



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 340 OF 2006**

**IN THE MATTER OF THE ESTATE OF JAPHET M'ITIRITHIA (DECEASED)**

**MARTHA NKIROTE M'ITIRITHIA .....PETITIONER**

**VERSUS**

**JANET KARAI NDEGE.....1<sup>ST</sup> ADMINISTRATOR**

**DANIEL KAUMBUTHU.....2<sup>ND</sup> ADMINISTRATOR**

**JUDGMENT**

[1] **JAPHET M'ITIRITHIA (“the deceased)** to whom this Succession Cause relates died on 2<sup>nd</sup> March 2002. Through the Chief’s letter of introduction dated he stated that the deceased was survived by:

1. Martha Nkirote - Widow
2. Janet Karai Ndege - Daughter (married)
3. Gediel Kirimi Japhet - Son
4. Daniel Kaumbuthi Japhet - Son
5. Jenesis Njagi Japhet - Son
6. Joshua Mbaabu Japhet - Son
7. James Kiruki Japhet - Son
8. Martha Nchuri Muthuri - Daughter ( Married)
9. Nancy Kagwiria Gikunda - Daughter (Married)
10. Irene Kinanu Mbaya - Daughter (Married)
11. Ella Karwitha Musa - Daughter (Married)
12. Elijah Kinoti Japhet - Son

[2] The petitioner petitioned for the letter of administration where she stated that the deceased’s assets comprise of:

1. **Kibirichia/ 2241 measuring 0.039 Ha**
2. **Kibirichia/ 3402 measuring 0.046 Ha**
3. **Kibirichia/3403 measuring 0.046 Ha**

4. **Kibirichia/3404 measuring 0.046 Ha**
5. **Kibirichia/3405 measuring 0.0586 Ha**
6. **Kibirichia Market Plot No. 6A**
7. **Kibirichia Market Plot No. 63**
8. **Kibirichia Market Plot No. 7B**
9. **Rugusu Market No. 28A and 28B**
10. **Shares in Kiirua/Nkando Plot No. 2**
11. **Shares at Co-operative Bank of Kenya Ltd**
12. **Money in the Post Office Bank**
13. **Weighing Machine**
14. **1 Oxen Plough**
15. **1 Oxen Cart**
16. **1 Cow**

[3] Liabilities were listed as:

1. **Plot No. Kibirichia/3402 to Janet Karai Ndege**
2. **Plot No. Kibirichia/3403 to Janet Karai Ndege**
3. **Plot No. Kibirichia/ 3404 to Julius Mutwiri Mberia**

[4] The petition was gazetted in the Kenya gazette on 23<sup>rd</sup> February 2007 but an objection was raised by the 2<sup>nd</sup> administrator. However, the petitioner died and the 1<sup>st</sup> administrator applied through her application dated 21<sup>st</sup> November 2016 to be issued with the letters of administration. This was opposed by the 2<sup>nd</sup> administrator and consequently, Janet Karai Ndege and Daniel Kaumbuthi were appointed as joint administrators of the estate of the deceased on 20<sup>th</sup> March 2017.

#### **ANALYSIS AND DETERMINATION**

[5] Both parties cannot agree on how the estate is to be divided. Thus, the issue for determination by this court is how the estate of the deceased is to be distributed.

[6] At the time of his death, the deceased was survived by his wife and children. However, the widow later passed on. Accordingly to **Section 38 of the Law of Succession Act** applies. The section stipulates how the estate of an intestate who has left children but no spouse ought to be distributed as follows:

**“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”**

[7] As I have stated, the children of the deceased seem not to agree on the mode of distribution. The 1<sup>st</sup> administrator filed her mode of distribution which was supported by her Ella Karwithia Musa vide her supporting affidavit sworn on 23<sup>rd</sup> October 2017. The 2<sup>nd</sup> administrator filed his mode of distribution which was consented to by all the beneficiaries except the 1<sup>st</sup> administrator and Ella Karwithia Musa through the consent to the mode of distribution of the estate dated 1<sup>st</sup> November 2017.

[8] The 1<sup>st</sup> administrator stated that the deceased was originally the registered owner of LR No. Kibirichia/ Kibirichia/244 measuring 5.387Ha. And or about 1987 he subdivided it into 8 portions that is Kibirichia/Kibirichia/1737 to 1744 and transferred six of them to four of his sons and two of his brothers sons. Plot Nos. 1742 and 1744 remained in his name. LR. Kibirichia/Kibirichia/1744 he divided it into Plots No. 2240 and 2241 of which he sold the latter to Bundi Magiri. Pplot No. 2240 remained under his name. The deceased subdivided L. R. Kibirichia/Kibirichia/1742 into four plots that is Nos. 3402, 3403, 3404 and 3405. 1<sup>st</sup> administrator and the deceased entered into a friendly fatherly arrangement to sell to her Plot Nos. 3402 and 3403 and sold No. 3404 to Julius Mberia and remained with **No. 3405** in his name.

[9] I have perused the mode of distributions presented by both administrators. Firstly, I have noted that the daughters of the deceased have seemingly accepted to a lesser share of the estate in spite of the fact that they are entitled to an equal share. Secondly, the 1<sup>st</sup> administrator pointed out that when the deceased divided Kibirichia/Kibirichia/1737 to 1744 he transferred six of them to four of his sons and two of his brother's sons. The Law of Succession is very clear on who a dependant is under Section 29:

**For the purposes of this Part, "dependant" means—**

**(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**

**(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**

**(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.**

[10] From the record, you cannot establish who the four sons of the deceased are and who his nephews are for they have all been listed as sons of the deceased. It has not been explained the reason why but it seems that the beneficiaries of the deceased have no problem with that for they have incorporated them into the mode of distribution. Thirdly, there are liabilities of the estate in form of land which should be settled. And, fourthly, there are some of the beneficiaries who were gifted part of the estate by the deceased of which this court has to take into account when it distributes the estate as expressed under **Section 28 and 42 of CAP 160**. See section 42 below:-

**42. Previous benefits to be brought into account Where**

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

**(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.**

These beneficiaries are his six sons and the 1<sup>st</sup> administrator and the gifts made shall be taken into account in determining their ultimate share in the estate. The 1<sup>st</sup> administrator alleged that she bought the land from the deceased but she has not proved this. Hence, I shall treat it as a gift and not as sale of land as alleged by her.

[11] Accordingly, I order the estate shall be distributed as follows:

**1. Kibirichia/ 2241 measuring 0.039 Ha shall be shared equally amongst:-**

- i.) Martha Nchuri
- ii.) Nancy Kagwiria
- iii.) Irene Kinanu
- iv.) Ella Karwithia Musa

**2. Kibirichia/ 3402 measuring 0.046 Ha Janet Karai Ndege**

**3. Kibirichia/3403 measuring 0.046 Ha Janet Karai Ndege**

**4. Kibirichia/3404 measuring 0.046 Ha Julius Mutwiri Mberia (Purchaser)**

**5. Kibirichia/3405 measuring 0.0586 Ha shall be shared equally amongst:-**

- i.) Martha Nchuri
- ii.) Nancy Kagwiria
- iii.) Irene Kinanu
- iv.) Ella Karwithia Musa

**6. Kibirichia Market Plot No. 6A to be shared equally amongst:-**

- i.) Martha Nchuri
- ii.) Nancy Kagwiria
- iii.) Irene Kinanu
- iv.) Ella Karwithia Musa

**7. Kibirichia Market Plot No. 63 to go to;** Gediel Kirimi Japhet, Jenesis Njagi and Elijah Kinoti

**8. Kibirichia Market Plot No. 7B** James Kiruki

**9. Rugusu Market No. 28A** Joshua Mbaabu and Jenesis Njagi

**10. Rugusu Market No. 28B** Daniel

**11. Shares in Kiirua/Nkando Plot No. 2 to be shared equally amongst:-**

- i.) Martha Nchuri
- ii.) Nancy Kagwiria
- iii.) Irene Kinanu
- iv.) Ella Karwithia Musa

**12. Shares at Co-operative Bank of Kenya Ltd** Elijah Kinoti

**13. Money in the Post Office Bank to be shared equally amongst:-**

- i.) Martha Nchuri
- ii.) Nancy Kagwiria
- iii.) Irene Kinanu
- iv.) Ella Karwithia Musa
- v.) Janet Karai Ndege

**14. Weighing Machine, 1 Oxen Plough, 1 Oxen Cart and 1 Cow to be shared equally amongst:-**

- i.) Martha Nchuri
- ii.) Nancy Kagwiria
- iii.) Irene Kinanu
- iv.) Ella Karwithia Musa
- v.) Janet Karai Ndege

[12] The grant herein is confirmed in the foregoing terms. No order as to costs. It is so ordered.

Dated, Signed and delivered in open court at Meru this 29<sup>th</sup> Day of January, 2019

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**F. GIKONYO**

**JUDGE**

**In presence of**

Wamache for Mburugu for 1<sup>st</sup> administrator

Ojiambo holding brief for F.K Gitonga for 2<sup>nd</sup> – administrator

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**F. GIKONYO**

**JUDGE**