never went to the home of the deceased Njuki. Much later, Damiano who was the father to Njuki sub-divided the land into 2 portions and showed the petitioner and protestor their sections but the protestor did not immediately take up her portion since the petitioner chased her away.
11. In re-examination, PR1 stated that the dowry negotiations were completed but not followed up with payment due to delay by the deceased to remit the dowry but that she continued to live as husband and wife with the deceased Njuki. She stated that their father in law subdivided the land in 2 portions to reflect the 2 wives of his son Njuki.
12. PR2 Timothy Kiambi and PR3 Gilbert Mutembei both cousins to the deceased Josphat Njuki told the court that the protestor was indeed one of the widows of the deceased. The protestor was represented by Mwirigi Kaburu & Company Advocates. In their respective cross-examinations, the following came to light: Timothy came to know of the protestor in 1995 when the deceased Njuki took him for a visit to the protestor's rented unit where Njuki cohabited with the protestor. The petitioner was a lawful wife to the deceased Njuki although no official wedding was done for the 2. Damiano subdivided the



land into 2 portions in 1995 but the protestor could not take up her portion due to resistance from the petitioner.

13. In re-examination, the witnesses affirmed that no dowry was paid either for Gladys or Anne and that each woman gave birth to 2 children by the deceased Njuki.
14. At the end of their respective hearings, the parties lodged written submissions.
15. The protestor filed written submissions dated 19<sup>th</sup> June, 2024 citing section 79 of the Evidence Act to support the admission of the chief's letter dated 26/11/2018 as a public document since it was written by the local administrator. It was submitted that by this letter, the petitioner herself had introduced the protestor and her children as beneficiaries as well as the petitioner and her children. It was further submitted that the consent adopted by the High Court in *Succession Cause No. 700 of 2015* was recorded by the petitioner and the protestor as wives to the deceased.

### **Issues for Determination**

1. Whether or not the protestor was a widow to the deceased;
2. What were the properties, if any, of the deceased Njuki;
3. Mode of sharing the deceased's estate property.

### **Determination**

#### **Issue 1: Status of Anne Karimi Muguna**

16. There was no dispute that the Petitioner Gladys was a widow of the deceased under *Meru Customary Law* following their traditional marriage and cohabitation from the 1980s and the 2 had 2 daughters who are now adults.
17. As for the case of Anne Karimi, on the merit and the tested evidence tendered before this court, the protestor proved that she was a common law wife to the deceased Njuki by virtue of long cohabitation, siring of children and being recognized by the relatives and the local community as a husband and wife. As of the date of the demise of the deceased Njuki it was the protestor who was cohabiting with the deceased in a rented house in Meru town. Further, her father in law recognized both Anne and Gladys as the surviving widows of his son Njuki and proceeded to subdivide his own land Abothuguchi/Kiija/189 into 2 portions and showed both Anne and Gladys their respective portions to cultivate. The protest is, therefore, merited and upheld. In arriving at this finding, the court considered the principles of common law marriage as discussed in [CSO v RBO](#) [2019] eKLR (Abida Aroni J.)

“ 8. Marriage by cohabitation as a principle of common law has been recognised over time in Kenya. My understanding of the Respondent's pleadings is that she alludes to marriage by cohabitation which is a common law marriage.

9. Indeed Section 98(1) of the *Marriage Act* is a saving clause and states that any marriage which under any written or customary law hitherto in force constituted a valid marriage before coming into force of this Act is valid for purposes of this Act.

The *Judicature Act* in Section 3(1) a & b alludes to the application of the common law and doctrine of equity as a source of law.



10. Further in the case of *MDN v SML*, Muigai J. in applying the Principles of Common law in a similar matter referred to Section 119 of the *Evidence Act* which provides that:

"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case."

The Petition before court seeks to have the court presume the existence of certain facts. No answer to the petition was filed challenging the facts. If one is to go by the preliminary points raised, the pleaded facts are neither admitted. Therefore, In my view there is need for the court to hear the matter and not summarily dismiss the same as the concerns raised are not purely points of law. Further presumption of marriage can only be proved by way of evidence.

11. In *SWG vs AM 2015 Musyoka J* in applying the doctrine of common law Marriage had this to said;

"when a marriage does not comply with the relevant formalities laid down by the *Marriage Act* or under customary law, it may be rescued by presumption of marriage by cohabitation."

18. Even from the further material placed before the court, it is the finding of this Honourable Court that the Protestor was indicated as a widow of the deceased Josphat Njuki by the High Court in *Meru Succession Cause 700 of 2015*. She had borne 2 children with the deceased. Therefore, the question of the status of Anne Karimi was *res judicata* and should not have been raised again for determination before this court since both Gladys and Anne had recorded a consent before the Judge in which both were recognized as widows of the deceased Njuki. Their consent is proved by the annexed proceedings and orders in the aforesaid High Court Succession Cause.

## **Issue 2: Identification of Properties**

19. On the official search certificate filed with the Petition for Letters of Administration, the only proved asset of the estate was Abothuguchi/Kijja/189 which was registered in the name of the deceased person's father Ikibitu and this will be considered for distribution as hereunder. As for the other mentioned Abothuguchi/Kijja/128 the court found no material prove that the property was connected in any way to the deceased or his father. It will not be included in the estate.

## **Issue 3: Mode of Sharing the Property**

20. Having found that the deceased Njuki had 2 wives Gladys and Anne, this was a case for distribution of the estate of a polygamous man under section 40 of the [Law of Succession Act](#) which provides as follows:

40. Where intestate was polygamous

- (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.



21. The guiding authority applied for this case was the decision in [\*Re Estate of Joseph Eric Owino \(Deceased\)\*](#) (2022)eKLR (Nyakundi J.):

#### The Applicable Law

12. In a case of this nature where the deceased died intestate and was a polygamous man survived by two widows and children the anchor on distribution of his estate is Section 40 of the *Law of Succession Act* which primarily provides as follows;

- "(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 interest within each house shall then be in accordance with the rules set out in sections 35 to 38"

The basic scheme is in line with the principles expounded in the following cases *Rono v Rono* Civil Appeal No. 66 of 2002, where Waki JA stated inter alia that;-

"More importantly, section 40 of the *Act* which applies to the estate makes provision for distribution of the net estate to the "houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children." A "house" in a polygamous setting is defined in section 3 of the *Act* as a "family unit comprising a wife and children of that wife."

In addition, *In the Matter of Re Estate of Benson Ndirangu Mathenge(deceased)* Nakuru HCSC No. 231 of 1998(Ondeyo J), the deceased was survived by his two widows and their children. The first widow had four children, while the second widow had six children. The court stated that the first house was comprised of five units while second had seven units. The two houses of the deceased combined and looked at in terms of units made up twelve units. The court distributed the estate to the children and the widows treating each as a unit. The land available for distribution was forty acres, which was divided by the court into twelve units. Out of the twelve units, five were given to the first widow and her four children, while the remaining seven units went to the second widow and her six children.

Further, *In the Matter of the Estate of Nelson Kimotho Mbiti(deceased)* HCSC No.169 of 2000, Koome J directed that the estate of a polygamist be divided in accordance with the provisions of Section 40 of the Act. The estate was divided into units according to the number of children in each house with the widows



being added as additional units. The same reasoning was also applied by Judge Ali Roni *In the Estate of Ainea Masinde Walubengo(deceased)* (2017) eKLR stating that “I am of the view that Section 40 of the *Law of Succession Act* will apply to the circumstances of this Case. Meaning that the Court will distribute the estate of the deceased according to each house taking into account the number of children in each unit including the surviving widow.”

22. The result is that the share of Jospaht Njuki out of his father’s parcel of land Abothuguchi/Kiija/189 shall be and is hereby shared out equally amongst the following with the widows being counted as extra units:
- a. Gladys Gatabi.
  - b. Anne Karimi.
  - c. Eunice Gaicugi
  - d. Irene Gatwiri.
  - e. Kelvin Koome.
  - f. Carlos Mawira.
23. A certificate of the confirmation of grant is hereby issued in terms of the equal sharing determined by the court. Right of appeal is 30 days.

**DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 28<sup>TH</sup> DAY OF JUNE, 2024**

**HON. T. A. SITATI**

**SENIOR PRINCIPAL MAGISTRATE**

**GITHONGO LAW COURTS**

Present

Mr. Kirigiah Adv for the Petitioner

Mr. Karanja Adv for the Protestor

Gladys Gatabi

Anne Karimi

