

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CASE NO. 20 OF 1983

IN THE MATTER OF THE ESTATE OF JAMES SAMUEL GICHURU (DECEASED)

JOAN NJOKI NDUNGI.....ADMINISTRATRIX

VERSUS

PERSIAH MUTHONI MASINDE.....RESPONDENT

RULING

1. This matter relates to the estate of James Samuel Gichuru who died intestate on 10th August 1982. The deceased was survived by his wife Rahab Wambui Gichuru and five children and a Grant of Letters of Administration was issued to his wife Rahab Wambui Gichuru on 29th April 1983 who subsequently died in 1995.

2. Subsequently administration of the estate was taken up by John Gitau Gichuru, Mary Nyaguthii Gichuru and Anne Njeri Gichuru, three of the five children of the deceased. However they all passed on. Subsequently David Ndatha Gichuru also died leaving behind Joan Njoki Ndungi as the only surviving child of the deceased. The matter before Court relates to the mode of distribution of the estate of the deceased.

3. On 8th April, 2019, Mrs. Joan Njoki Ndungi deposed that she was the sole surviving Administratrix and beneficiary of the Estate of the deceased as her mother and siblings have all passed on. She stated that each of her siblings were entitled to an equal share of their deceased father's estate translating to 20(%) percent of the estate. In addition she deposed that she took up the administration of the estate of the deceased in 2003 and discovered that the estate was embroiled in litigation which had huge debts and there was a poor working relationship especially between the family of John Gitau Gichuru and the families of the other beneficiaries. She outlined the assets of the estate available for distribution as follows:

ASSETS	COMMENTS	PROPOSED DISTRIBUTION
L.R No. 214/213 Muthaiga Road	Sold through Shapley & Barret Advocates	
L.R No. 209/2412 Nairobi	Litigation before High Court	To be distributed equally among the five beneficiaries when Pending suit is resolved
L.R No. 4955/19 Sigona less some 20 acres graveyard,	Constitutes home of the deceased, Family of John Gitau Gichuru are residents They have not been paying rent nor account for the proceeds	To be shared equally among among the five beneficiaries less some 20 acres for the graveyard, garden, access road and 1/8 acre gifted to Michael Wanyoike Mungai
L.R No. 209/946 Ngong Road	Sold and proceeds distributed between Joan Njoki Ndungi, Ann Njeri Gichuru, and Phylis Mukami(as administratrix of estate of John Gitau	

	Gichuru)	
Kiambu/ kikuyu/58	Located in Kimbu County	To be distributed equally Among beneficiaries
Kiambu/ Limuru/34	Shop in Limuru town	To be shared equally among the beneficiaries.
Githunguri/ Githunguri/34	approximately 13 acres	To be share equally among The beneficiaries
Nararashi wholesalers	A public company	If available to be shared Equally Among the five beneficiaries
East African Breweries	A public company	If available to be shared Equally Among the five beneficiaries
Lonrho Motors (EA) Ltd Formerly Motor Mart	A public company	If available to be shared Equally Among the five beneficiaries
Kiguthia Farmers(k) Ltd	A public company	If available to be shared Equally Among the five beneficiaries
Bata Shoe Company	A public company	If available to be shared Equally Among the five beneficiaries
Tourist Paradise	A public company	If available to be shared Equally Among the five beneficiaries
ICDC Investement Co.	A public company	If available to be shared Equally Among the five beneficiaries
Nation Printers	A public company	If available to be shared Equally Among the five beneficiaries
Housing finance Co	A public company	If available to be shared Equally Among the five beneficiaries
Gimalu Estate Limited	Technically insolvent	

4. The Administratrix stated that the list of assets and documents filed on 31st May, 2007 by the family of the late John Gitau Gichuru was inaccurate as some of the assets stated therein did not belong to their late father. She also stated that some assets were listed more than once, other assets had already been sold while companies such as Gimalu Estates had mortgaged their assets and were unable to repay the debts. She proposed the exclusive allocation of a prime asset to the family of Gitau Gichuru to limit disputes. In the alternative, she proposed the liquidation of the entire estate except a small portion of L.R No. 4955/19, reserved for the graveyard, garden, access road to Michael Wanyoike Mungai and the net proceeds to be shared equally among the beneficiaries and/or their estates.

5. In response, Persiah Muthoni Masinde swore a Replying Affidavit dated 24th April, 2019. She stated that she was the Administratrix of the Estate of the late John Gitau Gichuru a beneficiary of the estate of the deceased herein. She averred that all liabilities of the estate were paid through the sale of one of the assets of the estate in Muthaiga and which was done before the demise of the deceased's wife Rahab Wambui

Gichuru in 1995. The net assets of the deceased available for distribution were also ascertained by a will of Rahab Wambui Gichuru. She proceeded to outline the properties available for distribution as follows:

- I. Dagoretti/Riruta/395
- II. L.R No. 49955/19 Sigona
- III. Dagoretti/Thogoto/T63
- IV. Plot No. 045 Eleri Longonot Niavasha
- V. Dagoretti/Thogoto/142
- VI. L.R No. 214/277 Muthaiga
- VII. L.R No. 4955/19 Kikuyu
- VIII. L.R No. 214/213 Muthaiga
- IX. L.R No. 7304/34 Limuru Sub divided into:
 - a. 214/748 Muthaiga
 - b. 214/749 Muthaiga
 - c. 214/750 Muthaiga
 - d. 214/751 Muthaiga
- X. Dagoretti/Thogoto/148
- XI. Dagoretti/Thogoto/152
- XII. L.R. 231/25 Kikuyu
- XIII. 29,998 of the 30,000 shares in Gimalu Estate Limited.

6. She further stated that when the grant of probate of the estate of Rahab Wambui was confirmed, the administrators never distributed the estate. She further claimed that the Administratrix herein through a replying affidavit dated 10th December, 2003 had admitted that Gimalu Estate owned 180 acres in Redmill whose shareholders were the deceased herein, his wife Rahab and one of his children Mary Nyaguthi. She refuted claims that Gimalu Estate was technically insolvent.

7. Persiah Muthoni Masinde also stated that the deceased was survived by his wife Rahab Wambui who passed on in 1995 and five children. John Gitau Gichuru, David Ndatha Gichuru, Mary Nyaguthi Gichuru and Ann Njeri Gichuru have all passed on. She averred that since David Ndatha, Mary Nyaguthii Gichuru and Ann Njeri Gichuru had all died without leaving any spouse or children, the net assets of the estate should be distributed equally between the Administratrix herein and the estate of John Gitau Gichuru.

8. In response to the Replying affidavit, the Administratrix Mrs. Joan Njoki Ndungi filed a further affidavit dated 21st June, 2019. She stated that the distribution of the estate of the deceased was determined by the confirmation of grant dated 29th April, 1983 and each beneficiary was entitled to one fifth (20%) of the net residue of the net estate upon the death or re-marriage of their mother which took effect on the demise of their mother. She dismissed claims that the estate had no liabilities stating that its liabilities amounted to millions of shillings emanating from land rates, legal fees, loans and advances. With regard to Gimalu Estate Limited, she averred that there were court orders still in force restraining the company from dealing with its assets (**HCCC NO. 207 OF 2007 Milimani Commercial and Admiralty Division**). Further, she challenged the Administratrix of the Estate of John Gitau Gichuru to verify her assertions that the listed assets are indeed estate assets.

9. With regard to the will of Rahab Wambui Gichuru which purported to distribute the estate of the deceased, she stated that the same was invalid since the assets of the deceased did not belong to her for distribution. Further, that the assets of her late mother were identified in **High Court Succession Cause no. 1982 of 1995** and distributed to his beneficiaries including John Gitau Gichuru.

10. Florence Wanjiru Ndungi swore two affidavits both dated 21st June, 2019 in support of the Administratrix Joan Njoki Ndungi proposed mode of distribution dated 8th April, 2019. She deposed the affidavits as the sole executrix of the Estate of Mary Nyaguthii Gichuru who died in 2nd October, 2001 and Ann Njeri Gichuru who died on 24th August 2003. In both affidavits, she associated herself fully with the averments of Joan Njoki Ndungi both in the proposal and the further affidavit. She urged the Court to treat the Children of the deceased equally and ensure all beneficiaries receive an equal share of the Estate of James Samuel Gichuru.

11. Parties through their Advocates filed written submissions which they highlighted in court. Counsel for the administratrix Mr. Mbaabu submitted that the estate should be distributed among the five beneficiaries of the deceased as provided for under the confirmed grant issued on 29th April, 1983 in conformity with **Section 35 of the Law of Succession Act**. He further stated that two of the deceased beneficiaries who died left wills which were confirmed in court and left their shares to the Administratrix. In response, learned Counsel Mr. Oyatsi submitted that it would be wrong to stop in 1983 when distributing the assets since four of the five beneficiaries have passed on. Some of them had no offsprings or spouses. He further stated that Florence Wanjiru Ndungi has no legal claim since the alleged will does not exist. He urged the court to use the will of Rahab Gichuru to identify the assets of the deceased.

12. Having carefully considered the pleadings and the submissions of the parties to this matter, it is my view that the substantive issue for determination is how the estate of the deceased should be distributed. The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property and the rightful beneficiaries must be identified.

13. The deceased died in 1982. It is disappointing that his estate has not been distributed to date. Representation to his estate was obtained in 1983 and the grant confirmed. The life interest of his widow extinguished in 1995 upon her death. The estate was still not distributed to the rightful beneficiaries. As stated elsewhere, the core function of the administrator is to distribute the estate to its rightful beneficiaries. It is unclear why the estate has not been distributed to date.

14. There is a dispute regarding what constitutes the net estate of the deceased available for distribution. The Administratrix outlined the assets of the deceased that are currently in existence. She challenged the schedule of assets provided by the Administratrix of the estate of John Gitau stating that the list was inaccurate. She insisted that some of the properties provided thereto were no longer in existence or had been repeated. She further challenged the Respondent to provide records of the assets claimed including searches to prove their existence.

15. As stated above, the principal purpose of succession proceedings is to have the estate of the deceased shared out amongst those entitled to the assets, be they survivors, heirs, beneficiaries or creditors. The principal duty of the personal representative in that process is to collect, gather and get in the assets, identify the persons entitled to a share in the assets and eventually distribute the estate. The primary mandate of the probate court seized of a succession cause is to facilitate distribution of the estate.

16. A person who is not an administrator, and to whom, therefore, the property of the estate does not vest has no power to handle it. When such a person deals with such property they are said to intermeddle because they lack the authority to deal with it. It will therefore be very difficult for the Respondent to have full access to the properties available for distribution and provide their current status. This responsibility falls squarely on the Administratrix of the estate.

17. The duties of personal representatives are clearly provided in **Section 83 of the Law of Succession Act** as follows:

(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his debts;

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

There have been allegations and counter allegations on the current status of the assets of the estate. From the pleadings by the Administratrix it is evident that the estate of the deceased has not been properly administered if the Administratrix does not seem to know whether some shares in the companies listed exist or not.

18. I have perused the entire record and It is clear that since the Administratrix took over the administration of this estate, she has not provided a full and accurate inventory of the assets and liabilities of the deceased or a full and accurate account of all dealings therewith up

to the date of the account as required under the provisions of **Section 83(h) of the Law of succession Act**. The personal representative of a deceased person holds a unique position in law.

19. The property of the deceased is vested in the personal representative by virtue of **Section 79 of the Law of Succession Act**. The effect of **Section 79**, read together with **section 82** of the Act, is that the provisions put the personal representative on the same footing with the owner of the property, in the sense that he/she exercises the powers that the legal owner of the property would have exercised were they alive. They also suffer the same burden of duties and obligations over the property as the legal owner would have been under were they alive. Yet, the property, although vested in them by law, would not be theirs. Although the personal representative has legal title akin to that of an owner, the property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof.

20. In the circumstances, therefore, the Administratrix of the estate of the deceased herein stands in a fiduciary position so far as the property of the deceased is concerned, and owes a duty to the beneficiaries to render an account to them of her handling of the property in trust for them. It is not the duty of the Respondent herein to provide records of the assets as alluded to by the Administratrix but that of the legal representative of the estate.

21. The second issue for determination is to whom the estate of the deceased should be distributed. Upon his demise the deceased was survived by five children and one wife. Each beneficiary was entitled to one fifth (20%) of the net residue of the net estate upon the death or re-marriage of their mother which took effect upon her demise. However, before the estate was distributed by John Gitau Gichuru, Mary Nyaguthii Gichuru and Anne Njeri Gichuru who had taken up its administration, they all died. Subsequently, David Ndatha Gichuru also died leaving behind Joan Njoki Ndungi to take up the administration of the estate in 2003.

22. The respondent stated that David Ndatha, Mary Nyaguthii Gichuru and Ann Njeri Gichuru all died without leaving any spouses or children. This was not challenged by the Administratrix. It was therefore the respondent's prayer that the net assets of the estate should be distributed equally between the Administratrix herein and the estate of John Gitau Gichuru. Florence Wanjiru Ndungi disputed this mode of distribution affirming that she was the sole executrix of the Estates of Mary Nyaguthii Gichuru who died in 2nd October, 2001 and Ann Njeri Gichuru who died on 24th August 2003. The Administratrix herein also proposed the distribution of the estate among the five beneficiaries of the deceased. However, the relationship between Florence Wanjiru Ndungi and the parties in this cause was not clear and the wills under which she was mandated to be the executrix of the estate of Mary Nyaguthii Gichuru and Ann Njeri Gichuru were not presented in court.

23. The aggregate effect of **Part V of the Law of Succession Act, Cap 160**, Laws of Kenya, is that the estate of a parent who is not survived by a spouse is shared equally amongst the children. Where the deceased is survived by a child who subsequently dies before the estate is distributed, the estate of such child would be entitled to the share that would have gone to the said child were he alive at distribution. His estate would be entitled to a share equal to that of his siblings.

24. Where such a child was himself survived by a spouse and a child or children, then, by virtue of **section 35**, his entitlement would go to the said surviving spouse and children. In the absence of a surviving spouse, the share would go to the child or children of the dead child by virtue of section 38. In the absence of such survivors, then the estate or share of the entitlement of the dead child would devolve in accordance with **Section 39 of the Law of Succession Act**.

25. In the context of the instant cause, the way forward is to have the shares of Mary Nyaguthii Gichuru, Anne Njeri Gichuru and David Ndatha Gichuru the deceased's children devolve upon their estates so that they can thereafter share it. The law allows it. The dead beneficiaries died after their father's demise, consequently their estates are entitled to a share in the estate. Since however they died without spouses or children, the persons entitled to their estate would be the persons mentioned in Section 39 of the Law of Succession Act.

The relevant portion of **section 39** states as follows:-

'(1) where the intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority –

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sister, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares'

26. In this case, informed by **Section 39(1) (c)**, the estate should be divided equally amongst the surviving siblings during distribution of the estate of the deceased. By virtue of **section 39(1)(c)**, the share going to the estates of Mary Nyaguthii Gichuru, Anne Njeri Gichuru and David Ndatha Gichuru ought to be shared equally between Joan Njoki Ndungi and the estate of John Gitau Gichuru.

27. Having taken all factors into consideration, this Court finds that it is not correct as stated by the Administratrix that the estate should be distributed to the children of the deceased who died without leaving any survivors. Further, the Court is not convinced that Florence Wanjiru Ndungi has a stake in the estate of the deceased herein. In the foregoing, I hereby make the following orders:

28. That the Administratrix shall in the next forty (40) days file detailed accounts of her administration of the estate from the date of her appointment to date.

- i. The Administratrix to also file a proper list of the assets of the estate as was set out in Court on confirmation.
- ii. The Respondent shall file accounts of any rental income that she might have collected from any of the assets of the estate; and
- iii. That the estate of the deceased shall be divided equally between the Administratrix herein and the estate of John Gitau Gichuru.
- iv. Each party to bear their own costs.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 24TH DAY OF SEPTEMBER, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Administratrix

In the presence of.....Advocate for the Respondent