



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 239 OF 1997**

**IN THE MATTER OF THE ESTATE OF MORRIS WAINAINA MUCHAI (DECEASED)**

**JUDGMENT**

1. The summons for confirmation of grant, the subject matter of this judgment is dated 3rd October, 2013. It was taken out by Peter Njenga Wainaina (Administrator).
2. The summons elicited a protest which was lodged by way of the affidavit of protest sworn by Sarah Muthoni Wainaina (Protestor) on the 20th November, 2013.
3. The Administrator and the Protestor have both made proposals for the distribution of the estate herein which proposals are to some extent at variance a fact inviting the Court to determine the issue of distribution.
4. The deceased died on 25/7/1996. The applicable law, therefore, in respect of distribution of his estate would be the **Law of Succession Act Cap 160 Laws of Kenya**.
5. The deceased died intestate. He had 7 sons and 1 daughter. 2 sons are since deceased.
6. The beneficiaries of the deceased are listed as;
  - Peter Njenga Wainaina - Male Adult - ID No. 0328331/63
  - Mrs. Alice Wanjiku Gatumbi - Female Adult – married
  - George Muchai Wainaina - Male Adult -ID No. 0840948/63
  - Patrick Muiruri Wainaina - Male Adult - ID No. 0474308/63
  - Gilbert Wanene Wainaina - Male Adult - ID No. 0474247/63
  - Geoffrey Kihara Wainaina - Male Adult - ID No. 2930999/63
  - Peter Mucheru Wainaina - Male Adult - ID No. 02543390/63
7. As per the form P & A 5 filed herein, the assets comprising the estate are as follows;
  - a) Olkalou Scheme Plot 1228
  - b) Mirangine Plot No. 48
  - c) Manyatta Town Plot No. 029
  - d) Nakuru Teacher's Housing Co-op Housing Society Plot No. 30
  - e) Gichungo Town Plot No. 4
  - f) Limuru/Biberioni Plot No. T. 560
  - g) Barclays Bank Olkalou A/c No. [particulars withheld]
  - h) Gema Holdings Kikopey Plot – Block No. C 240 Gilgil
8. By way of a consent of the parties recorded in court on the 11/4/2016, a valuation report by M/s Precision Valuers Limited dated 29/3/2016 was adopted as the true value of the deceased's estate. Parties were to adduce *viva voce* evidence.

9. On 10/4/2017 the parties agreed that the Court was to use the valuation report by M/s Precision Valuers and the parties were to file written submissions on distribution. Both parties complied.

10. The only issue for determination is the respective shares of the beneficiaries.

11. All the survivors of the deceased are children. It follows therefore that distribution of the estate herein will be governed by **Section 38** of the **Law of Succession Act**. That Section provides;

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

12. The law envisages equal share for each child. However, the practical realities in division of real property militate against actual equal share. The Courts have held that it is not necessarily about equal share but what is equitable. Equality to precision is an elusive goal but the Court will always strive to do equity.

13. **Musyoka J** in the **Estate of John Musambayi Katumanga (deceased) [2014] eKLR** stated;

**“Equal distribution does not always work justice, especially in polygamous situations where the youngest child of the deceased may be one (1) year old, while the eldest may be over fifty (50) years of age. The infant no doubt would generally have far greater needs than the fifty year old, who would generally have received education and has probably been settled in life by the deceased. There cannot be justice in equal distribution in such a case. The fortunes of one child may be better than those of the other. One could end up in a lowly job, say a driver or office messenger, or nurse or nursery school teacher, with the other becoming a commercial pilot or the Chief Executive officer of a Blue chip Company. There would be no fairness in equal distribution. In such a case the law as currently framed does not do justice in such circumstances. Ideally equal distribution should be the principle, with some discretion left to the Court to consider the circumstances of each case.”**

14. While the circumstances in our case are different, I would hasten to add that, as alluded to above, achieving precision in equal shares may not be achievable in some circumstances and therefore while ideally equal distribution should be the principle, some discretion should be left to the Court to consider the circumstances of each case.

15. The administrator proposes distribution as recorded in the amended consent of confirmation of grant dated 22/2/2017 and filed in Court on 6/3/2017. It is urged that this mode is aligned with the valuation report by M/s Precision Valuers. Indeed 6 beneficiaries have consented to that mode of distribution.

16. In her submissions, the Protestor avers that after the deceased died all beneficiaries sat and unanimously agreed on the mode of distribution of the estate. The beneficiaries agreed on equal distribution. Each beneficiary was to inherit properties worth Kshs. 300,000 as at the time. A secret ballot was conducted after beneficiaries agreed on the distribution.

17. It is noteworthy that even assuming there was an agreement then as stated by the Protestor, that agreement no longer holds as there are now serious disagreements on distribution.

18. The Court's duty is to distribute the estate in accordance with the law. The Court will not interfere where parties are agreed on distribution. Even in instances where some beneficiaries renounce their inheritance, the Court would not interfere. Where a dispute arises, however, the Court must rise to the occasion and follow the law.

19. It is strange that the Protestor asks the Court to distribute the estate based on a total valuation of 2,100,000 agreed on by the parties earlier on yet she is the person on whose instructions the valuation by M/s Precision Valuers was done. The report by M/s Precision Valuers is the best guide in this matter, in any event, the parties consented to the Court's reliance on it.

20. Having considered the law applicable and the proposals for distribution as elucidated in the submissions filed, I am persuaded that the distribution proposed by the administrator is honest, just and equitable.

21. All the beneficiaries are well catered for as far as practically possible.

22. I am disposed to distribute the estate of the deceased as follows;-

NAME	DESCRIPTION OF PROPERTY			S	V
				H	A
				A	L
				R	U
				E	E
PETER NJENGA WAINAINA	Oi Kalou Scheme/Mukindu/1228	2 acres	550,000		
	Nakuru Teachers Cooperative	Housingwhole	700,000		

Plot No. 30

OI Kalou Scheme/Mukindu/1228

ELIZABETH WAITHERA

Limuru Bibirioni

2 acres 550,000

To hold in trust for children Dominic Njogu wainaina  
(Deceased)

Plot No. T 560

whole 1,200,000

OI Kalou Scheme/Mukindu/1228

GEORGE MUCHAI WAINAINA

Nyandarua Gichungo

1 acre 275,000

Plot No. 4

0.5 acre 910,000

OI Kalou Scheme/Mukindu/1228

PATRICK MUIRURI WAINAINA

Nyandarua Gichungo

1 acre 275,000

Plot No. 4

0.5 acre 910,000

OI Kalou Scheme/Mukindu/1228

SERAH MUTHONI WAINAINA

5 acres 1,375,000

OI Kalou Scheme/Mukindu/1228

GEORGE KIHARA WAINAINA

Plot No. 48 Nyandarua/Mirangine

4 acres 1,100,000

whole 250,000

OI Kalou Scheme/Mukindu/1228

PETER MUCHERU WAINAINA

5 acres 1,375,000

**Dated and Signed at Nakuru this 25th day of May, 2018.**

**A. K. NDUNG'U**

**JUDGE**