



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 55 OF 2010**

**IN THE MATTER OF THE ESTATE OF GEORGE**

**NGUTHURI alias NGUTHURI ITHARUNI (DECEASED)**

**DANIEL THIANDERI NGUTHURI.....OBJECTOR**

**VERSUS**

**MARTHA NTHING'A.....PETITIONER**

**J U D G M E N T**

1. **GEORGE NGUTHURI (“the deceased”)** died in November, 1999. **Martha Nthingá Nguthuri (“the petitioner”)** lodged a citation on 16<sup>th</sup> February, 2010 against **Daniel Thianderi Nguthuri (“the objector”)**. On the objector failing to answer the Citation, on 8<sup>th</sup> February, 2011 the court ordered that the petitioner do lodge the succession cause for the deceased estate which she did on 25<sup>th</sup> February, 2011.

2. The grant of letters of administration intestate was issued to the petitioner on 4<sup>th</sup> July 2011. On 9<sup>th</sup> May, 2012, she applied for its confirmation making proposals on how the deceased’s estate should be distributed. By a Summons dated 1<sup>st</sup> July 2013, the objector applied that the grant be revoked and he be allowed to lodge an objection out of time.

3. The objector contended that he was a son of the 1<sup>st</sup> wife while the petitioner was the 2<sup>nd</sup> wife of the deceased. That the petitioner had not sought the consent of the 1<sup>st</sup> house before lodging the cause; that the petitioner had disregarded the family agreement on distribution that had been entered on 13<sup>th</sup> April, 2009 and had started to dispose off parts of the estate property. He further contended that the proceedings leading to the grant were defective in substance as the consent of the members of the 1<sup>st</sup> house had not been sought.

4. The petitioner opposed the application vide her replying affidavit sworn on 19<sup>th</sup> March 2014. She deponed that the applicant’s family members were always aware of the cause and disregarded the citation served upon the objector. She denied the allegations that she had sold parts of the estate and averred that, it was members of the 1<sup>st</sup> family who had sold portions of the estate. That neither her nor any of her family members attended the meeting of 13<sup>th</sup> April, 2009. She contended that the mode of distribution proposed in that meeting was not equitable or fair. She concluded that her family was looked down upon because she only had one son out of the 5 children she had.

5. Since the matter was very old, the court decided to treat the application as a protest to the confirmation. This was borne by the fact that, there was evidence that the Court (Kasango J.) had allowed the petitioner to lodge the Cause after being satisfied that for a whole year between February, 2010 and February, 2011, the objector had not answered the Citation. That order was still in force and there had been no application to set it aside. Further, the objector wanted the distribution of the estate to be as had allegedly been agreed upon at the meeting of 13<sup>th</sup> April, 2009. This was meant to save both the court and the parties, time in terms of **Article 159 of the Constitution of Kenya**. For these reasons, the court ordered that the protest be heard by way of *viva voce evidence*.

6. **OW1** was **Daniel Thianderi**, the objector. He told the court that the deceased had two wives. He was from the first wife who had 8 children while the petitioner was the second wife with 5 children. He stated that he never received the Citation by the petitioner and that his mother, **Elizabeth Kinaiti** who was 85 years old, would like to distribute the estate according to the minutes of the meeting of 13<sup>th</sup> April, 2009 (*sic*). That the said minutes showed that 2 members of the 2<sup>nd</sup> family attended that meeting. **OW1** further testified how the two families were in occupation of the estate properties.

7. **OW2 Christine Kananu George** told the court that she is the assistant chief of Athinga sub-location Muthaara, Tigania East as well as the daughter of the deceased. That after the death of the deceased, the family had a meeting on 13<sup>th</sup> January, 2009 and distributed the deceased’s properties to the satisfaction of all. Everyone took possession of their portions and started developing them.

8. That through sale agreements dated 6<sup>th</sup> November 2009, 21<sup>st</sup> October, 2015 and 31<sup>st</sup> March, 2016, respectively the petitioner and her children, **Duncan Murigi** and **Joy Kendi** sold their portions to 3<sup>rd</sup> parties. She asked the court to adopt the sharing the family had made on 13<sup>th</sup> January, 2009 since most of the beneficiaries had developed their own portions. Pursuant to the said distribution. According to her, nullifying the sharing by the family will bring chaos to the family. She produced various documents (**Oexh1 – 7**) in support of her testimony.
9. **PW1 Martha Nthing'a** opposed the protest relying on her replying affidavit sworn on 19<sup>th</sup> March 2014, statement dated 10<sup>th</sup> June 2014 and the Citation dated 15<sup>th</sup> February, 2010. She stated that she had neither involved the first wife nor sought the consent of the 1<sup>st</sup> wife in bringing this Cause because she had her own problems. She denied there having been any family meeting after the demise of the deceased to discuss about distribution of the property of the deceased.
10. As regards the meeting of 13<sup>th</sup> January, 2009, she stated that she attended the same but did not know that it was about distribution of the estate as the proceedings were mainly in English and Kiswahili. She confirmed that some of the beneficiaries, including her own children, had sold portions of the estate.
11. Both parties filed their respective submissions. The Objector submitted that it is after the beneficiaries had agreed on how the estate was to be distributed that the petitioner and her children went ahead to sell their shares. That in the premises, the petitioner had come to court with dirty hands to claim what belongs to the other beneficiaries. The objector urged the court to accept and adopt the mode of distribution agreed by the beneficiaries as per the meeting held on 13<sup>th</sup> January, 2009.
12. In her submissions, the petitioner stated that since the main and only issue was distribution of the estate, the same should be undertaken in accordance with the provisions of **Sections 35 and 40 of the Law of Succession Act “the Act”**.
13. Having carefully considered the evidence on record and the submissions of learned Counsel, the issues for determination are; **whether the grant issued on 4<sup>th</sup> July, 2011 should be revoked, whether the family had agreed on how the estate should be distributed and if so, whether the same should be adopted. If not, how should the estate be distributed?**
14. The objector was firm that neither he nor his family was notified by the petitioner at the time of lodging the Cause. The consent of members of the 1<sup>st</sup> family was not sought. The petitioner admitted that fact and stated that she did not inform her co-wife nor seek the consent of the members of the 1<sup>st</sup> family because she had her own problems. She never disclosed the sort of problems that she was facing that prevented her from following the express provisions of the law.
15. However, I have looked at the record. The firm of F. K. Gitonga & Company Advocates entered appearance to the Citation on 15<sup>th</sup> March, 2010. When the matter was referred to the Judge on 6<sup>th</sup> January, 2011, the court did not see any opposition to the Citation and therefore ordered on 8<sup>th</sup> February, 2011 that the petitioner do lodge the present Cause.
16. In view of the foregoing, it is clear that the present Cause was lodged in accordance with the law. The objector entered appearance to the Citation but did nothing for a whole year. He cannot now turn around and allege ignorance of that Citation. In any event, the petitioner is a fit person to have taken the grant as she is ‘a surviving spouse of the deceased’. **Section 66 of the Law of Succession Act Cap 160 of the Laws of Kenya (“the Act”)** is clear on who is entitled to petition for grant of letters of administration.
17. I am aware that the petitioner should not have excluded her co-wife and that she should have sought her consent under **Rule 26 of the Probate and Administration Rules**. However, considering the time the matter has taken and that all the parties have been given adequate opportunity to air their respective cases, I will revoke the grant issued to the petitioner but at the same time re-issue a fresh one to the petitioner together with the objector, jointly.
18. Regarding the meeting of 13<sup>th</sup> January, 2009, I am satisfied that there was such a meeting. That it was concerned with the distribution of the estate of the deceased. I did not believe the petitioner when she stated that she did not know what was being discussed at that meeting. It should be recalled that she had first denied the holding of any such meeting but later admitted attending the same when evidence to the contrary was produced.
19. The objector and his sister (**PW2**) testified that the estate of the deceased was distributed at that meeting to the satisfaction of all. That there were elders who assisted in the said distribution. I have perused the minutes that were produced. They were not signed by anyone. It is true that the petitioner attended the meeting together with her son. However, there is nothing to show that she and her son agreed to the distribution.
20. In my view, families of deceased persons should be given as much latitude as possible to sort out the issue of distribution of estates of their deceased. However, when there is no agreement, the court will not shy away from its responsibility of distributing such estates in accordance with the law.
21. In the present case, although there was a family meeting on 13<sup>th</sup> January, 2009 whereon the estate of the deceased was distributed, there is nothing to show that the distribution was agreed upon. The minutes of that meeting were not signed. The petitioner alleges that her family was short changed because she has only one son.
22. In matters succession, the law is clear, a child of the deceased is a child. There is no male or female, married or unmarried. All are equal. Indeed, the law presupposes that both in monogamous as well as polygamous set up, all the children of the deceased get equal shares their gender notwithstanding. This is what **sections 38 and 40 of the Act** decree.

23. In this regard, if there is no evidence that whatever was arrived at in a family meeting was agreed upon by all the beneficiaries, ie. by signing of the minutes, the court in my view is entitled to enquire as to whether such agreement is in accordance with the law.

24. In the present case, I have looked at the Minutes of the subject meeting. They are not signed by anyone. The entire estate was 'distributed' but a look at the same shows that the distribution was far from fair. The parties were represented in this cause by able advocates. None however filed any valuation of the estate property. It is therefore difficult to gauge equality leave alone equity.

25. Having considered the 'family distribution', it is clear that the distribution of land between the two houses was nearly equitable. This is so considering that out of the total 46.825 acres available, the 1<sup>st</sup> family (with 9 units) got 29.285 acres instead of 28.095 acres while the 2<sup>nd</sup> family (with 6 units) got 16.747 acres instead of 18.73 acres. The difference therefore between what the 2<sup>nd</sup> family was to get under section 40 of the Act and what it actually got is 1.983 acres.

26. What is disturbing however, is that while one of the male child got over 7 acres of land, the daughters got less than 1.5 acres each. To my mind that was a grave injustice. None of the daughters appeared before me to renounce their interest or confirm the so called family distribution except **PW2**. The proper mode should have been to distribute the 46.825 acres by 15 units, making it 3.121 acres for each beneficiary. Any sales that had been effected were unlawful and cannot stand. They cannot prevent the court from applying the law as it should.

27. The court has also noted that all the developed properties were distributed to the sons only. That is not in accordance with **section 40 of the Act**. Accordingly, for the interests of justice, the estate will be distributed with a view to strike equality where possible. The court will also take into consideration of the matrimonial homes of the respective widows where the deceased left them.

28. Accordingly, I find that the objection/protest has merit and I make the following orders: -

a) The grant of letters of administration intestate issued to Martha Nthinga George on 4<sup>th</sup> July 2011 is hereby revoked.

b) A fresh grant of letters of administration is hereby issued to Daniel Thianderi Nguthuri and Martha Nthinga George and confirmed as follows: -

**NGUTHIRU FARM - 12.20 ACRES**

a) Elizabeth Kinaiti - 3.121 acres

b) Daniel Thianderi Nguthuri - “

c) Patrick Thuranira - “

d) David Mutabari - 2.836 acres

**KAITHA FARM - 23.465 ACRES**

a) Martha Nthinga George - 3.121 acres

b) Dancan Murungi - “

c) Agnes Nkatha - “

d) Joy Kendi - “

e) Racheal Makena - “

f) Catherine Ntinyari - “

g) Peter Munyaro - “

h) Jeniffer Inorira - 1.618 acres

**LII FARM - 7.16 ACRES**

a) David Mutabari - 0.285 acres

b) Christine Kananu - 3.121 acres

c) Tony Koome

Kimathi James

Esther Kauria.....3.121 acres jointly

d) Marisella Karei 0.633 acres

THAMANA FARM - 4 ACRES

a) Marisella Karei - 2.4acres

b) Jeniffer Inorera - 1.6 acres

PLOT NO 1”A”

a) Daniel Thianderi Nguthuri (front face and 7<sup>th</sup> room rear)

b) David Mutabari (2<sup>nd</sup> and 6<sup>th</sup> room)

c) Patrick Thuraniira (3<sup>rd</sup> and 4<sup>th</sup> room)

d) Tony Koome

Kimathi James

Esther Kauria (jointly 5<sup>th</sup> Middle Room)

BUTCHERY

a) Martha Nkatha George

b) Dancan Murungi

c) Agnes Nkatha

d) Joy Kendi

e) Rachel Makena

f) Catherine Ntinyari - Jointly

PLOT NO. 18 - KARACHINE MARKET

Peter Munyaro

UNDEVELOPED PLOT & SLAUGHTER HOUSE

David Mutabari

29. This being a family matter, there will be no order as to costs.

DATED and DELIVERED at Meru this 21st day of February, 2019.

A. MABEYA

JUDGE