

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 2571 OF 2005

IN THE MATTER OF THE ESTATE OF MICHEAL WAWERU

GITAU alias WAWERU GITAU (DECEASED)

RULING

PLEADINGS:

The deceased Michael Waweru Gitau died intestate on 1st December 2002. Maria Wanjiku Waweru widow of the deceased petitioned this court for grant of letters on 14th September 2005 and the same were issued to her on 18th April 2007. On 4th May 2007 the administrator sought to confirm the said grant of letters of administration. The deceased was survived by 5 children namely;

- i. Esther Mumbi Kilu- Daughter
- ii. Joseph Gitau Waweru-son
- iii. Esther Mumbi Waweru-daughter
- iv. Wanjiru Waweru- daughter
- v. Wainaina Waweru- son

Two widows

- vi. Maria Wanjiku Waweru-widow
- vii. Mary Njeri Waweru-widow

In the summons for confirmation for grant of letters of administration administrator proposed the deceased's estate be distributed as follows;

Assets	Names	
Ngenda/Kahugu-ini/T.161	Maria Wanjiku Waweru	Absolutely
Ngenda/Kahugu-ini/T.137	Mary Njeri Waweru	Absolutely
Ngenda/Kahugu-ini/T.127	Maria Wanjiku Waweru Mary Njeri Waweru	Equal shares
Ngenda/Kahugu-ini/880	Maria Wanjiku Waweru Mary Njeri Waweru	Equal shares
Motor Vehicle Reg. KTB 558 Toyota Pick Up	Maria Wanjiku	Equal shares

	Waweru Mary Njeri Waweru	
Shares at Ali Juja Farmers Society (Cert.11103,20 shares)	Maria Wanjiku Waweru Mary Njeri Waweru	Equal Shares
Ngenda/Kimunyu/157	Maria Wanjiku Waweru Mary Njeri Waweru	Equal Shares
Kenya Breweries Shares	Maria Wanjiku Waweru Mary Njeri Waweru	123 Shares 123 Shares

Joseph Gitau Waweru in his affidavit of protest dated 12th September 2007 opposed the distribution of the estate as proposed by the administratrix. They proposed the distribution of the deceased's estate as follows.

Assets	Names	
Ngenda/Kahugu-ini/T.161	Patrick Wainaina Waweru Joseph Gitau waweru	
Ngenda/Kahugu-ini/T.137	Joseph Gitatu Waweru	Absolutely
Ngenda/Kahugu-ini/T.127	Joseph Gitau Waweru Patrick Wainaina Waweru	Equal shares
Ngenda/Kahugu-ini/880	Joseph Gitau Waweru	Absolutely
Motor Vehicle Reg. KTB 558 Toyota Pick Up	Joseph Gitau Waweru	absolutely
Shares at Ali Juja Farmers Society (Cert.11103,20 shares)	Hannah Wanjiru Gitau	Absolutely
Ngenda/Kimunyu/157	Patrick Wainaina Waweru	Absolutely
Kenya Breweries Shares	Joseph Gitau	123

	Wainaina	Shares
	Patrick Wainaina Waweru	123 Shares

Maria Wanjiku Waweru in reply to the said protest filed her affidavit dated 28th September 2007. She avers that the protestors had sought to totally disinherit her. She pleaded that their late husband had apportioned the assets between the 2 wives. Each wife occupied and developed their respective portions for over 30 years. That the step children were seeking by the Protests to disinherit her. Unfortunately, Maria Wanjiku Waweru died on 5th September 2009 and Esther Mumbi Kiilu her daughter made an application to rectify the grant and substitute Maria Wanjiku for purposes of these proceedings.

On 10th November, 2011, by the judgment of Justice D. K. Maraga (as he then was) he held that the argument advanced by the protestor that Esther Mumbi Kiilu should be left out as she was married and it was discriminatory to leave out a beneficiary on the basis of being married. Further, it was held that the estate of the deceased be shared equally among the deceased's children and surviving widow the latter being considered as one of the units.

It was held that parties within 30 days agree on who was to take what on the basis of equal distribution failure to which Esther Mumbi Kiilu and the eldest son of Mary Njeri Waweru were to appoint a valuer within 60 days to value the deceased's entire estate for the court to complete the issue of distribution." Valuation of all the assets forming the deceased estate was carried out and reports gave values as follows;

- i. Ngenda Kahungu-ini/880 -1,050,000/- (0.34 Ha)
- ii. Ngenda Kahungu-ini/T.137- Kshs.700,000/- (0.22 Ha) - 8,000 loan to Standard Chartered –registered on 25/4/1983)
- iii. Ngenda/Kimunyu/157-Kshs.1,300,000/- (0.84 acre) (no encumbrance)
- iv. Ngenda Kahungu-ini/127-Kshs.8,600,000/-(5.4 acres) no encumbrances noted
- v. Ngenda Kahungu-ini/T.161 Kshs.650,000/-(0.25 acre) no encumbrance noted

Parties gave their proposed mode of distribution. Esther Mumbi Kiilu in her affidavit dated 17th November 2017 proposed that Ngenda/Kahunguini/127 which measures 5.4 acres and where the home for the two respective houses is built be distributed equally into two portions one for each house taking into account where each house is built. Further, that 1st house be allocated parcel known as Ngenda/Kahunguini/T.167 while Ngenda/Kahungu-ini/880. She added that Joseph Gitau had taken Ali Juma Farmers society Ltd, Gatuanga Farmers Society Ltd, Shares in Kenya Breweries and motor vehicle registration no. KBT 550 Toyota Pickup.

The objectors stated that the deceased was survived by 2 wives namely Maria Wanjiku Waweru and Mary Njeri Waweru. Maria Wanjiku Waweru was blessed with one child Esther Mumbi Kiilu while Mary Njeri Waweru was blessed with 4 children namely; Joseph Gitau Waweru, Esther Mumbi Muinde, Wanjiru Waweru & Wainaina Waweru.

It was proposed Ngenda/Kahungu-ini/T.161be shared as follows.

- Maria Wanjiku Waweru ½ acre
- Mary Njeri Waweru- ½ acre
- Esther Mumbi Kiilu-1/8 acre
- Esther Mumbi Muinde- 1/8 acre
- Remainder 3 acres to be share equally between Joseph Gitau Waweru and Wainaina Waweru

Ngenda/Kahungu-ini/T.161 – Joseph Gitau Waweru-absolutely

Ngenda Kimuyu-157- Wainaina Waweru- Absolutely

Ngenda/Kahugu-ini/880 - Wainaina Waweru –Absolutely

Ngenda/Kahugu-ini/T.137- Wainaina Waweru-Absolutely

Motor vehicle KTB Toyota – Joseph Gitau Waweru

Shares at Ali Juja Farmers Society – Esther Mumbi Kiilu

The objectors sought to bring to the attention of the court that the deceased had prior to his demise bequeathed

- i. Esther Mumbi Kiilu –Plot No. 20 Phase IV
- ii. Esther Mumbi Muinde- Plot No.21 Phase IV
- iii. Esther Mumbi Kiilu- M/V KNF.203 Peugeot 404

All which they sought to be put into consideration whilst distributing the deceased's estate.

DETERMINATION

The deceased was a polygamist and died intestate and was survived by 2 wives Maria Wanjiku Waweru and Mary Njeri Waweru and five children namely, Esther Mumbi Kiilu, Joseph Gitau Waweru, Esther Mumbi Muinde, Wanjiru Waweru (deceased) & Wainaina Waweru. In line with the judgment dated 10th November, 2011 Justice D. K. Maraga (as he then was). The said estate is to be devolved under **Section 40 of the Law of Succession Act** that provides,

“(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 intestate Estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

Parties complied with directions of this court and had carried out valuation of the properties to enable this court in distribution of the assets surviving the deceased. Under the Law of Succession Act there is no distinction between female and male children of a deceased person, regardless of their marital status unless, they expressly renounce their interest in the estate.

Section 31 of the Law of Succession Act provides as follows with respect to gifts made in contemplation of death:

“A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if-

(a) the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and

(b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and

(c) there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and

(d) a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive that illness or danger; and

(e) the person making that gift dies from any cause without having survived that illness or danger; and

(f) the intended beneficiary survives the person who made the gift to him:

In *RE ESTATE OF THE LATE GEDION MANTHI NZIOKA (DECEASED) [2015]eKLR,*

“For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered, it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee.”

It is alleged that the deceased had gifted two of his daughters Esther Mumbi Kiilu and Esther Mumbi Muinde with parcels of land. This allegation is not refuted by the petitioner. According to the letter dated 10/6/2002 the deceased wrote to the Chairman Gatuanyaga Dairy Farm Company limited seeking to transfer Plot no. 21 phase IV to Esther Mumbi Muinde and her husband Lucas Muinde Mutua. The letter dated 2/11/2000 the deceased wrote to the Chairman and Board of Directors of Gatuanyaga Dairy Farm Company Limited seeking to transfer plot No. 20 Phase IV to Esther Mumbi Kiilu. I find that **Section 31 of the Act** applies in this case and as such the gifts so given will be considered in the distribution of the deceased's estate.

The deceased was polygamous and had two wives and children. His estate therefore devolves under section 40 of the law of Succession Act.

In RE ESTATE OF JOHN MUSAMBAYI KATUMANGA – (DECEASED) [2014] eKLR Musyoka J stated as follows;

“Under Section 40 of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the Law of Succession Act, the children would divide the estate equally amongst themselves. Section 40 was not designed for the circumstances of the instant estate, but it would appear more appealing for the purpose of distribution of the said estate than Section 35. The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is “equally” as opposed to “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”

From the proceedings on record Maria Wanjiku Waweru and Wanjiru Waweru are deceased. As it stands the beneficiaries to be considered are; Mary Njeri Waweru, Esther Mumbi Kiilu, Joseph Gitau Waweru, Esther Mumbi Muinde and Wainaina Waweru. Further, the objectors had pointed out that two of the deceased’s daughters Esther Mumbi Muinde and Esther Mumbi Kiilu had been gifted parcels of land by the deceased. The letters however do not disclose the acreage of the said portions of land or their value. In instances where the deceased who died intestate had gifted some of the beneficiaries this gifts are put into consideration during. **Section 42 of the Law of Succession Act** provides:-

“Where-

(a) an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate.

That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house.”

Distribution of the assets that comprise of the estate of the deceased to the beneficiaries by virtue of **Section 40 and 42 of the Law of Succession Act** and in compliance with judgment delivered on 10th November 2011 which has not been reviewed, set aside , varied and/or appealed against; as follows;

Consequently, I hold that the deceased’s estate shall be shared equally among his children and the surviving widow [as she was alive then], the latter being considered as one of the units.

DISTRIBUTION

At the time of hearing the matter, the gifts *intervivos* were not brought to the attention of the Court. However, it is not contested that Emily Mumbi Kiilu and Esther Mumbi Muinde were gifted properties whose value is not established to be able to take the value into account during distribution of the estate. On the other hand Joseph Gitau Waweru has held exclusively to himself the title documents off various properties of the deceased’s estate as per the applications filed in Court and held Motor Vehicle Reg. KTB 558 Toyota Pick Up, shares at Ali Juja Farmers Society (Cert.11103, 20 shares) and Kenya Breweries Shares again their value is not known so as to take the same into account during distribution of the estate, Therefore in the unfolding circumstances and in line with the judgment without mathematical precision but a sense of fairness and equity; the distribution of the estate shall be as follows;

1. Ngenda/Kahungu-ini/T.127 (measuring 5.4 acres) holds the family homes and as such the same be shared to all beneficiaries equally and without demolishing permanent structures and where one has developed as follows;
 - i. Mary Njeri Waweru- 1 acre
 - ii. Esther Mumbi Kiilu- 1 acre
 - iii. Esther Mumbi Muinde 1 acre
 - iv. Joseph Gitau Waweru- 1 acres
 - v. Wainaina Waweru-1 acres

Ngenda Kahungu-ini/880 -1,050,000/- (0.34 Ha) Wainaina Waweru to hold absolutely

Ngenda/Kimunyu/157-Kshs.1,300,000/- (0.84 acre) (no encumbrance) Joseph Gitau Waweru - to hold absolutely

Ngenda Kahungu-ini/T.137- Kshs.700,000/- (0.22 Ha) - 8,000 loan to Stand Chartered –registered on 25/4/1983)- Esther Mumbi Kiile to hold absolutely

Ngenda Kahungu-ini/T.161 Kshs.650,000/-(0.25 acre) no encumbrance noted - Esther Mumbi Muinde

Motor Vehicle Reg. KTB 558 Toyota Pick Up, shares at Ali Juja Farmers Society (Cert.11103, 20 shares) and Kenya Breweries Shares - Joseph Gitau Wainaina and Wanaina Waweru equally.

Esther Mumbi Kiilu –Plot No 20 Phase IV

Esther Mumbi Muinde Plot No 21 Phase IV

Esther Mumbi Kiilu – Motor Vehicle KNF 203 Peugeot 404

Any aggrieved party to lodge appeal

Cost in the cause. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 14th DAY OF DECEMBER 2018.

M.W.MUIGAI

JUDGE –FAMILY DIVISION –HIGH COURT