



**REPUBLIC OF KENYA**

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

**(CORAM: R. MWONGO, J)**

**HIGH COURT SUCCESSION CAUSE NO. 75 OF 2014**

**IN THE MATTER OF THE ESTATE OF JOSEPH MBUGUA THUKU, (DECEASED)**

MARY WANGARI KARITU.....1<sup>ST</sup> PETITIONER

SAMUEL THUKU MBUGUA.....2<sup>ND</sup> PETITIONER

**-VERSUS-**

MARY WANGUI KIN'GORA.....1<sup>ST</sup> OBJECTOR

MARGARET WAMBUI GITHAIGA.....2<sup>ND</sup> OBJECTOR

**JUDGMENT**

**Background**

1. The deceased was the son of Gladys Wairimu Thuku, who died on 21<sup>st</sup> August 2002, and whose estate was subject of Succession Cause No 77 of 2005. The deceased's wife is Mary Wangari Karitu, the 1<sup>st</sup> Petitioner.
2. Mary Wangui Kin'gora and Margaret Wambui Githaiga, the Objectors, are the deceased's sisters, and also children of Gladys Wairimu Thuku.
3. The deceased died leaving two sons and five daughters, namely: Anthony Ndungu Mbugua; Samuel Thuku Mbugua (2<sup>nd</sup> Petitioner); Gladys Wairimu; Veronical Muthoni Mbugua; Ann Wanjiru Mbugua; Margaret Wambui Mbugua and Mary Wangui Mbugua.
4. This Court, Meoli, J, delivered a Ruling in this matter on 2<sup>nd</sup> November, 2015, in which the court found as follows:
  - a. That the parcels of land Naivasha / Mwingiri/ Block 1/149 (hereinafter called "Parcel 149") and Naivasha / Mwingiri/ Block 1/437(hereinafter called Parcel 437") ("together referred to as "the Parcels") were registered in the name of the deceased from the estate of Gladys Wairimu Thuku, in Succession Cause No 77 of 2005;
  - b. That Gladys Wairimu Thuku was the mother of the deceased in this cause, and also of the 1<sup>st</sup> and 2<sup>nd</sup> Objectors;
  - c. That the file for Succession Cause No 77 of 2005 cannot be traced;
  - d. That the two objectors herein who are claiming a share of the Parcels transferred to the deceased in this cause are entitled to a share of the Parcels which they did not receive by dint of **Section 38** of the **Law of Succession Act**, when Succession Cause No 75/2005 was done;
  - e. Accordingly, that the distribution of the deceased's property in the present succession cause ought to take into account the Objectors.
5. In light of those findings the court ordered in the ruling as follows:
  - a. That a grant be issued in the joint names of the two petitioners and the two objectors;

b. That should the parties fail to agree to file a joint grant of confirmation within six months, they should respectively file affidavits detailing their proposed mode of distribution for consideration by the court.

6. The said Ruling of this Court was not appealed against or reviewed or otherwise varied, and remains extant and in force.

7. The Petitioners are represented by the firm of Rumba Kinuthia, Advocate, and the Objectors are represented by the firm of Chuma Mburu, Advocate.

8. On 13<sup>th</sup> November, 2017, a grant was issued in the joint names of the two petitioners and the two objectors in pursuance of the said ruling.

9. However, the parties, failed to agree to apply jointly for summons for the confirmation of grant for the reason that they differed on the mode of distribution of the estate. On 6<sup>th</sup> June, 2018 the Objectors filed a summons for confirmation of grant and served it on the petitioners 12<sup>th</sup> June, 2018. In the consent to distribution, the Objectors' wish for both Parcels to be distributed equally between the two objectors and the 2<sup>nd</sup> Petitioner, Samuel Thuku Mbugua.

10. When the summons for confirmation was mentioned in court on 22<sup>nd</sup> July 2019, the 2<sup>nd</sup> Petitioner objected to the confirmation and urged that the Parcels should be distributed by subdividing them into ten parts to be distributed to the Objectors the 1<sup>st</sup> Petitioner and the 1<sup>st</sup> Petitioner's children. The parties are however agreed that the Parcels comprise the totality of the estate which is the subject of these proceedings.

11. The court therefore directed the parties to file affidavits containing their proposals for distribution of the Parcels since they had been unable to agree on the mode of distribution. Copies of the titles of both of the Parcels were attached to the summons

12. The Petitioner filed a proposed list of distribution on 15<sup>th</sup> August, 2019. Their proposal is that Parcel 149 be subdivided into four half acre parcels and a parcel each be distributed to Mary Wangari Karitu, Margaret Wambui Githaiga, Anthony Ndungu Mbugua and Samauel Thuku Mbugua. Further, that Parcel 437 be subdivided into six half acre parcels and a parcel each be distributed to: Mary Wangui Kingora,

13. The Objectors filed a replying affidavit on 18<sup>th</sup> November, 2019. They propose that: Parcel 149 be subdivided into three equal parcels of 0.347 hectares (0.857 Acres) and be distributed between the three children of Gladys Wairimu Thuku with the deceased's wife taking the deceased's share. Similarly, they propose that Parcel 437 be divided into three equal parcels of 0.619 hectares (1.529 Acres) and be distributed between the three children of the said Gladys Wairimu Thuku as aforesaid.

**14. In re Estate of G K K (Deceased) [2017] eKLR** Musyoka J stated the object of a probate court as follows: *"3. The primary function of a probate court is distribution of the estate of a dead person. Indeed, the primary reason for initiating a succession cause is to set in motion the process that will lead up to the distribution of the estates. Upon grant of representation being made, the administrators appointed are given the first six months to ascertain the estate, in terms of establishing who the proper heirs and beneficiaries are and the assets that make up the estate, to gather and collect the estate and finally to preserve the same pending distribution. After ascertaining the assets and the heirs and beneficiaries, the next stage should be distribution, which follows after six months"*

15. The thrust of the Petitioners' proposal is the underlying perception that the deceased's sisters are not entitled to an equal share of their mother's estate, which had been transferred to the deceased as the man in the family by virtue of his having been the sole administrator of his mother's estate pursuant to Succession Cause No 75 of 2005. That perception does not sit at ease with **Article 27** of the **Constitution 2010** which provides that:

*"Every person is equal before the law and has the right to equal protection and equal benefit of the law"*

The Petitioners' perception also runs counter to **section 38** of the **Law of Succession Act** on equal distribution to the children of the deceased.

16. The concept and principle of equality of distribution of inheritance property to the children of the deceased, is now well entrenched in our jurisprudence. A few examples will suffice: In the case of **Douglas Njuguna Muigai v John Bosco Maina Kariuki & another [2014] eKLR** the Court of Appeal stated that inheritance rights are not to be denied women:

*"Thankfully, under the Constitution of Kenya 2010, all these rights are enshrined and they cannot be derogated against, they are jus cogens. The general rules of international law also form part of the Law of Kenya. See Article 2(5) of the Constitution. The yoke and burden of discrimination should not be worn by the female gender anymore, the Constitution set it apart."*

17. In the case of **Mwongera Mugambi Rinturi & Another v Josphine Kaarika & 2 Others [2015] eKLR** the Court of Appeal was clear in its articulation of non-discrimination toward women in inheritance matters when it stated:

*It would appear from the totality of the submissions made before us and the stance adopted by the appellants all through this protracted litigation that the kernel of their disenchantment lies in the fact that their sister Florence, a married daughter of the deceased, became not only a beneficiary but also an administratrix of the estate. That much was clear from Mr. Kioga's resort to Meru Customary Law which stipulated, as captured by Dr E. Cotran in his Restatement of African Law: Vol 2 Laws of Succession at p30;*

**“Daughters receive no share of the estate. In the absence of Sons, the heirs are the nearest paternal relatives of the deceased, namely father, full brothers, half-brothers and paternal uncles”.**

**With the greatest respect, such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny; not least because it is plainly discriminatory of itself and in its effect. It is anachronistic and misplaced notwithstanding that it was the norm for a vast majority of Kenya’s communities. This Court has long accepted that a child is a child none being lesser on account of gender or the circumstance of his or her birth. Each has a share without shame or fear in the parents’ inheritance and may boldly approach to claim it. What Rono –vs- Rono (Supra) decided about the prohibition of discrimination on grounds of sex under the retired Constitution applies with yet greater force under the current progressive Constitution of Kenya, 2010. See Also Grace Wachuka –Vs- Jackson Njuguna Gathungu [2014] eKLR. We have already noted that Mr. Kioga did concede, as he had to, that one cannot exclude daughters. We have also adverted to the irony of his then asserting in the same breath, that Florence should nevertheless have been excluded.”**

18. Similarly, in the case of **Stephen Gitonga M’Murithi v Faith Murithi [2015]** the Court of Appeal again categorically held that:

**The Appellant’s complaint against the above mode of distribution is that it failed to take into account the clear principles of law enshrined in section 38 and 40 of the Law of Succession Act.**

**Cap 160 Laws of Kenya. 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. Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each house hold of a polygamous deceased. 12. Applying the above principles to both the learned trial Judges’ reasoning and distribution, it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the Law of Succession Act by discriminating against the married daughters of the deceased.”**

19. It is pertinent to make a point concerning the seeming conflation in this decision of the free property of the deceased, and the property of 2<sup>nd</sup> Petitioner’s mother which he received and obtained title to after he administered his mother’s estate. In other words, it is clear that I have proceeded on the premises that the property which belonged to his mother and was dealt with in Succession Cause 75/2014, has re-emerged in the deceased’s present succession cause, conflating issues.

20. It could be argued that once the deceased’s mother’s property was transferred to the 2<sup>nd</sup> Petitioner, it properly fell into the category of property defined in **section 2** of the **Law of Succession Act** as:

**“property of which that person [deceased] was legally competent to dispose during his lifetime and in respect of which his interest has not been terminated by his death”**

21. As I pointed out earlier, the ruling of this court enjoined the petitioners and objectors to become joint administrators and found in the ruling:

**“4) ....The initial Succession file cannot be found. There is no evidence that the objectors’ consent was sought to the Succession Cause in question [No 77 of 2014] or that they were aware of the same. What I hear more emphatically asserted by the Petitioners is that, the Objectors being married women had no standing as beneficiaries of the estate of their deceased mother, through whom Joseph Mbugua Thuku inherited the assets listed herein”**

22. On that basis, the court then proceeded to order that:

**“a grant in the joint names of the two Petitioners and the two objectors does issue”**

The court would then determine what each beneficiary is entitled to.

## **Disposition**

23. In light of the foregoing, I can now make a determination on distribution. The position taken by the objectors is clearly in accordance with the law as I have outlined herein and I adopt the same.

24. As regards the confirmation of grant, this is provided for under **section 71** of the **Law of Succession Act**. Sub sections 71(1)(2), state as follows:

**‘(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower distribution of any capital assets.**

**(2) The court to which an application is made, or to which any dispute in respect thereof is referred, may –**

**(a) if it satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or**

*(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be un-administered; or*

*(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or*

*(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:*

*Provided that, in cases of intestacy, the grant shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.'*

25. The grant of Letters of Administration issued on 13<sup>th</sup> November, 2017, shall be confirmed with distribution being set out therein as indicated in the orders following.

26. Accordingly, I direct that the distribution shall be as follows:

a. Parcel 149 shall be subdivided into three equal parcels of 0.347 hectares (0.857 Acres) and be distributed between the three children of Gladys Wairimu Thuku, namely: Joseph Mbugua Thuku (Deceased), Mary Wangui Kin'gora and Margaret Wambui Githaiga with the deceased's wife Mary Wangari Karitu, taking the deceased's share.

b. Parcel 437 shall be divided into three equal parcels of 0.619 hectares (1.529 Acres) and be distributed between the three children of the said Gladys Wairimu Thuku, namely: Joseph Mbugua Thuku (Deceased), Mary Wangui Kin'gora and Margaret Wambui Githaiga with the deceased's wife Mary Wangari Karitu, taking the deceased's share

27. Each party shall bear its own costs.

28. Orders accordingly.

**Dated and Delivered at Naivasha this 11<sup>th</sup> Day of March, 2020**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Mary Wangari Karitu and Samuel Thuku Mbugua Petitioners in person
2. Mary Wangui King'ora and Margaret Wambui Githaiga Objector in person
3. Court Clerk - Quinter Ogutu