



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**SUCCESSION CAUSE NO. 691 OF 2012**

**IN THE MATTER OF THE ESTATE OF EUNICE WAMBUI KIBUNJA**

**(DECEASED)**

**PAUL GEOFFREY KIBUNJA .....OBJECTOR**

**VERSUS**

**JOSEPH KANG'ETHE KIBUNJA .....RESPONDENT**

**JUDGMENT**

1. Eunice Wambui Kibunja (deceased) died on 30/5/2012. She was survived by children namely:

1. Agnes Wanja Nyaga
2. Paul Geoffrey Kibunja
3. James Mathew Ngigi Kibunja
4. Joseph Kangethe Kibunja
5. John Ndungu Kibunja (deceased)
6. Grace Wanjiru (deceased)
7. Margaret Wanjiku (deceased)

2. She left behind the following assets:

- i. Mau Narok/Siyapei Block 3/30 Mutukanio A
- ii. Mau Narok Siyapei Block 3/501 Mutukani A
- iii. Mau Narok/Siyapei Block 3/500 Mutukanio A
- iv. Mau Narok Siyapei Block 3/485 Mutukani A
- v. Mau Narok/Siyapei Block 2/9 Mutukanio B
- vi. Mau Narok Siyapei Block 3/499 Mutukani A
- vii. Kshs. 650,000/= in Account No. 01301000247272 – Equity Bank
- viii. Motor vehicle Registration No. KBQ 226A
- ix. Plot No. 84 in Ol Kalou – township

x. Slaughter house in Mau Narok

xi. Shares at Safaricom

3. Joseph Kangethe Kibunja applied for and obtained letters of administration in respect of the said estate which grant was confirmed on 24/5/2013.

4. These letters were challenged and by a consent of the parties dated 13/6/2018 Paul Kibunja and Agnes Wanja Nyaga were appointed administrators of the estate. Properties Mau Narok/Siapei Block 3/501 Mutukanio A and Mau Narok/Siapei Block 3/485 Mutukanio A which had been transferred were to revert to the estate. Earlier grant was revoked.

5. A summons for confirmation of grant was taken out by the administrators and lodged in court on 1/11/2018 detailing the proposed distribution of the estate by the administrators.

6. The summons for confirmation of grant elicited a protest from Joseph Kangethe Kibunja through his affidavit sworn on 13/12/2018. The said protest is supported by a beneficiary namely; **James Mathew Ngige Kibunja**.

7. In a nutshell, the administrators' proposal for distribution is as follows:

a. LR MAU NAROK SIAPEI BLOCK 3/485 – 1 acre housing the slaughter house – Paul Geoffrey Kibunja.

1 ½ acres to be shared equally between Macharia Ndungu to hold in trust for the children of the deceased John Ndungu.

Peter Kibunja to hold in trust for beneficiaries of Grace wanjiru Watta (deceased).

Grace Wanjiru to hold in trust for Margaret Wanjiku's family.

-James Matthew Ngige

-Joseph Kengethe.

b. MUTUKANIO B 2/9 – To be sold and proceeds to pay the land rates, survey fees and advocates fees.

c. MAU NAROK/SIAPEI BLOCK 3/30

Plot 501 – Agnes Wanja Nyaga – Wholly

d. Plot 500 – Macharia Ndungu to hold in trust for all beneficiaries of John Ndungu (deceased).

e. Plot 499 – James Matthew Ngige Kibunja

f. Plot 498 – Paul Geoffrey Kibunja

g. Plot 497 – Joseph Kangethe

The balance to be shared between Grace Wanjiru (holding in trust for deceased Margaret Wanjiku's family, Peter Kibunja to hold in trust for the family of Grace Wanjiru (deceased). Balance be shared between Goeffrey Kibunja and Agnes Wanja.

8. The protestor's proposal is contained in the affidavit of protest at para 5 viz:

a) Mau Narok Siapei Block 3/30 to be shared equally among the 7 beneficiaries after deducting a plot measuring 50 x 100 ft for Peter Gitau Kibunja.

b) Mau Narok Siapei Block 3/485 – to Joseph Kang'ethe Kibunja – Whole share.

c) Mau Narok Siapei Block 3/500 – to Macharia Ndung'u to hold in trust for the beneficiaries of the estate of John Ndung'u (deceased).

d) Mau Narok Siapei Block 3/501 to James Mathew Ngige Kibunja.

e) Plot No. 84 Ol Kalou Township to be sold by administrator and proceeds shared among all the beneficiaries.

f) Motor vehicle Registration No. KBQ 226A to Joseph Kang'ethe Kibunja.

g) Safaricom shares – administrator to sell and share proceeds among all beneficiaries.

h) Money in Equity Bank Account No. 0130100247272 – Nil

i) Mutukanio B 2/9 to Paul Geoffrey Kibunja and James Mathew Ngige Kibunja as trustees of the family of Eunice Wambui Kibunja.

9. I have had regard to the summons for confirmation of grant and the supporting affidavit. I have considered the affidavit of protest and the oral evidence adduced.

I have had regard to the submissions by the applicants/administrators.

10. The only issue for determination is the mode of distribution of the estate herein.

11. The deceased was survived by children and no spouse. The applicable law in distribution would thus be found in **Section 38** of the **Law of Succession Act**, which provides;

***“S. 38 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 shall be equally divided among the surviving children.”***

12. In Re estate of John Musambayi Katumanga (deceased) [2014]eKLR W. Musyoka J explained the applicable Law in similar circumstances as follows;

*“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is ‘equally’ as opposed to ‘equitably’. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall... be equally divided among the surviving children”. Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”*

13. I do note from the record that among the children who were entitled to inherit from the estate, some are deceased but were survived by children. These later children (Grandchildren to the deceased) are entitled to take between them in equal shares that which their respective parents would have received.

14. Emukule J (now retired) elucidates the legal position very ably in Elizabeth Wairimu Thimba and 2 Others –Vs- Wilfred Njogu Mbutia and 2 Others [2014]eKLR. He stated;

*“In Law of Succession (Law Africa Publishers), William Musyoka expounds on the provisions of Section 41 in terms of the rights of grandchildren at page 102 – The rule of substitution of a grandchild for his or her parent in all cases of intestacy where the parent dies before the intestate is known as the principle of representation. The law on this is section 41. If a child of the intestate has predeceased the intestate or dies before attaining the age of eighteen years, then that child’s issue alive or en ventre sa mere at the date of the intestate’s death will take in equal shares per stirpes contingent on attaining the age of majority, or if a female marrying under that age.*

*The term per stirpes is defined in the Black’s Law Dictionary, 9<sup>th</sup> Ed to mean “proportionately divided between beneficiaries according to their deceased ancestor’s share. “Therefore the grandchildren of the intestate are only entitled to take between them equally the share which their parent would have received had he not predeceased the intestate but on condition that at the time of his death whether before or after the intestate, he had attained eighteen years or if female, married under that age. Therefore, reasonable provision as per the law refers to an equal share of what their parent’s portion would have been.”*

15. The other aspect of Law that in the circumstances of this case requires clarification is on whether any of the children have more or superior rights to others in inheritance based on whether they are sons or daughters, married or unmarried.

16. The Law governing succession matters in this country is the Law of Succession Act (See Section 2(1) of the Act). That Law does not discriminate between gender in matters of succession or inheritance. This legal position was buttressed by Lesiit J in Elisers Mbura M’Thara –Vs- Harriet Ciambaka and Another where the court stated;

*“The Law of Succession Act does not discriminate between gender in matters of succession or inheritance. Under the Law of Succession Act and indeed under the Constitution a child is a child and every person has equal rights under the law irrespective of gender. The Law of Succession Act does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person.”*

17. From the foregoing, the task before the court becomes an easy one. The properties available are to be shared out equally between the children of the deceased with the grandchildren taking equal shares from the inheritance entitlement of their deceased parents.

18. As mandated by **S.28** of the **Law of Succession Act** while making provision for each of the dependants, the court will have regard to any advancement or other gift to the dependant during the lifetime of the deceased.

19. It is common ground that during her lifetime, the deceased had given out land to James Mathew Ngige Kibunja (LR Narok Siapei Block

3/498) and Joseph Kang'ethe (Narok Siapei Block 3/497).

20. From the evidence, it is clear that Joseph Kang'ethe sold motor vehicle Registration No. KBQ 226A at Sh. 650,000 and used the proceeds. This was before he even filed the petition that gave rise to the revoked grant.

21. It is also clear from the evidence that Joseph Kang'ethe withdrew Sh. 650,000 from Account No. 01301000247272 Equity Bank and by his own admission in cross examination used the funds to buy building stones and pay fees for his children.

22. By his own admission in his testimony, James Mathew Ngigi Kibunja was collecting rent in respect of Land Parcels Mau Narok Siapei/Block 3/500 and Mau Narok Siapei/Block 3/501.

23. All these factors as particularized at paragraphs 20, 21, 22 and 23 above become relevant and crucial for consideration when sharing out the estate. Needless to add, the said acts of Joseph Kangethe and James Mathew Ngigi Kibunja consisted of illegal and fraudulent dealing with the estate and are actionable under **S.45 of the Law of Succession Act.**

24. So, which way the distribution? Looking at the affidavit of protest and the evidence by Joseph Kangethe Kibunja and which is supported by James Mathew Ngigi Kibunja, it is manifestly clear that these two (2) beneficiaries are intent on having a distribution skewed in their favour in total disregard of the gifts made **inter vivos** to them and glossing over their acts and benefits from the estate accruing from the illegal acts alluded to above. In my considered view, the proposal by the protestor will not achieve the principle of equality envisaged under **S.38 of the Law of Succession Act.**

25. The proposals by the administrators are in my view fair and just in the circumstances of this case.

26. In view of the foregoing, I proceed to confirm the grant herein and make orders for the distribution of the estate herein as per the schedule below:

<b>Property</b>	<b>Who to inherit</b>
1. Mau Narok Siapei Block 3/500 Macharia Ndungu Kibunja).	(To hold in trust for himself and the children of John Ndungu)
2. Mau Narok Siapei Block 3/501 Grace Wanjiru Kibunja Wanjiku).	(To hold in trust for herself and the children of Margaret Wanjiku).
3. Mau Narok Siapei Block 3/30 ½ share to Peter Gitau Kibunja Watta). ½ share to Agnes Wanja Nyaga absolutely.	(To hold in trust for himself and the children of Grace Wanjiru)
4. Plot 84 Ol Kalou To be sold and proceeds shared equally among all beneficiaries except Joseph Kangethe Kibunja who benefitted from rent collection, sale of motor vehicle and proceeds from bank.	
5. Mau Narok Siapei Block 3/48 To be shared out equally amongst all beneficiaries.	
6. Mau Narok Siapei Block 2/9 To be sold to meet all liabilities and the net remainder be shared out equally among all beneficiaries.	

Orders accordingly.

**Dated and Signed at Kisii this 20<sup>th</sup> day of November 2019.**

**A.K NDUNG'U**

**JUDGE**

**Delivered this 27<sup>th</sup> day of November 2019.**

**R. NGETICH**

**JUDGE**