



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 740 OF 2011**

**In The Matter Of The Estate Of Mimpwi M'itaru Alias Impwi Itaru (Deceased)**

**GLADYS KAROKI M'IMPWI.....1<sup>ST</sup> PETITIONER**

**Versus**

**SAMUEL MWONGERA IMPWI.....2<sup>ND</sup> PETITIONER**

**JUDGMENT**

[1] **MIMPWI M'ITARU alias IMPWI ITARU** ("the deceased) to whom this Succession Cause relates died on 22<sup>nd</sup> November 2004. Through the Chief's letter of introduction dated 8<sup>th</sup> November 2011 he stated that the deceased was survived by:

1. Gladys Karoki M'Impwi - Widow
2. Samuel Mwongera M'Impwi - Son
3. Joyce G. M'Impwi - Daughter
4. Janet Ruguru Simon - Daughter
5. Hellen Ngautani Marangu- Daughter
6. Eunice Nyoroka - Daughter
7. Susan Mwari - Daughter
- 8.

According to the petition his estate comprises of **Land Parcel No. Nkuene/Uruku/902** measuring 3.577 Ha and **Land Title No. Ngobit Supuko Block 5/249** measuring 0.970Ha.

[2] On 10<sup>th</sup> September 2014 grant of letters of administration intestate were issued to Gladys Karoki M'Impwi and Samuel Mwongera Impwi. The 1<sup>st</sup> petitioner applied for the confirmation of the grant and proposed that the estate be distributed as follows:

**LR No. Nkuene/Uruku/902 measuring 8.8 Acres**

1. **Gladys Karoki M'Impwi** - 1 acre
2. **Joyce Gatabi M'Impwi** - 1 acre
3. **Janet Ruguru Simon** - 1 acre
4. **Hellen Ngautani Marangu** - 1 acre

5. Eunice Nyoroka - 1 acre
6. Susan Mwari - 1 acre
7. Samuel Mwongera Impwi - balance

**LR No. Ngobit Supuko Block 5/249**

1. Gladys Karoki M'Impwi - 1.39 acres
2. Samuel Mwongera M'Impwi - 1 acres

[3] The foregoing proposed distribution was opposed by the 2<sup>nd</sup> petitioner who, in his affidavit sworn on 27<sup>th</sup> October 2014, proposed that the estate be distributed as follows:

**Land Parcel No. Nkuene/Uruku/902**

1. Gladys Karoki M'Impwi
2. Joyce Gatabi M'Impwi
3. Janet Ruguru Simon- each to get one acre
4. Samuel Mwongera Impwi - balance

**Land Parcel No. Ngobit Supuko Block 5/249**

**To be shared between himself and Gladys Karoki M'Impwi equally**

[4] This matter was heard *vide viva voce* evidence. **P1W1 Gladys Karoki M'Impwi** adopted her statement dated 28<sup>th</sup> January 2016 as evidence. She asserted that all her children are in agreement with her mode of distribution apart from the 2<sup>nd</sup> petitioner who does not want some of his sisters to have a share. She told the court that the deceased used to tell her that none of their children should be left out in the inheritance of his assets. This he did when they were the two of them and also in the presence of their eldest daughter Joyce Gatabi.

[5] **P1W2 Eunice Nyoroka** adopted her statement dated 28<sup>th</sup> January 2016 as her evidence. She affirmed that she supports the 1<sup>st</sup> petitioner's mode of distribution. That the 2<sup>nd</sup> petitioner failed to include her together with Hellen Ngautani and Susan Mwari on his proposed mode of distribution yet they have a right to inherit. She stated that she was married at the time of the death of the deceased. When the deceased was ill their mother used to take him to hospital. She used to talk to the deceased and stated that the deceased told her mother that she should get land of which he allowed her to cultivate and which she does up to date. She did not however attend the elder's meeting.

[6] **P1W3 Joyce Gatabi M'Impwi** adopted her statement dated 28<sup>th</sup> January 2016 as her evidence. She affirmed that she agrees with her mother's mode of distribution. She stated that she has a home on her father's land at a location the deceased showed her. She was married but when the deceased died she was at home. She testified that the 1<sup>st</sup> petitioner used to take the deceased to the hospital. She used to give money for medication and their brother used to keep the receipts. She affirmed that she never neglected their father. She also stated that the deceased did not leave any will and she did not hear her father say whoever takes him to the hospital shall be rewarded with land and at no point did he tell them that he has given land to the 2<sup>nd</sup> petitioner.

[7] **P1W4 Susan Mwari** asserted that she supports 1<sup>st</sup> petitioner's mode of distribution since it follows after their father's wishes. She stated that their father used to say that all his children should be given land. At the time of his death she was not married but she got married after his death.

[8] **P1W5 Helen Ngautani** also avowed that she supports the 1<sup>st</sup> petitioner's mode of distribution. She married in 1983 and was not home when the deceased died but she used to visit the deceased and help him. She asserted that it is a lie that their mother neglected their father

[9] **P1W6 Janet Ruguru** stated that she supports the 1<sup>st</sup> petitioner's mode of distribution. That at the time of their father's death she was married but she is not married now.

[10] At the close of the 1<sup>st</sup> petitioner's case, the 2<sup>nd</sup> petitioner gave a sworn testimony and called one witness. **P2W1 Samuel Mwongera** who told the court that the daughters of the deceased are married. When the deceased was ailing he used to take care of him and none of the daughters helped to take care of him. The deceased called his brother David, 1<sup>st</sup> petitioner and other people to a clan meeting where the deceased showed him his piece of land and the rest was his. He did not however tell him of the acreage of his portion but showed him his boundary. He also showed him where the 1<sup>st</sup> petitioner will live together with any of the daughters who shall be divorced. He proposes that for Parcel No. 902 they all share the 3 acres and the balance goes to him. As for Parcel No. 249 he says that this was given to him by the deceased as a gift of which his mother is aware of.

[11] **P2W2 David Muthomi** brother of the deceased stated that he and the 2<sup>nd</sup> petitioner were the ones taking care of the deceased when he was ill and took him to the hospital when needed. They were the ones that paid the hospital bills. None of the daughters came to help as they were married and their homes were far away. He confirmed that indeed the deceased convened a clan meeting where he the 2<sup>nd</sup> petitioner was the only one who was shown land. The other part was to go to the 1<sup>st</sup> petitioner and if any daughter was to come back home she shall live on the land where the 1<sup>st</sup> petitioner is living.

### Submissions

[12] This matter was canvassed by way of written submissions. The 1<sup>st</sup> petitioner submitted that **Section 35 of the Law of Succession Act** applies in this cause. The section does not discriminate between boy and girl child. Her proposal is supported by her 5 daughters as it is fair, reasonable and does not discriminate any child except she has favored the 2<sup>nd</sup> petitioner by giving him a bigger share than the others.

[13] The 2<sup>nd</sup> petitioner submitted that he put in hard work to foot all the hospital expenses without the assistance of his sisters. He claimed that none of them could produce even one receipt as they only came back after his death to claim his property. He was left by his father cultivating more than 5 acres and his mother was cultivating the rest and no daughter was given any separate cultivation rights. When the deceased called the elders and told them his wishes, this amounted to an oral will as per **Section 8 and 9 of the Law of Succession Act**. **Section 35** of the said Act is similar to Kimeru tradition where the widow is given life interest in the deceased's estate so long as she does not marry. Under Meru Customary Law that the widow is entitled to remain on the piece of land as she has full rights of use and cultivation over this land during her lifetime and the remaining land is shared equally among the sons as the daughters were not allowed to be given land to control absolutely. Therefore, the deceased's declaration to his witnesses amounted to an oral will where he declared his intentions to distribute to the son and wife but directing that the widow to have life interests and to hold in trust for daughter who may return home.

### ANALYSIS AND DETERMINATION

[14] The issue for determination is how the estate of the deceased is to be distributed.

[15] Firstly, the 2<sup>nd</sup> petitioner alleges that the deceased made an oral will which was made before clan elders. **PW2** testified on the alleged will. For an oral will to be recognized by this court it must meet the criteria laid down in **Section 9 (1) of the Law of Succession Act** which stipulates that:

***“(1) No oral will shall be valid unless—***

***(a) it is made before two or more competent witnesses; and***

***(b) the testator dies within a period of three months from the date of making the will:***

***Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.”***

[16] The 1<sup>st</sup> petitioner and her witnesses averred that the deceased did not make an oral will. **PW2**, told the court that the deceased did not leave any will but narrated what he alleged the deceased did in 2001- showed the 2<sup>nd</sup> petitioner his land. The deceased died in 2004. The 2<sup>nd</sup> petitioner merely interpreted in his submissions what the petitioner did to amount to an oral will. In any case, the alleged oral will does not even fulfill the first requirement which stipulates that the will shall not be valid unless the testator dies within a period of three months from the making. In this case, the allegedly will was made in 2001 and the deceased died in 2004 meaning that the deceased died three years after the alleged event and not within three months. No cogent evidence was adduced to show that the deceased made an oral will in the presence of two or more competent witnesses and died within three months of the making of the will. Accordingly, I find that the deceased did not make an oral will as alleged.

[17] That being the case, the law on intestacy applies to this estate. The intestate left behind a surviving spouse and children and **Section 35 of CAP 160** reproduced below applies:

***“(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—***

***(a) the personal and household effects of the deceased absolutely; and***

***(b) a life interest in the whole residue of the net intestate estate:***

***Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”***

[18] Nonetheless, jurisprudence coming through is that strict application of section 35 may breed injustice especially because, the spouse's life interest hovering over the whole estate, is an impediment on the right of enjoyment by the other dependants of their rightful shares in the estate. The spouse's rights to the property of their marriage should also not be reduced and confined to mere life interest. Such connotes that the surviving spouse never had any property rights in the matrimonial properties; and, that upon the death of one spouse, the rights of the surviving spouse are obliterated and reduced to mere life interest. I do not think the law seeks such down trod on rights of spouses in their property of the marriage. It is time courts started bringing the law of succession into conformity with the Constitution on this matter. See

section 7 of the Sixth Schedule of the Constitution which provides as follows:-

## 7. Existing laws

***(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.***

[19] As a result, courts are not opposed to a spouse getting a distinct share as well as the dependants so that they may all benefit and enjoy their respective entitlements. This was so expressed by the Court of Appeal in the case of **Stephen Gitonga M'murithi v Faith Ngira Murithi [2015] eKLR** as follows:

***“As for the issue of the widow having been given an outright tangible shareholding in the net intestate estate of the deceased as opposed to a life interest, we find nothing in section 40 of the Laws of Succession Act that can prevent a court of law from looking at the peculiar circumstances of each case and then determine whether to apply strictly the rule on life interest or temper with it in the interests of justice to all the affected parties. In the circumstances of this case having found that the principle in section 38 was the appropriate applicable principle, ordering a life interest would have occasioned injustice to all the dependants as opting for such an option would have only bestowed upon the widow Naomi a hovering interest over the individual interests of all the other beneficiaries thereby making it impossible for all the beneficiaries to enjoy freely the resulting benefits from the deceased’s estate. We find it was prudent for the learned trial Judge to accord a direct unencumbered benefit to the widow Naomi as opposed to a life interest.”***

[20] Accordingly, each dependant to have their own share. I note that patriarchy reared its ugly head here. See the testimonies of the 2<sup>nd</sup> petitioner and his witnesses to the effect that in Kimeru tradition daughters did not inherit land. The law loathes this kind of discrimination and I cast it away. The said custom was responsible for the apprehensions by the 1<sup>st</sup> petitioner that the clan intended to cast away her children. **See also** the case of **Mary Rono v Jane Rono & another [2005] eKLR** where such discriminatory practices were found to offend the Constitution as well as international instruments.

[21] Before I close, let me examine the claim that it was the 2<sup>nd</sup> petitioner and PW2 who took care of the deceased when he was ailing. I understood him to be saying that his said act or gesture gave the 2<sup>nd</sup> petitioner expectation that he would be granted a larger share of the estate by his father and he says that is exactly what happened. Children in African society are expected to take care of their parents at all times and not only during ailing days of the parents. It is a pity that the 2<sup>nd</sup> petitioner only took care of his father during his ailment, not as a matter of gratitude or call of duty but for a reward; to get a larger portion of land. Taking a sick parent to the hospital per se does not raise the status of any child or elevate his or her entitlement. Furthermore, the allegation by the 2<sup>nd</sup> petitioner that the daughters neither participated in caring for the deceased nor contributed towards the medical bill is neither here nor there. In fact it was not substantiated and it could be true that he only kept the receipts for he was near their father. The receipts do not show who paid for the hospital bills. In short, his claim is not supported by evidence.

[22] From the foregoing, this estate is governed by the **Law of Succession Act, CAP 160 and the Constitution** which knows not discrimination of a particular gender in inheritance. Accordingly, the estate of the deceased shall be distributed according to the principles of fairness and equality. In light thereof, I find the mode of distribution proposed by the 1<sup>st</sup> petitioner to be fair although she has given the 2<sup>nd</sup> petitioner a slightly larger portion of land. She treated every child equally. Again, the daughters are in agreement with her distribution dated 25<sup>th</sup> March 2015.

[23] In the upshot, I make the following orders:

***a) The grant of letters of administration intestate issued to Gladys Karoki M'Impwi and Samuel Mwangera Impwi on 10<sup>th</sup> September 2014 is confirmed.***

***b) The estate shall be distributed as follows:***

### **Land Parcel No. Nkuene/Uruku/902 measuring 8.8 Acres**

- 1. Gladys Karoki M'Impwi - 1 acre**
- 2. Joyce Gatabi M'Impwi - 1 acre**
- 3. Janet Ruguru Simon - 1 acre**
- 4. Hellen Ngautani Marangu - 1 acre**
- 5. Eunice Nyoroka - 1 acre**
- 6. Susan Mwari - 1 acre**
- 7. Samuel Mwangera Impwi - balance**

### **Land Parcel No. Ngobit Supuko Block 5/249**

1. *Gladys Karoki M'Impwi* - 1.39 acres

2. *Samuel Mwongera M'Impwi* - 1 acres

Dated, signed and delivered in open court this 23<sup>rd</sup> day of January, 2019

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**F. GIKONYO**

**JUDGE**

**In presence of**

**Kithinji for 1<sup>st</sup> petitioner**

**Wamache for Kaumbi for 2<sup>nd</sup> petitioner**

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**F. GIKONYO**

**JUDGE**