



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 83 'B' OF 2003**

**IN THE MATTER OF THE ESTATE OF MARY WAMBOI NJATHI – DECEASED**

**LUCIA WANJIRU KIMANI.....APPLICANT**

**VERSUS**

**ABRAHAM NGUGI.....1ST RESPONDENT**

**NANCY WANGARE .....2ND RESPONDENT**

**JUDGMENT**

1. The deceased herein Mary Wambi Njathi died intestate leaving behind the following children;

- a) Margaret Wanjiru
- b) Annah Wanjiku
- c) Nancy Wangare
- d) John Kimani Njathi

2. The only son John Njathi has sine died and his widow Lucia Wanjiru Kimani took out letters of administration and consequently replaced him in this cause.

3. The deceased left behind property No. Waitaluk/Kapkoi Sisal Block 10/Kapkoi Sisal/311 measuring 5 acres or thereabouts.

4. The parties were unable to agree on the mode of distribution. Initially this court had directed that the same be heard by way of viva voce evidence but when the matter began it became clear that the only dispute was to do with how to share out the parcel of land.

5. From the evidence on record, it appears that all the girls, who are now grandparents were married and are settled in their respective homes. As at the time their mother died, it was their brother who stayed in the suit property.

6. Nancy Wangare Ngugi objected to the line taken by her brother in terms of sharing out the land. She stated in her affidavit on record that the deceased had given her power of Attorney dated 17/7/2001 in which she had instructed her to divide the land as follows and have then transferred.

- 1. John Kimani - 3 Acres
- 2. Margaret Wanjiru - 1.5 Acres
- 3. Hannah Wanjiku - 0.5 acres
- 4. Kamau Thuku - 0.5 Acres
- 5. Nancy Wangare - 1.5 acres

7. As cOrreCtly submitted by the counsel for the Applicant the said Power of Attorney was not effected as at the time the deceased died, the

land was still intact and no subdivision or transfer had been effected. More importantly, the said Power of Attorney was extinguished at the death of the donor.

8. The same cannot be termed a will. Whatever it is worth the donee ought to have utilised the instructions given therein. This court cannot therefore rely on the same.

9. Having stated so, and in the absence of a will the court shall therefore share out the deceased estate pursuant to the provisions of the Succession Act. The beneficiaries do recognise each other. The beneficiaries do recognise each other. The only difference in my view is that Lucia Kimani the appellant feels that she should inherit the entire parcel of land as the Respondent are all married and eking their living in their respective homes.

10. Obviously in terms of equity there is always need to strike a balance between the beneficiaries. The other people mentioned in the affidavit of the Respondent sworn on 12/7/2011 namely Kamau and Grace Wanjiku Muturi are not direct beneficiaries of the deceased estate. There is nothing exhibited to show that they were take care of by the deceased. At any rate they should derive their share from his wife and their parents respectively.

11. Having stated so, there is every evidence on the pleadings available that the applicant and her late husband resided on the land throughout. The rest of the daughters have their homes and are thus desiring to get a share from their mother's estate.

12. Taking into consideration the above scenario, I am inclined to grant them their wish. They shall however not get an equal share of the estate with the Applicant. None of them showed that they derived their livelihood from the deceased like the applicant. Noting that the deceased died aged 96 years there is every probability that it was the applicant who took care of her and provided for her needs till her death.

13. Consequently Land parcel Waitaluk/Kapkoi Block 10/Kapkoi Sisal/311 be divided out as follows:-

**a) Lucy Wanjiru Kimani – 4 Acres**

**b) Nancy Wangare Ngugi – 0.3 Acres**

**c) Hannah Wanjiku - 0.3 Acres**

**d) Margaret Wanjiru – 0.3 Acres**

14. Its the considered opinion of this court that at least each of them shall have a share out of their mother's estate and as indicated above their sister in law and her husband have their fixed abode in the suit property and unlike them have nowhere else.

15. The grant be confirmed in that order. Costs in the cause.

**Delivered, signed and dated at Kitale this 30<sup>th</sup> day of January, 2019.**

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**H.K. CHEMITEI**

**JUDGE**

**30/1/19**

**In the presence of:**

**Wanyonyi for the Petitioner**

**Bisonga for Respondent**

**Court Assistant - Kirong**

**Judgment read in open court.**