



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MERU**

**SUCCESSION CAUSE NO 284 OF 2008**

**IN THE MATTER OF ESTATE OF M'IKUNYUA M'MURITHI (DECEASED)**

**GEORGE M'IKIRIMA M'IKUNYUA.....PETITIONER**

**VERSUS**

**PRISCILLA KARIMI.....1<sup>ST</sup> PROTESTOR**

**ROSEMARY GACHEGE MBAYA..... 2<sup>ND</sup> PROTESTOR**

**SARAH MWARI M'IKUNYUA.....3<sup>RD</sup> PROTESTOR**

**MARY MWAROMO.....4<sup>TH</sup> PROTESTOR**

**EVANGELINE RUGARU.....5<sup>TH</sup> PROTESTOR**

**JUDGMENT**

1. **M'IKUNYUA M'MURITHI** (“the deceased”) died on 5<sup>th</sup> December, 1995. A letter by the Chief of Thimbiri location dated 27/02/2008 introduced the survivors of the estate as, **George M'Ikirima, Sarah Mwari, John Gatobu** (deceased but had a son) and **Joel Muriuki**.

2. Pursuant thereto, George M'Kirima (“the original petitioner”) petitioned for letters of administration intestate on 9<sup>th</sup> July, 2008 which was duly issued on 8<sup>th</sup> December, 2008. On 19<sup>th</sup> August, 2010, he applied for the confirmation of grant whereby he proposed to distribute the estate, which only comprises **Parcel No. Ntimbiri/Igoki/11**, as follows: -

- a) Sarah Mwari - 1acre
- b) JK( minor) - 7 acres
- c) Joel Muriuki - 7 acres
- d) George M'Ikirima - 7 acres

3. Subsequently, the original petitioner died and Joel Muriuki applied under **section 47, 81 and 82 of the Law of Succession Act (“the Act”)** to be appointed the administrator. On 15<sup>th</sup> October, 2018, **Priscilla Karimi (“the 1<sup>st</sup> Protestor”)** lodged a protest on behalf of the rest of the protestors against the proposed distribution.

4. The protest was heard by way of *viva voce* evidence. **OW1 Priscilla Karimi (“the 1<sup>st</sup> protestor”)** testified that she was the daughter of the deceased who had 8 children; **George Kirimi, Priscilla Karimi, Rosemary Gachege, Sarah Mwari, Mary Mworomo, Joel Muriuki, John Gatobu and Evangeline Rugaru**. She denied that the deceased had divided his property or of having called any meeting for that matter before his demise. She told the court that the wishes of the protestors was that the daughters of the deceased be given 2.5 acres each while the sons get 3 acres each.

5. The petitioner (**PW1**) **Joel Muriuki**, opposed the protest and called 4 witnesses in support of his case. He agreed with the protestor that the deceased had 8 children and not 4 as indicated in the letter of introduction by the chief. He testified that the deceased had in 1988 called a clan meeting whereat he distributed his land to his sons and left 3 acres for the daughters. He started that there were no minutes for that meeting or another meeting allegedly held in June, 2018.

6. **PW2 Veronica Nkatha**, a daughter in law to the deceased told the court that there was a clan meeting called by the deceased in 1988 to divide his land. That the deceased had in 1985 put boundaries on his land and in 1986, he settled her in the portion where she has been in occupation to-date.

7. **PW3 Justus Murugi**, the chairman of the OMO clan recalled that sometimes in 1988, the deceased called him and other members of the clan to a party in his home. During the party, the deceased took him around and showed him the boundaries he had put on his land. He denied that the same was a clan meeting.

8. **PW4 Elijah Matumbi Ayub**, a nephew of the deceased, told the court that in 1988, the deceased called the clan to his home to show them how he had put boundaries in his land. Over 20 people attended the meeting. **PW5 Samwel Kirimi**, testified that after the alleged clan meeting of 1988 at the deceased's home, the deceased called him, **PW3, PW4, Robert M'turuchi (deceased), M'bijiwe, Mwirigi M'Mbutu** and showed them the boundaries he had put on his land.

9. The parties filed their respective submissions which the court has carefully considered. The issues for determination are; ***whether the deceased had divided his land before his demise and if not, how the estate should be distributed.***

10. It was the petitioner's case that sometimes in 1988, the deceased called a clan meeting wherein he divided his land to his sons and left 3 acres for his daughters. That several members of the clan attended that meeting in which the deceased willed himself. The protestors denied there being any such meeting. They contended that if the deceased had called any such meeting for purposes of distributing his property, he would have called involved them.

11. While the petitioner and his witnesses insisted that the said meeting was for purposes of dividing the deceased's property, **PW3 Justus Murungi M'Mugwika**, the chairman of the OMO clan was categorical that the said occasion was not a clan meeting. That the same was only a party during which time the deceased took him around his land to show him the boundaries he had put on his land.

12. It should be noted here that neither the petitioner nor any of his witnesses told the court exactly how the alleged boundaries of the land were. While the petitioner seemed to suggest that the alleged meeting was for purposes of the deceased dividing his land to his children, his witnesses suggested otherwise. It was their evidence that the land had already been divided and the boundaries put. All the deceased did after the "party" was to take the witnesses around pointing to them the boundaries that had been put.

12. In view of the foregoing, questions arise as to; when was the land divided? Who were present during the said division? How was the land divided or put in another way, to who and what acreage was the land given?

13. It is not lost of this court that **PW2 Veronica Nkatha Karimi** told the court that the boundaries were put in 1985 and that she was put in possession of her portion in 1986 where she has been in occupation to-date. With such contradictory evidence, it is difficult for the court to find that at some meeting held in 1988, the deceased divided his property as alleged by the petitioner.

14. Even if there was any such meeting, it cannot be said that the deceased willed himself or allocated any land to his children as to amount to ***gifts inter vivos***. ***In re Estate of The Late Gedion Manthi Nzioka (deceased) [2015] eKLR*** Nyamweya J held:-

***"For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of a declaration of trust by the donor or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard Halsbury's Laws of England 4<sup>th</sup> Edition Volume 20(1) at paragraph 32 to 51"***

15. In the present case, there was no evidence that the deceased executed any transfer of the alleged portions to any of his children during his lifetime. Accordingly, the provisions of ***section 31 of the Law of Succession Act ("the Act")*** having not been met, I make a finding that there was no any gift ***inter vivos*** by the deceased.

16. In the submissions, Counsel for the petitioner seemed to suggest that what the deceased did in the meeting of 1988 amounted to an oral will. With greatest respect, it never came out from the testimony of any of the witnesses that the deceased made any oral will at that meeting. In any event, even if the deceased made any such will at that meeting, the same cannot hold since he died in December, 1995, over 7 years later. It is trite that for an oral will to hold, the maker must die within 3 months of making of the will.

17. ***In the Matter of the Estate of Elizabeth Wanjiku Munge [2015] eKLR*** Musyoka J held:-

***"It is clear from the wording of both Section 9 of the Law of Succession Act and Rule 13 of the Probate and Administration Rules that the date of the making of an oral will is critical. The life of an oral will is only three (3) months, unless it is made by a mariner. The maker of the will should die within three months of its making for it to be valid."***

18. The deceased dying in 1995, the alleged oral will cannot hold. The deceased died intestate and the rules of intestacy shall apply to his estate.

19. As to distribution, ***section 38 of the Act*** is clear on how an estate of a deceased is to be distributed in the absence of a spouse. In this case, there was no allegation that the widow was alive. Accordingly, in terms of the aforesaid ***section 38 of the Act***, the estate is supposed to be distributed equally amongst all the children of the deceased, whether male or female, married or unmarried.

20. However, since the protestors, who are daughters of the deceased are agreeable that they get a smaller share in the estate, the court will adopt their mode of distribution and distribute the estate as follows: -

**Ntimbiri/Igoki/1 (21.14 acres)**

**a) Veronica Nkatha Karimi - 3 acres**

**b) Joel Muriuki - 3 acres**

**c) Godfrey Kinyua**

**(Son of John Gatobu (dcd)) - 3 acres**

**d) Priscilla Karimi - 2.42 acres**

**e) Rosemary Gachege - 2.42 acres**

**f) Sarah Mwari - 2.42 acres**

**g) Mary Mwaromo - 2.42 acres**

**h) Evangeline Rugaru - 2.42 acres**

21. This being a family matter, I make no order as to costs.

**DATED and DELIVERED at Meru this 21<sup>st</sup> day of February, 2019.**

**A. MABEYA**

**JUDGE**