



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**SUCCESSION CAUSE NO.88 OF 2017**

**IN THE MATTER OF THE ESTATE OF ZACHARIA NUNU GATHIGI (DECEASED)**

**A N D –**

**MARY MUTHONI THEURI.....1<sup>ST</sup> PETITIONER**

**REBECCA MWERU.....2<sup>ND</sup> PETITIONER/ADMINISTRATOR**

**V E R S U S**

**SAMSON GATHIGI NUNU.....OBJECTOR/ADMINISTRATOR**

**JUDGMENT**

**Zacharia Nunu Gathigi** died on 14/3/1992 at Gatondo Sub Location in Nyandarua. He was survived by the following beneficiaries:

1. **Samson Gathigi Nunu** - Son
2. **James Theuri** - Son (deceased)
3. **Rebecca Mweru** - Daughter
4. **Esther Muthoni** - Daughter
5. **Margaret Wangui** - Daughter (deceased)
6. **Mary Nyakiringa** - Daughter
7. **Mary Njambi** - Daughter

The deceased's estate comprised of only one property known as Nyandarua/Kirima/293 measuring 2.2 Ha. (5.4. Acres).

The deceased died intestate. Mary Muthoni, the wife of James Theuri and Rebecca Mweru, Petitioned the Principal Magistrate's Court Nyahururu, for letters of administration in Succession Cause No.186/2006. The case was later transferred to the High Court when the PM's Court jurisdiction was challenged.

The objector, Samson Nunu Gathigi (PW1) challenged the taking out of the letters by Mary Muthoni and Rebecca Mweru and later a consent was recorded to the effect that the 2<sup>nd</sup> petitioner, Rebecca Mweru and the objector, Samson Nunu Gathigi would be the administrators of the deceased's estate. Thereafter, the grant was confirmed on 7/3/2012 but on 31/7/2012, Tabitha Njambi, the widow to James Theuri applied to have the grant of letters of administration revoked on grounds of non-disclosure of material facts. In his ruling of 16/9/2014, J. Emukule allowed the application, set aside the grant of letters of administration and the two administrators were directed to administer the estate with the participation and consent of all the other beneficiaries. In addition, J. Emukule directed that affidavits be filed in the prescribed form 9 in support of the application for confirmation of grant and proposals on the mode of distribution.

Pursuant to that order, the objector filed an affidavit dated 17/10/2014 setting out his proposed mode of distribution. The other beneficiaries did not agree with the said proposal. In the said affidavit, the objector proposed that the estate be shared equally among the 7 children of the

deceased, so that each would be entitled to 0.7 acres and that James Theuri's share be registered in the joint names of his two wives Mary Muthoni and Tabitha Njambi and the share of Margaret Wangui, his deceased sister, be registered in the name of his eldest son John Mungai who was to hold in trust for his siblings. He further proposed that ½ acre be sold to cater for the costs of the administration of the estate.

On the other hand, Rebecca Mweru, Mary Njambi, Esther Muthoni and Tabitha Njambi filed their respective affidavits on the proposed mode of distribution. They proposed that 3 acres devolve to Tabitha Njambi to hold for herself and her children while 2 acres go to John Mungai to hold in trust for himself and the other children of Margaret Wangui.

The parties agreed that the issue of distribution be resolved by way of viva voce evidence.

**PW1 Samson Gathigi** adopted his affidavits and reiterated the contents thereof.

It was his testimony that he lives at Thegenge in Nyeri on Plot Thegenge/Gathuthi/141 and that he got the title to the said land in 1958 when he was 32 years old. He denied that he was given the said land by the deceased as a gift or that it should be taken into account during distribution of the deceased's estate. He maintained that his father left word that they had to share the subject land in Wanjohi, that is, Nyandarua/Kirima/293 and his sisters to get something out of it because of the provisions of the Constitution.

According to him, Theuri's family lives at Solai whereas his parents lived at Wanjohi on the subject land and the father was buried on the said land at Wanjohi. He admitted that Tabitha Theuri, widow to James Theuri (deceased) has been using the Wanjohi land alone by leasing it out.

Tabitha Njambi, DW1, the wife of James Theuri (deceased) and therefore a daughter in law of the deceased, testified that Nyandarua/Kirima/293 was left to James Theuri and Margaret Wangui who are both deceased; that the deceased called one Nehemiah Wanyombe who did the distribution of the land; that Margaret Wangui had returned home after her marriage failed and had children and that is why she was given land but her other sisters did not get any land; that the Wanjohi land was distributed by the deceased when he was still alive. Three daughters of the deceased, namely Rebecca Mweru, Mary Njambi and Esther Muthoni Swore affidavits dated 26<sup>th</sup> October, 2015 in which they relinquished their entitlement over Nyandarua/Kirima/293 and said that it should be shared between James Theuri and Margaret Wangui (both deceased) and therefore the land should devolve to Tabitha Njambi Theuri, 3 acres to hold in trust for herself and her children and 2 acres to John Mungai to hold in trust for himself and the children of Margaret Wangui. They opposed the distribution proposed by the objector. I note however, that one of the deceased's daughter Mary Nyakiringa did not swear any affidavit of renunciation DW1 maintained that the objector was given 5 acres of land in Nyeri by the deceased. She did not however tender any evidence to support the contention that the deceased gave the Nyeri land (Thegenge/Gathuthi/141) to PW1. DW1 also said that her co-wife Mary Muthoni Theuri, has no objection to her getting the land alone.

I have considered the testimonies of the objector, PW1 and the petitioner (DW1), the affidavits of the respective parties and submissions of both counsel.

This petition was filed by Mary Muthoni Theuri and Rebecca Mweru for letters of administration intestate. Later when the objector and Rebecca Mweru were substituted as administrators, the position remained the same, that the deceased died intestate. For the first time, in her testimony, DW1 testified that before the deceased's death, he called one Nehemiah Wang'ombe to share out the land between DW1 and Margaret Wangui's son.

DW1 did not say the date when the subdivision was done by the said Wang'ombe. DW1 did not call the said Wang'ombe as a witness though she claimed that he could be called if required. It is DW1 who alleged the existence of an oral Will through Nehemiah Wang'ombe and should have called him as a witness.

In my considered opinion, the allegation that the deceased's land had been shared out is an afterthought and was never disclosed from the onset. I find that the deceased died intestate.

There is no doubt as to who survived the deceased. It is also not in dispute that the only property left by the deceased is Nyandarua/Kirima/293 measuring 2.2 Ha or about 5.4 acres.

The next question then is who should inherit the said land?

It is the contention of DW1 that the land should devolve to herself, Tabitha Njambi, wife of James Theuri son of the deceased, to hold for herself and her children and Margaret Wangui, a daughter of the deceased who is also deceased.

First of all, I wish to observe that since the deceased was survived by his children, the estate will be administered in accordance with Section 38 of Part V of the Law of Succession Act; which provides:

***“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 be equally divided among the surviving children.”***

It is not clear when James Theuri and Margaret Wangui died but it is not in contest that James Theuri was survived by two wives and children whereas Margaret Wangui was survived by children. As to whether the grandchildren of the deceased should inherit, Section 41 gives guidelines. Section 41 of the Laws of Succession Act provides that:

***“...for or any of the issue of any child of the intestate predecease him and who attain that age or so marry, in which case the***

***issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”***

It means that the children of James Theuri and Margaret Wangui can step in the shoes of their parents and inherit from the deceased.

According to DW1, the objector is not entitled to a share of Nyandarua/Kirima/293 because the deceased had already given him Thegenge/Gathuthi/141. This issue was raised before J. Ouko and in his ruling of 7/3/2012, the Judge stated inter alia

***“Regarding Thegenge/Gathuthi/141; the protestor has once more failed to satisfy the court that it indeed belonged to the deceased before it was given to the objector. The objector for his part has demonstrated that he has been the registered proprietor of the property since 1958....”***

DW1 never produced any evidence to prove that the said Nyeri land ever belonged to the deceased before it was transferred to PW1 in 1958. Had it been shown that PW1 had been gifted with the said land during the life of the deceased, then it would have been taken into account in accordance with provisions of Section 42 of the Laws of Succession Act.

Section 42 provides:

***“Where***

***(a) an intestate has during his lifetime or by Will, paid, given 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 finally accruing to the child, grandchild or house.”***

So far, there is no evidence that PW1 was given the said land by the deceased. It therefore, means that PW1 will be entitled to the same share of the subject land as the other beneficiaries.

The next question then is how is the land to be shared?

Article 27(4) of the Constitution prohibits discrimination directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health, status, ethnic or social origin, colour, age, culture e.t.c. read together with Section 38 Laws of Succession Act. Both sons and daughters of the deceased are entitled to equal share of the deceased's property.

The land in question is said to be 2.2 Ha or 5.436 acres. The deceased's children are 7 in number. It means that each will be entitled to 0.7 acres.

This court cannot ignore the affidavits of the deceased's daughters, Rebecca Mweru, Esther Muthoni and Mary Njambi in which they clearly stated that they wish to relinquish their shares to the house of James Theuri and Margaret Wangui (both deceased). As noted, one of the deceased's daughters never filed any affidavit of renunciation, Mary Nyakiringa. Mr. Njogu in opposing that proposal submitted that the beneficiaries had not executed any renunciation deeds, renouncing their right to inherit.

I find that the affidavits made on oath by the three are sufficient renunciation of their rights to inherit from their father. Many a times, beneficiaries come to open court and verbally renounce their rights to inherit which the court records and it is deemed to be sufficient renunciation. In my view, the court cannot decline to accept the request of the three deceased's daughters because of mere want of form. The share of Mary Njambi, Rebecca Mweru and Esther Muthoni will therefore devolve to the houses of James Theuri and Margaret Wangui. However, the entitlement of PW1 and Mary Nyakiringa remain 0.7 acres each. I note that the three sisters had shared the subject property such that the house of Theuri would get more land. Although no share had been given to Mary Muthoni Theuri, she did not swear any affidavit relinquishing her share to her co-wife Tabitha Njambi (DW1).

In my view, the shares of the three should be shared between the houses of James Theuri and Margaret Wangui as follows:

***(1) James Theuri's house will get two more shares to make three, that is, 2.3 acres, from Rebecca Mweru, and Esther Muthoni. The two widows, Mary Muthoni and Tabitha Njambi (DW1) will hold the said property jointly in equal shares, for themselves and their children;***

***(2) Margaret Wangui's house will get one more share from Mary Njambi to make two 1.55 acres. The said property will devolve to John Mungai son of Margaret Wangui, to hold on his behalf and in trust for the children of Margaret Wangui in equal shares.***

In the event Mary Muthoni and Mary Nyakiringa do not claim their share of the property, they are at liberty to renounce her shares.

In the end, the deceased's estate will be shared as follows:

***(1) Samson Gathigi Nunu – 0.7 acres;***

*(2) Mary Nyakiringa - 0.7 acres;*

*(3) Mary Muthoni and Tabitha Njambi jointly 2.3 acres to hold in trust;*

*(4) John Mungai- 1.5 to hold in trust.*

This being a family matter, I direct that each party bears its own costs.

**Dated, Signed and Delivered** at **NYAHURURU** this **27<sup>th</sup>** day of **June**, 2019.

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Mr. Njogu for objector/1<sup>st</sup> administrator

Ms. Wanjiru holding brief for Mr. Kibet for petitioner/2<sup>nd</sup> administrator

Soi – Court Assistant