



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**MISC. SUCCESSION APPLICATION NO. 34 OF 2000**

**IN THE MATTER OF THE ESTATE OF WAWERU MBATIA (DECEASED)**

**JOHN MBATIA WAWERU.....APPLICANT/ADMINISTRATOR**

**VERSUS**

**WAIHIGA WAWERU.....PROTESTOR/ADMINISTRATOR**

**JUDGEMENT**

**Background Facts**

1. The deceased in this case died on 5/1/1991 and his first widow Lucy Nyambura petitioned for letters of administration intestate. The petitioner died before this cause was concluded. Her son, the applicant herein was appointed administrator to step into his late mother's shoes. Later the protestor herein Waihiga Waweru was appointed a co-administrator of the estate alongside the applicant.
2. The protestor in her affidavit of protest sworn on 01/07/2011 and filed on the same day opposed the mode of distribution proposed by the applicant herein. She stated that before his death, the deceased had expressed his wishes on how his property would be shared which was disregarded by the applicant.
3. Directions were taken that the protest be heard by way of viva voce evidence.

**The Protestor's Case**

4. The protestor testified that she is the 2<sup>nd</sup> wife of the deceased and that he had two wives and that the 1<sup>st</sup> wife, Lucy Nyambura had 5 children and is the mother of the applicant. The protestor said that she has four (4) children.
5. The protestor testified that the deceased had distributed his land before his demise. L.R Othaya/Kiahugu/580 was divided between the two houses equally. The protestor added that there are clear boundaries on the said land showing the parcel of each of the houses. L.R Othaya/Kiahugu/639 was given to the protestor absolutely whereas Plot 33A in Othaya was given to the 1<sup>st</sup> wife. The Nyahururu shares were given to the protestor as per the Mediation agreement. For that reason, the Karemno shares ought to be given to the first house. It is the protestor's prayer that the wishes of the deceased be respected.
6. On cross-examination the protestor stated that the deceased made these wishes when he was sick and in the presence of the 1<sup>st</sup> wife, herself, Joseph Kiboi and Mr. Kahuthia. She further added that all the said persons have since died and that she is the only one alive.

**The Applicant's Case**

7. The applicant is a son to the deceased and he testified that the deceased had two (2) wives namely Lucy Nyambura who had five (5) children being four(4) sons and a daughter and the protestor had four (4) children, three(3) daughters and a son.
8. The applicant testified that the deceased's property ought to be shared as per his proposal as follows:-
  - a. L.R No. Othaya/Kiahagu/580 ought to be shared between the 5 sons;
  - b. L.R No. Othaya/Kiahugu/639 to be shared equally between the children of the 1<sup>st</sup> wife;

- c. Plot No. 33A Othaya to be allocated to the protestor;
- d. Karemeno shares to be allocated to the children of the 1<sup>st</sup> wife;
- e. Nyahururu Farmers Saco shares to be allocated to the protestor (2<sup>nd</sup> wife).

9. The applicant testified that the deceased called a meeting on 26/12/1990, when he was sick, and divided L.R No. Othaya/Kiahagu/580 equally to his sons. The deceased did this in the presence of senior clan elders Charles Kahugia and Joseph Kiboi, the 1<sup>st</sup> wife, the protestor, the applicant and his brothers Michael Wambugu and Kingangi and the deceased's elder brother. The applicant added that Charles Kahugia and Kingangi have passed on. The applicant further contends that the deceased did not change his mind later on distribution despite what the protestor alleges.

10. On cross-examination, the applicant stated that L.R Othaya/Kiahagu/580 measures 7.8 acres, L.R No. Othaya/Kiahagu/ 639 has a commercial room for rental though no one has rented it while on Plot 33A there is also a shop. He further stated that L.R No. Othaya/Kiahagu/639 was co-owned by one Rufus Mugo, Ngugi and the deceased. The land was later sub divided and the three were to get titles. Although the land was sub divided, the co-owners have not processed the titles for their respective shares.

11. The applicant added that the deceased and one Simon Muthukumi jointly own Land Parcel No. 33A. The family of Simon Muthukumi run the shop on the plot and only Simon receives the rent for the plot. The plot is smaller than Land parcel No. 639. The Nyahururu Farmers Sacco, bought by the Nyahururu Farmers Cooperative Society, is undeveloped land and the applicant gave evidence in court that he does not have any documentation to show its existence or its size. The applicant also added that he does not have any documentation on the Karemeno shares.

### **The Applicant's Submissions**

12. The applicant reiterates what he has averred in his affidavit and oral evidence and provides that the deceased's estate should be distributed pursuant to sections 35 and 40 of the Law of Succession Act. The applicant submits that although the deceased had distributed his estate when he was alive, he prays that the estate be shared as his proposal in his summons for confirmation.

13. The protestor opted not to file any submissions.

### **Issues for determination**

14. After careful analysis, the main issue for determination is how the estate of the deceased ought to be distributed.

### **Analysis and Determination**

15. It is not disputed that the deceased died intestate and had two wives and 9 children. It is also not in dispute that the deceased had the following assets:-

- a. L.R No. Othaya/Kiahagu/580 measuring 7.8 acres
- b. L.R No. Othaya/Kiahagu/639
- c. Plot No. 33A
- d. Shares in Nyahururu Farmers Co. Ltd
- e. Shares in Karemeno Farmers Co-operative Society

16. It is important to note that there is a court order regarding the Nyahururu Farmers Co. Ltd shares to the effect that the shares be allocated to the protestor. Although both parties state that the deceased shared his estate during his lifetime, the bone of contention is the mode of distribution of the rest of the assets. According to the applicant the deceased shared out his estate on 26/9/1990 whereas the protestor contends that the deceased changed his mind and shared out his property at a later date which she did not specify when. As such, the question arises as to whether the deceased distributed his property during his lifetime and if so should the said distribution be taken into account herein.

17. **Section 42 of the Law of Succession Act** provides that:-

**Where:-**

**An intestate has, during the lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or**

**Property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35 of this Act;**

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

18. The law is very clear that assets given by the deceased to beneficiaries during his lifetime shall be taken into during distribution of the estate.

19. It is trite law that if a deceased person had distributed his estate during his lifetime, his wishes ought to be respected. However, if it can be demonstrated that the wishes of the deceased are illegal, unfair or discriminatory to the beneficiaries or some of them, the deceased's wishes should not be respected. This principal was upheld in the case of **Paul Kiruhi Nyingi & Another vs Francis Wanjohi Nyingi Nyeri High Court Succession Cause No. 580 of 1999.**

20. The protestor testified that the deceased had given each of the two houses half share of L.R. Othaya/Kiahagu/580. The families have been using their half-share since then but the land is still in the name of the deceased. This was a fair indication by the deceased whereas he treated the houses equally.

21. The mode of distribution presented by the applicant, is in my view discriminatory against the female beneficiaries of the deceased's estate in regard to L.R. Othaya/Kiahagu/580. There is only one daughter in the first house and four (4) sons while only one son in the 2<sup>nd</sup> protestor's house. If this mode was to be followed especially in respect of the said parcel of land, the first house where the applicant belongs would be at an advantage fourfold compared to the 2<sup>nd</sup> house that has one son and four daughters.

22. Article 27 of the Constitution outlaws discrimination on grounds of sex. The Law of Succession Act which is applicable herein treats the children of both sexes equally. The protestor told the court, which evidence was not disputed, that there are clear boundaries on L.R. Othaya/Kiahagu/580 between the two houses of the deceased since the deceased had demarcated the land to be occupied and cultivated by each family. As for this particular parcel, it would not be in the interests of justice to adopt the applicant's mode of distribution. The protestor proposes that for this parcel of land, the status quo as far as the size of their portions are concerned, do remain

23. In respect to the other assets, the court will apply the law in respect of the two houses and the number of children in each house.

It was held in the case of **Re Estate of Solomon Ngatia Kariuki (Deceased) (2008) eKLR** Makhandia J (as he then was) stated:-

**“The LSA does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to state a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu customary law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.”**

24. The protestor's proposal on the mode of distribution is in my view acceptable because it does not discriminate against any gender and is in line with **section 40 of the Law of Succession Act** which provides:-

**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.**

**The distribution of the personal and household effects and the residue of the net intestate estate within each household shall then be in accordance with the rules set out in sections 35 to 38.**

25. This principle was also enunciated In the Estate of **John Musambayi Katumanga (Deceased) [2014]eKLR Musyoka J** considered the application of Section 40 and 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.**

26. Having considered all the foregoing, I find the protest successful but of course with some adjustments to serve the interests of justice.

27. The court had adopted as judgment of the court the Mediation Agreement dated 18<sup>th</sup> April 2019 that the share in Nyahururu Farmers measuring seven(7) acres be registered in the name of the protestor Waihiga Waweru. The judgement of this court will take this order of the court into consideration.

28. I hereby enter judgment in favour of the protestor in the following terms:-

- a. L.R. Othaya/Kiahagu/580 measuring 7.8 acres to be shared equally between the two houses.
- b. L.R. No. 639 - To be shared equally amongst the widow and children of the 2<sup>nd</sup> house.
- c. Plot No. 33A - To be shared equally amongst the children of the 1<sup>st</sup> house.
- d. Shares in Nyahururu Farmers Society to be registered in the name of Waihiga Waweru.
- e. Shares at Karemeno Farmers Co-operative society to be shared equally amongst the children of the 1<sup>st</sup> house.

24. The certificate of confirmation of grant to issue in the said terms.

25. It is hereby ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 26<sup>TH</sup> DAY OF AUGUST, 2021.**

**F. MUCHEMI**

**JUDGE**

**JUDGEMENT DELIVERED THROUGH VIDEOLINK THIS 26<sup>TH</sup> DAY OF AUGUST, 2021.**