



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO 61 OF 2011

In the Matter of the Estate of Jackson M'Mukindia

MÁranya alias Mukindia Maranya (Deceased)

ANDREW MUTUAL MUKINDIA.....1ST PETITIONER

ISAIAH KIUMBE MUKINDIA.....2ND PETITIONER

Versus

ELIZABETH NGARI KIMERIA.....1ST OBJECTOR

SILVERIA KANJA MUKINDIA.....2ND OBJECTOR

JUDGMENT

Distribution of estate

[1] By consent of parties, distribution of this estate is to be determined by way of affidavits and mode of distribution filed by the parties. The petitioners and interested party filed their proposed mode of distribution dated 30th November, 2017 on 1st December, 2017. They averred that, the deceased left behind LR NO. NYAKI/GIAKI/258 measuring about 24 acres or thereabout. They proposed the estate to be distributed as follows:-

1. Jeremiah Bundi Kiumbe-1 Acre (son to Andrew Mutua)

2. Isaiah Kiumbe - 4 Acres and 9 points

3. Nelly Gakii - 1 Acre

4. Daniel Mawira - 3 Acres

5. Danis Mugambi - 3 Acres

6. Nicholas Mirithi - 3 Acres

7. Silveria Kanja - 1 Acre

8. Margarete Mutarari - 1 Acre

9. Elizabeth Ngari Kimeria - 1 Acre

10. Salesio Kaburu Jacob - 2 Acres

11. Catherine Mbuthu

[2] The Objectors proposed that the estate be distributed equally among the 10 sons of the deceased. More specifically, each to get 2.40 acres. See their mode of distribution dated 18th December, 2015 and filed in court on the same date. See also their submissions filed on 19th June, 2014 as well as the affidavit by Elizabeth Ngari Kimeria sworn on 2nd September, 2013.

DETERMINATION

[3] These proceedings relate to the estate of **Jckson M'Mukindia M'Aranya alias Mukindia Maranya (Deceased)**. He died intestate. His spouse Jeniffer Karuru is also deceased. The deceased was, however, kind enough to leave LR NO. NYAKI/GIAKI/258 as his children's inheritance. His children, some of whom are deceased are:-

- i. Elizabeth Ngari Kimeria - Daughter*
- ii. Julius Kuthuka -Son (deceased)*
- iii. Margarete Mutarari - Daughter*
- iv. Andrew Mutua - Son*
- v. Isaiah Kiumbe - Son*
- vi. Joseph Kinyua Mukindia – Son (deceased) – survived by Nicholas Murithi*
- vii. Evangeline Kananu- Daughter (Deceased) survived by Nelly Gakii*
- viii. Silveria Kanja - Daughter*
- ix. Daniel Mawira - Son*
- x. Francis Mwenda- Son (deceased) survived by Danis Mugambi*

But, the children- who are siblings of the same mother- are not able to agree on how the estate property should be distributed. And now the court has been called upon to decide on the matter.

[4] Absent a consent, I shall fall back to the law on distribution. There is no surviving spouse but there are children, some of whom are deceased. In such situation, the relevant law is section 38 and 41 of the Law of Succession Act. Section 38 provides as follows:-

38. Where intestate has left a surviving child or children but no spouse

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.

This section embodies the principle of equality in sharing of the estate of the deceased amongst the children of the deceased regardless of gender. In this respect, see what the Court of Appeal in the case of **STEPHEN GITONGA M'MURITHI vs. FAITH NGIRAMURITHI [2015] eKLR** stated that:-

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”

[5] But, section 38 of the Law of Succession Act is subject to section 41 which encapsulates the principle of representation which allows the children of a deceased beneficiary to take their deceased parent's share. See Section 41 of the Law of Succession Act which provides as follows:-

41. Property devolving upon child to be held in trust

Where reference is made in this Act to the “net intestate estate”, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who 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. [Underlining mine for emphasis]

[6] Applying the test of the law, I find the proposals by the Petitioner and the interested parties to be against the principle of equality enshrined in section 38 of the Law of Succession Act. Worse still; it is tainted with prohibited discrimination against daughters in inheritance, for it seems to award bigger share to the sons without any lawful justification. The alleged wishes of the deceased was not established as the purported agreement before the area chief was not annexed. Every time the law encounter this kind of discrimination, its heart throbs with anger and I find myself repeating a work of court **in the Matter of the Estate of M'Ngarithi M'Miriti alias Paul**

M'Ngarithi M'Miriti (Deceased) [2017] e KLR on the subject, as follows:-

Discrimination of daughters in inheritance

From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when RONO vs. RONO [2008] 1 KLR 803 delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement the Constitution- which state categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and the Constitution. More specifically I am content to cite the proclamation by the Court of Appeal in the case of STEPHEN GITONGA M'MURITHI vs. FAITH NGIRAMURITHI [2015] eKLR that:-

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”

Therefore, a son will not have priority over a daughter of the deceased simply because he is male; all- male and female siblings- are equal before the law and are entitled to equal protection of the law. See article 27 of the Constitution.

[7] Therefore, I order that the estate property shall be shared equally among all the children of the deceased. And more specifically LR NO NYAKI/GIAKI/258 shall be shared equally amongst the following:

- i. Elizabeth Ngari Kimeria - Daughter*
- ii. Julius Kuthuka -Son (deceased)*
- iii. Margarete Mutarari - Daughter*
- iv. Andrew Mutua - Son*
- v. Isaiah Kiumbe - Son*
- vi. Joseph Kinyua Mukindia – Son (deceased)*
- vii. Evangeline Kananu- Daughter (Deceased)*
- viii. Silveria Kanja - Daughter*
- ix. Daniel Mawira - Son*
- x. Francis Mwenda- Son (deceased)*

The share of any child of the intestate who is deceased shall be taken by the issue or issues of their deceased parent through degrees, in equal shares. Meanwhile, such share shall be held in trust by the administrators for those families; in which case the issues thereof shall take through degrees, in equal shares, the share which their parent would have taken had he not died. It is so ordered.

Dated, signed and delivered in open court at Meru this 30th day of January, 2018

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F. GIKONYO

JUDGE

In the presence of:

Anampiu for objectors

M/s. Nyaga for petitioner and Interested Party

F. GIKONYO

JUDGE