



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 23 OF 2005**

**IN THE MATTER OF THE ESTATE OF ANDEREA M'IKIUGU(DECEASED)**

**JUDAH KIUMBE.....PETITIONER**

**VERSUS**

**TERESIA KANYUAERA THIURU.....OBJECTOR**

**JUDGMENT**

1. This is a matter which relates to the estate of the deceased, Anderea Mkiugu, who died on 8<sup>th</sup> April, 1989. The grant of letters of administration of the estate of Andrea M'Ikiugu (deceased) was jointly issued to the petitioner and the objector on 21/2/2019. The administrators could not agree on a mode of distribution and the court directed that the same would be determined on the basis of affidavits, submissions of the parties and the Law.

2. The only affidavit on record is that of a daughter to the deceased namely, Seberina Nthuku M'ikiugu sworn on 21/2/2020. She supports the petitioner's proposed mode of distribution which only takes account of the sons and not daughters. She then makes it clear that she wishes to have no share of the father's estate. I take the affidavit to constitute a renunciation of her rights.

**Submissions**

3. The parties are in agreement that the deceased herein was survived by a widow (now deceased), 3 sons and 5 daughters. It is further in agreement that two of the sons of the deceased have since died. According to the objector, **L.R NO. KIIRUA/NAARI/527** should be divided amongst his 8 children. She invites the court to take into consideration **L.R NO.NTIMA/IGOKI/1719**, which was a family land and given by the deceased to the petitioner to enable the deceased be allocated land at Naari.

4. The petitioner on the other hand submits that L.R NO NTIMA/IGOKI/1719 is his land by way of a first registration and does not form part of the estate, as it was a bequest from his grandfather. He proposes that the estate property should be distributed among the 3 sons only at the exclusion of the daughters.

**Analysis and Determination**

5. Estate is defined under Section 3 of the Law of Succession Act to mean *'the free property of a deceased person' while "free property", in relation to a deceased person, means "the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death'*. With the definition of the estate in mind, I have taken a keen look at the green card on record respecting NTIMA/IGOKI/1719 and come to the revelation that it was registered in favour of the petitioner on 8/1/1970 as the absolute proprietor thereof. It follows that NTIMA/IGOKI/1719 was not one of the assets the deceased could legally and freely dispose during his lifetime and did not form part of his estate. That position was amplified in ***Lucia Karimi Mwamba v Chomba Mwamba [2020] eKLR*** where the court stated that properties, which the deceased had given to beneficiaries during his lifetime, no longer formed part of his estate, as such gifts were settled for the beneficiary, and they did not accrue to the estate.

6. That finding leaves the only asset left behind by the deceased herein to be **L.R NO. KIIRUA/NAARI/527 (hereinafter referred to as the estate property)**. The undisputed evidence on record is that the deceased was survived by a widow (now deceased), 3 sons and 5 daughters. It emerges from the petitioner's proposed mode of distribution is an outright discrimination against the daughters of the deceased. While such form of discrimination in inheritance on the basis of gender or sex thrived in the dark day of patriarchy and male domination of the affairs of society and wealth holding and creation, the Kenyan people deemed it obnoxious in the modern world of equality and firmly outlawed same by the provisions of Article 27(3) of the Constitution.

7. The common position by Kenyan courts, in their obligation to respect and defend the constitution and its ethos is now well established

that the retrogressive practices, which appear to have stuck with the petitioner and some of his siblings has no place in our modern world and must be discouraged with the ultimate goal of total eradication. In the Matter of the Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti (Deceased) [2017] eKLR, the court expressed itself, regarding discrimination of daughters in inheritance, in the following excerpt: -

**“... From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when RONO vs. RONO [2008] 1 KLR 803 delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement the Constitution- which states categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and the Constitution.”**

8. The Court of Appeal in the case of **Stephen Gitonga M'murithi v Faith Ngiramurithi [2015] eKLR** held that: -

**“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”**

9. That the deceased herein died intestate is beyond contestation but agreed by all the parties. The law under **Section 38 of the Law of Succession Act**, dictates that the estate property be distributed equally amongst the children. In this matter, it being common ground that there were a total of 8 children and one of them, Seberina Nthuku M'Ikiugu, having renounced her rights in the affidavit sworn on the 21<sup>st</sup> February 2020, I find that the estate must be shared equally among the remaining seven children.

10. The law however command equality and fairness between the children in inheritance under section 42 by decreeing that a benefit given to a beneficiary by the deceased during his life time be taken into account at the point of distribution. In this matter, it was agreed by all that the property known as Ntima/ Igoki /1719 was the ancestral land and was registered in the name of the petitioner by the deceased. Even though the reasons for the decision is now agreed between the parties, it suffices that it was an ancestral land due to the deceased and he chose to give to wholly to the petitioner. I find that to have been a gift to the petitioner from the deceased which must be taken into account. I do take it into account, appreciate that it measures 0.64 hectares while the estate property measures 7 acres. With such appreciation, I order that, to meet equality between the siblings in this matter, the petitioner was adequately provided for by the gift inter vivos. The petitioner shall therefore get no share in Naari/Kiirua /527 which shall be shared equally between **Rebecca Naitore, M'Tirimania, Rael Mwari Jason, Damaris Kanoti Mathiu, Joyce Kananu Kaburia, the estate of Abel Mutua (Deceased) and the estate of Benjamin Thiuru (deceased).**

**Dated signed and delivered via Ms teams this 29<sup>th</sup> day of September, 2021.**

**Patrick J.O Otieno**

**Judge**

**In presence of**

Miss Gikunda for the petitioner

No appearance for objector

**Patrick J.O Otieno**

**Judge**