



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NUMBER 113 OF 1997**

**In The Matter Of The Estate Of M'ituathuku M'magai (Deceased)**

**GEOFFREY MWORIA M'ITWATHUKU (Legal rep' of the  
estate of the late**

**KARURI M'ITEATHUKU).....PETITIONER/RESPONDENT**

**VERSUS**

**CHARITY KAIRIGO.....OBJECTOR**

**JOHN WYCLIFFE M. GITUMA.....1<sup>ST</sup> INTERESTED PARTY**

**MARGARET K. GITUMA.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

[1] M'ITUATHUNKU M'MAGA ('the deceased') died intestate on 4<sup>th</sup> October 1996. Karuri M'itwathuku petitioned for grant of letters of administration which were granted on 4<sup>th</sup> December 1997. He listed the following as the deceased survivors;

- a) Karuri M'Tuathuku -Wife
- b) M'Arimi M'tuathuku - Son
- c) Margaret Karegi -Daughter
- d) Ayub Mwenda M'tuathuku - Son
- e) Geoffrey Mworis M'tuathuku - Son
- f) Jerica Gakii - Daughter
- g) Lucy Kagendo - Daughter
- h) John Mwitii M'tuathuku - Son

[2] He listed the following as the deceased's assets

- 1) LR NO. THIMBIRI/IGOKI/576
- 2) LR NO. THIMBIRI/IGOKI/577
- 3) LR NO. THIMBIRI/IGOKI/578
- 4) LR NO. THIMBIRI/IGOKI/579

**5) LR NO. THIMBIRI/IGOKI/580**

**6) LR NO. THIMBIRI/IGOKI/581**

[3] **CHARITY KAIRAGO** filed an objection and stated that the deceased was her husband and the petitioner her co-wife. In a replying affidavit the petitioner stated that the objector is misleading the court as she is not the wife of the deceased but a promiscuous woman who engaged in an extra marital affair with the deceased where she bore 3 illegitimate children Jerica Gakii, Lucy Kagendo and John Mwiti. She brought up the said children as her own and the objector has no valid interest on the deceased's estate.

[4] Karuri M'Itwathuku, the wife of the deceased died on 16<sup>th</sup> October 2001 and Geoffrey Mworua M'Itwathuku obtained letters of administration for her estate as legal representative.

[5] In his replying affidavit dated 22<sup>nd</sup> June 2012 Geoffrey Mworua M'tuanthuku stated that he had always been in occupation of LR NO. THIMBIRI/IGOKI/581 since 1976 and that the houses on the property were built by him. That the applicant was living on LR NO. THIMBIRI/IGOKI/580 where the deceased was buried. That since 1996 to January 2012 the applicant has been cohabiting with Mr. Mutwiri.

[6] In his affidavit in support of summons for confirmation of grant dated 3<sup>rd</sup> December 2013 Geoffrey Mworua Twathuku stated that the deceased left behind the following properties LR. NTHIMBIRI/IGOKI/581, 578, 577 AND 576 and proposed that the land be distributed as follows;

**LR NO. NTHIMBIRI/IGOKI/576,577 and 578** be combined and the resultant parcel be shared as follows

- 1) John Kaburia M'Rimberia - 2.0 acres
- 2) M'Mwirebua M'Rugiri -0.60 acres
- 3) Geoffrey Mworua Twathuku -1.00 acres
- 4) Dependants of Ayub Mwenda - 0.50 Acres

**L.R NO. NTHIMBIRI/IGOKI/581**

- 1) Peter Nturibi Mbiria -1.50 Acres
- 2) M'Arimi M'Twasnthuku -0.50 Acres
- 3) Anjerica Gakii and Lucy Kagendo -0.25 to share jointly
- 4) Silas Gituma Musa Muturuchiu -1 acre
- 5) Geofrey Mworua Twathuku - 0.45 Acres

[7] Jerica Gakii Cosmas and Lucy Kagendo Japheth in their affidavit dated 29<sup>th</sup> July 2015 stated that they are daughters of the deceased and therefore beneficiaries of the estate of the deceased. The objector is their mother. They stated that prior to his death, their father had sub divided NTHIMBIRI/IGOKI/305 into 6 portions for distribution and transfer to respective beneficiaries and he intended to distribute them as follows

- 1) Geoffrey Mworua - NTHIMBIRI/IGOKI/576
- 2) Francis Mbaabu - NTHIMBIRI/IGOKI/577
- 3) Ayub Mwenda - NTHIMBIRI/IGOKI/578
- 4) Harriet Gaiti -NTHIMBIRI/IGOKI/579
- 5) John Mwiti - NTHIMBIRI/IGOKI/580
- 6) Charity Kairigo - NTHIMBIRI/IGOKI/581

[8] They averred further that, by the time of his death the deceased had already transferred NTHIMBIRI/IGOKI/579 and 580.

[9] On 22<sup>nd</sup> March 2017 this court made a ruling and revised its order made on 8<sup>th</sup> February 2016 and removed the interested parties from these proceedings and gave them 6 months to establish their claim against the administrator of the estate.

**Affidavit evidence**

[10] This case was heard through affidavit evidence, **PW1 Geoffrey Mworja M'Itwathuku** swore an affidavit and averred that Charity Kairigo is a former wife to the deceased. He averred that prior to marrying the deceased the Objector was married to Mr. Gitigi of Mbaaria in kiirua area where she had two children Nkirote Gitigi and Joseph Gitigi. She divorced Mr. Gitigi in 1971 and married the deceased in 1971. Thereafter they got three children namely Anjerica Gakii, Lucy Kagendo and John Mwiti. The objector thereafter divorced the deceased in 1976 and the deceased formalized it when her dowry was returned in 1977. Since 1976, the objector relocated to the home of M'Ikungu where she cohabited with him as his wife until she left in 1997. She had 3 children with with M'ilkungu namely Kirimi M'Ikungu, Gaitimba M'Ikiungu and Makena M'Ikungu.

#### Statements by witnesses

[11] **PW1** told the court that the Objector left her home with M'Ikungu soon after the death of the deceased and sold his home to Koome Mwirebua and took away all his household items. She was re married by Mr. Mutwiri where she stayed until the year 2012. She then moved to stay with her son John Mwiti on **LR NTHIMBIRI/IGOKI/580** which had been transferred to him by the deceased. Similarly the deceased transferred **LR NTHIMBIRI/IGOKI/579** to Harriet Gaiti around the same time. That before his death the deceased sold his land to three parties John Kaburia M'Rimberia, Silas Gituma (deceased) and Peter Nturibi who bought 2 acres each. The Petitioner argued that by re-marrying the objector relinquished her interest in the estate of the deceased and urged the court to adopt his proposed mode of distribution.

[12] **PW2, William Kigunda Mutuga** through his statement told the court that in 1971 the objector got married to the deceased and bore him 3 children; Anjerica Gakii, Lucy Kagendo and John Mwiti. They later divorced in 1977 where elders met and dowry was returned and before he died he transferred 3 acres to John Mwiti. After her divorce the objector had 3 children with M'Ikungu. This was reiterated by a statement by **M'Ringeria M'Mirimiti**.

#### ANALYSIS AND DETERMINATION

[13] I have carefully considered the record and statements of the witnesses. Arising there from are the following issues for determination;

*I. Whether the objector is a wife of the deceased for purposes of distribution of the estate?*

*II. How the estate of the deceased should be distributed?*

#### Wife as per law

[14] Section 2 defines wife as follows:

*“wife” includes a wife who is separated from her husband and the terms “husband” and “spouse”, “widow” and widower” shall have a corresponding meaning;*

[15] Section 29 of the Law of Succession Act defines a dependant as follows;

#### *29. Meaning of dependant*

*For the purposes of this Part, “dependant” means*

*(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*

*(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and*

*(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.*

[16] Therefore, the objector as a former wife may be considered as a dependant of the deceased. The objector is said to have remarried only to come back after the death of the deceased. The evidence adduced show otherwise. In fact she continued to depend on the estate property.

#### Gifts inter vivos

[17] There are those who received gifts inter vivos. Section 28 of the Law of Succession Act is relevant. It provides that:

*“In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—*

*(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;.....*

And **Section 42** of the Law of Succession Act is also relevant. It specifically states that:

*“Where—*

*(a) an intestate has, during his lifetime or by will, paid, given or settled any property to 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 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”*

[18] I have stated time without number, that, the provisions in sections 28 and 42 of the Law of Succession Act embrace elegant principles of equity, equality and fairness in the distribution of the estate of the deceased to beneficiaries; it avoids double-portion syndrome and reins on greed of beneficiaries. In this case therefore the head title **NTHIMBIRI/IGOKI/308** was subdivided into 6 portions to wit **NTHIMBIRI/IGOKI/ 576-581**. The deceased transferred **NTHIMBIRI/IGOKI/579** to Harriet Gaiti and **NTHIMBIRI/IGOKI/580** to his son John Mwiti. He remained with **NTHIMBIRI/IGOKI/576, 577,578** and **581**.

#### **Distribution**

[19] Section 38 provides

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

[20] The deceased herein had 7 children, according to the records the children could not agree on the mode of distribution and therefore I will rely on Section 38 of the Law of Succession Act in the distribution of his estate and order that:

**I. NTHIMBIRI/IGOKI/576 (measuring 0.40 ha) – M’Arimi Mtuathuku wholly**

**II. NTHIMBIRI/IGOKI/577 (measuring 0.40 ha)- Charity Kairigo wholly**

**III. NTHIMBIRI/IGOKI/578- (measuring 0.81 ha) -Anjerica Gakii and Lucy Kagendo to share equally**

**IV. NTHIMBIRI/IGOKI/581-(measuring 1.72 ha) – to the Estate of Ayub Mwenda, Geoffrey Mworira and Estate of Margaret Karegi to share equally.**

[21] I confirm the grant in the foregoing terms. No orders as to costs. It is so ordered.

**Dated, signed and delivered in open court at Meru this 18<sup>th</sup> day of December, 2018**

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**F. GIKONYO**

**JUDGE**

**In presence of**

Kithinji for Mwarania for petitioner

M/S Atheru for Kariuki for protestor

Kiautha for interested parties – absent

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**F. GIKONYO**

**JUDGE**