



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CAUSE NO. 61 OF 2010**

**IN THE MATTER OF THE ESTATE OF SIMON MURAGE MUGO ALIAS S.M.MUGO ALIAS  
MURAGE MUGO (DECEASED)**

**BETWEEN**

**ANN MUTHONI GICHUKI**

**BERNICE WANGARI GICHUKI**

**MAGDALINE NJERI MUGO..... PROTESTORS**

**AND**

**MARTHA HUGIRU MURAGE..... RESPONDENT**

**RULING**

1. The estate relates to Simon Murage Mugo (deceased) who died on the 5<sup>th</sup> March, 2007 at Othaya District Hospital; the identifiable properties comprising the estate of the deceased are;

- i. Land Parcel No.Othaya/ Kiahagu/31
- ii. Land Parcel No. Othaya/Kihigiru/33A
- iii. Land Parcel No. Othaya/Kihigiru/561/16A, B & F

**iv. Shares in:** Kengen, Diamond Trust Bank of Kenya Ltd, KCB Ltd, ICDC Ltd, Centum Investment Ltd, Barclays Bank Ltd, Eveready Ltd, Mumias Sugar Co. Ltd, KTDA Ltd; Iriani Tea Company Ltd, Othaya Farmers Co-op Society Ltd, Othaya Housing Company Ltd and Nyeri Farmers Sacco Ltd

**v. Funds in:** Equity Bank Account No. 0080101534050

2. Simon Mugo Murage-the deceased herein had two wives- the first wife being Lydia Wanjiru Murage who is deceased- the second wife is Martha Hugiru Murage who was appointed as the administrator and is the Petitioner herein; the deceased died intestate and the persons listed in P&A5 as having been left surviving him are namely;

- i. Martha Hugiru Murage – who shall hereinafter be referred to as ‘**the petitioner**’; - widow
- ii. Antony Murage Mugo – grand-son

- iii. John Kihia Murage - son
- iv. Ann Muthoni Gichuki- hereinafter referred to as **‘the 1<sup>st</sup> Protestor’**
- v. Bernice Wangari Gichuki- hereinafter referred to as the **‘the 2<sup>nd</sup> Protestor’**
- vi. Eugenia Wachera Murage - daughter
- vii. Lucy Kagure Mwaniki - daughter
- viii. Veronicah Wangui Murage - daughter
- ix. Joseph Mugo Muthukumi - son
- x. Teresa Warukira Murage - daughter

3. The Petitioner had petitioned for Letters of Administration and was issued with the Grant on the 19/07/2010; thereafter she filed the Summons for Confirmation of the Grant and her proposed mode of distribution of the estate of the deceased is as set out as follows;

**Land Parcel No. Othaya/Kiahagu/31**

- Martha Hugiru Mugo - 2 Acres
- John Kihia Murage - 2 Acres
- Bernice Wangari Gichuki - 2 Acres
- Eugenia Wachera Murage - 1.05 Acres
- Joseph Mugo Muthukumi - 2 Acres
- Teresa Warukira Murage - 1.05 Acres
- Magdaline Njeri Mugo - 2 Acres

**Land Parcel No. Othaya/Kihigiru/ 561/ 33A**

- Bernice Wangari Gichuki – 1/2 Share
- Joseph Mugo Muthukumi \_ 1/2 Share

**Land Parcel No.Othaya/Kihigiru /561/16A, B & F**

- Martha Hugiru Mugo - 1/3 Share
- John Kihia Murage - 1/3 Share
- Magdaline Njeri Mugo - 1/3 Share

**Othaya Housing Company Ltd:**

To be shared equally amongst all the beneficiaries; Martha Hugiru Murage to have a life interest.

**Shares and money in the bank account:**

All the shares sell shares in Kengen Ltd, Diamond Trust Bank of Kenya Ltd, KCB Ltd, ICDC Ltd, Centum Investment Ltd, Barclays Bank Ltd, Eveready Ltd, Mumias Sugar Co. Ltd, KTDA Ltd; Iriani Tea Company Ltd, Othaya Farmers Co-op Society Ltd and Nyeri Farmers Sacco Ltd –be sold and combined with the monies in the bank to cater for legal fees, survey fees, administration costs and the balance to be shared equally amongst all the beneficiaries.

4. The court sanctioned partial distribution of the estate and only left the 2 acres in **Land Parcel No. Othaya/Kiahagu/31** and the ½ portion in **Land Parcel No. Othaya/Kihigiru/33A** given to Bernice Wangari Gichuki which portions were to be held in trust by the administrator pending the outcome of the decision of the court on the protests lodged; and these two portions form the subject matter of the protests;

5. The 1<sup>st</sup> Protestor and the 2<sup>nd</sup> Protestors filed their respective Affidavits of Protest and therein gave their reasons for filing the protest; and each outlined their proposed mode of distribution of the properties that form the interest derived by their late husband in the estate of his father the deceased herein.

6. Directions were given on the 10/2/2012 that the matter was ready for hearing and that viva voce evidence be tendered; the rival parties testified and hereunder is a summary of their respective evidence;

### **THE 1<sup>st</sup> PROTESTORS CASE**

7. The 1<sup>st</sup> protestor's evidence was that she got married to the late George Gichuki (hereinafter referred to as **'the late George'**) in 1977 under Kikuyu customary law; she tendered into court as an exhibit a letter from the chief dated the 30/11/2009 (**PExh.1**) confirming that she was a daughter in law of the deceased;

8. In 1987 she separated with the late George; but under cross-examination she categorically denied ever having filed divorce proceedings in Karatina namely Divorce Cause No.10/1997 against the late George to dissolve the marriage nor ever having been granted a divorce by the court; that any proceedings filed against the late George were to restrain him from harassing her; she further denied that upon separation with the late George having ever been married to one Mairuru; whom she stated was only a business partner and nothing more;

9. She testified that the union with the late George was blessed with three children named;

- i. Martha Wairimu
- ii. Gladys Wambui
- iii. Juliana Wangechi

10. The birth certificates for the above children were produced as exhibits; two of the Birth Certificates bore the name of the children's father but no fathers name was indicated for the child named Juliana; she stated that this child was borne during the period of separation and the reason for the omission was that the late George was to have given her consent to include his name as the father; she stated that this child was not an issue of Mairuru and reiterated that this child was an issue of herself and the late George;

11. The 1<sup>st</sup> protestor confirmed that the late George died in 2004; and at the time of his demise his father had not given him any property; she also confirmed that the late George was married to the 2<sup>nd</sup> protester herein and that union was blessed with 5 children and one of the children was deceased;

12. Her contention was that the late George by virtue of being a son of the deceased was entitled to a share out of the deceased's estate; and that although separated she was still a wife of the late George and was a beneficiary by virtue of Article 45 of the Constitution 2010 and Section 29(a) of the Law of Succession Act and was therefore entitled to his share; further it was her father-in-law's wishes that the grandchildren and herself get her husband's share in the estate; she proposed that the share of the late

George Gichuki be shared amongst his surviving widows and children in line with the provisions of Section 40 of the Law of Succession Act;

13. Her witness **PW2** told the court that she was a daughter of the 1<sup>st</sup> Protestor and the late George and that he passed on in 2004 and that her father had predeceased her grandfather; that her mother the 1<sup>st</sup> protestor was the first wife of her late father and that he also had another wife, the 2<sup>nd</sup> protestor herein, who had 5 issues from the marriage with her late father;

14. There were three siblings on her side of the family and even though her parents had separated in 1987; that they never ceased being his children; she denied having any other father except for the late George;

15. She corroborated **PW1's** and **PW3's** evidence that the estate belonged to her grandfather who passed on in 2007; and that during her father's lifetime her grandfather had not allocated him with any land;

16. She also confirmed that her grandmother had been given the mandate to administer the estate of her grandfather; that upon the demise of her grandfather, her grandmother had summoned them and in the presence of her aunties had told them that their grandfathers wish was to give them a portion of land if they choose to come back; and that they duly returned in 2008;

17. Her prayer was that she be allocated a portion of her father's interest in the estate of her grandfather;

18. The witness John Kihia Murage (**PW3**) stated that he was an older brother of the late George; he confirmed that his younger brother had two wives; that the 1<sup>st</sup> protestor was the first wife and had two children with his late brother and that she had also gotten another child after the two had separated; that the 2<sup>nd</sup> protestor was the second wife and had 5 children with his deceased brother;

19. He recalled that they had paid dowry for the 1<sup>st</sup> protestor; and that even though she left and had never come back to their home the dowry was never returned; therefore she was still his late brother's wife; under cross-examination he stated that he had heard that the 1<sup>st</sup> protestor and his late brother had been granted a divorce by the court;

20. He confirmed that his late brother during his lifetime had not been given land by their father; but one year before his father's demise, his father had subdivided property and all the boys were given 2 acres;

21. His late father gave everyone a portion and this was supported by a letter that his late father had written; that the late Georges' family's portion was fallow and that no one was tilling the land; and no one resided thereon not even the 2<sup>nd</sup> protestor who was currently residing in Turbo;

22. He prayed that the interest of the late George Gichuki be shared among the children.

23. After this witness had testified and was cross-examined the 1<sup>st</sup> Protestor closed her case.

### **THE 2<sup>nd</sup> PROTESTORS RESPONSE**

24. The 2<sup>nd</sup> Protestor told the court that she was the daughter-in-law of the deceased Simon Murage Mugo and was also a beneficiary to his estate; that she got married to the late George in 1978 and there were 5 issues borne of this marriage, namely;

- i. Judith Wangehi Gichuki
- ii. Caroline Wairimu Gichuki
- iii. Anthony Murage Gichuki

iv. Paul Kireri Gichuki

v. Bernard Mugo Gichuki (deceased)

25. She confirmed that the petitioner who is her mother in law was the administrator of the estate of the deceased Simon Murage Mugo; that when the petitioner sought to have the Grant confirmed the 1<sup>st</sup> protester together with her children filed the protest herein; that their claim in the protest was on the basis of the 1<sup>st</sup> protesters relationship with the late George Gichuki Murage;

26. She confirmed that the 1<sup>st</sup> Protestor Ann Muthoni Gichuki had been married to the late George and separated in 1987; that the 1<sup>st</sup> Protestor had filed for divorce in 1997 and had obtained a divorce from their common husband; the proceedings were produced and marked as “**DWExh.2 & 3**” ; immediately after the divorce the 1<sup>st</sup> protestor had gotten married to a man known as Mairuru; that when she left in 1987 the 1<sup>st</sup> Protestor had two children with the late George namely, Gladys Wambui Gichuki and Martha Wairimu Gichuki; the child known as Juliana Wangechi was not fathered by the late George and that there was evidence being the Birth Certificate (**PExh.4**); produced in court in support of this fact;

27. That the late George at the time of his death had no known estate in law; and during her father-in-law’s lifetime he had given her 2 acres of land in Parcel No. Othaya/Kiahagu/31 and that is where the late George’s remains were interred; and she was also given one half share of Plot No. Othaya/Kihugiru/33A in Othaya Township;

28. Her evidence was that her late father in law did the sub-divisions himself and that the petitioner shared out the whole estate in accordance with his wishes which were that the Parcel No. Othaya/Kiahagu/31 be divided into the six portions as set out hereunder;

i. Magdaline Njeri Mugo – 2acres

ii. Martha Hugiru Murage – 2acres

iii. John Kihia – 2acres

iv. Joseph Mugo Muthukumi -2acres

v. Teresa Warukira Murage - 1acre

vi. Euginia Wacera - 1 acre

29. She produced a mutation form “**DExh.3**” to support the above sub-divisions; that there was no house built on the 2acres she had been allocated but she tilled the land; her claim was that she was not benefiting by reason of being the wife/widow of the late George but by virtue of her father-in-law’s benevolence; that the wishes of her late father-in-law were known to all and sundry; and that even though the portions had been given to her these portions had not been formally transferred to any of them; but her father-in-law had made it abundantly clear that no one should claim her portions from her;

30. Her contention was that the 1<sup>st</sup> protestor and her daughters (**PW2**) claims had no legal basis and prayed that the protest be dismissed.

31. She had no witnesses to call and closed her case after cross-examination.

### **THE 3<sup>RD</sup> PROTESTORS CASE**

32. Before the hearing commenced it was agreed that the main protagonists in this matter were the 1<sup>st</sup> Protestor and the 2<sup>nd</sup> Protestor; this was due to the fact that the 3<sup>rd</sup> protesters claim had been

compromised.

### **ISSUES FOR DETERMINATION**

33. After the close of the proceedings the Counsels filed and exchanged written submissions and narrowed down the issues; upon perusal of the written submissions these are the issues framed for consideration;

- i. Whether the 1<sup>st</sup> protestor, her children and the 2<sup>nd</sup> protestor are dependants of the deceased herein;
- ii. What constitutes the interest of the late George in the deceased's estate;
- iii. Distribution of the remainder portions belonging to the estate to Simon Mugo Murage (Deceased).

### **ANALYSIS**

34. There is no dispute that the Petitioner had the mandate to petition for the Letters of Administration and to distribute the estate of Simon Mugo Murage; that Confirmation of the Grant had been sanctioned by the court on the 17/02/2012; and that portions that had been earmarked for the 2<sup>nd</sup> protestor were vested in the administrator to hold in trust pending the hearing and outcome of the protests; that the contest herein was as between the 1<sup>st</sup> and 2<sup>nd</sup> protestors who claim to be the wives of the late George; this contention prompted the dispute and led to the filing of the Protests as the 1<sup>st</sup> protestor claims a right to a share in the portions whereas the 2<sup>nd</sup> protestor claims exclusive rights to the portions;

35. These rights can only be resolved by determining whether the two wives and their children are dependents to the estate of the deceased herein; and what constitutes the interest of the late George in his late fathers' estate; and their rights to this interest.

### **Whether the 1<sup>st</sup> protestor, her children and the 2<sup>nd</sup> protestor are dependants of the deceased herein;**

36. The main protagonists are the 1<sup>st</sup> protestor and the 2<sup>nd</sup> protestor and the issue is whether the two are dependants and entitled to benefit from the estate of the deceased; it is important to always bear in mind that the estate in issue is that of Simon Mugo Murage (deceased) and not that of the protestors husband namely the late George Gichuki; that is why this court has chosen to use the words "interest of the late George" as opposed to "the estate of the late George"; this brings into play the issue as to whether either of the two protestors can be described as the deceased's dependants so as to qualify as beneficiaries; Section 29 of the Law of Succession reads as follows;

#### **'Section 29. Meaning of a 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-sister, and were being maintained by the deceased immediately prior to his death;**

37. It is not in dispute that George Gichuki Murage was the son of the deceased and that he predeceased his father; the 1<sup>st</sup> Protestor tendered evidence that she had cohabited with George from 1977 to 1987 and

thereafter were separated;

38. The evidence of 1<sup>st</sup> Protestors witness that is **PW3** was that his brother had two wives namely the 1<sup>st</sup> Protestor and the 2<sup>nd</sup> Protestor; that the 1<sup>st</sup> protestor left his brother and never came back to their home; under cross-examination he stated that he had heard that the 1<sup>st</sup> protester and his late brother had been granted a divorce by the court; but the dowry had never been returned;

39. It is not disputed that the late George was a child of the deceased; the evidence of and the circumstances of a customary marriage in both instances was cogently adduced by **PW3**; and the evidence of **PW3** was also clear on the issue of the wives and former wife of his late brother;

40. Both protestors are therefore found to have been validly married to the deceased's late son George under customary law which permits polygamy;

41. Even though the 1<sup>st</sup> protestor had separated with the late George she was nevertheless a wife for purposes of the Law of Succession and in particular Section 29;

42. This court has also noted after perusing the Chiefs letter and P&A 5 that the area chief and the administrator herein had both included the 1<sup>st</sup> Protestor and the 2<sup>nd</sup> Protestor as daughters-in-law and indicated that they were persons who had survived the deceased;

43. This court is satisfied that both protestors by virtue of being the late George's wife and former wife are the deceased's daughters-in-law and qualify to be described as his children/dependants;

44. As for **PW2** she stated she was a grandchild of the deceased; but nowhere in her evidence did she say that together with her other two siblings they had been taken in and or had been dependant on her grandfather prior to his death; infact her evidence was that she had been summoned by her grandmother after the demise of her grandfather and asked to return to the homestead; this is a clear indication that the deceased never maintained **PW2** together with her two siblings so as to qualify as dependants as set out in the afore-going Section 29 of the Law of Succession; therefore no interest can be directly derived to her grandfathers' estate but it can be derived through her late father's share.

45. Which then leads to the next issue as to what can be deemed to be the late George's interest in the estate of the deceased; this issue arises from the evidence adduced that the deceased herein had given the late George no land prior to George's demise;

**What constitutes the interest of the late George in the deceased's estate;**

46. Upon considering the evidence of 1<sup>st</sup> Protestor nowhere did she adduce evidence to demonstrate that during the subsistence of her cohabitation with George had his father gifted him with any portion of this estate; neither did she adduce any evidence to demonstrate that during the period of separation had his father gifted him with any property from the estate; this fact is corroborated by **PW2 and PW3** who confirmed that the late George during his lifetime had not been given any land by his father; that it was only one year prior to his fathers' demise he decided to subdivide his property and gave all the surviving sons 2acres each; and that he had given his wife (the petitioner herein) and all his sons whether surviving or deceased 2 acres each in parcel no. Othaya/Kiahagu/31; **PW3** also confirmed that the 2<sup>nd</sup> protestor had been given 2 acres in Parcel No.Othaya/ Kiaguayu /31; all the evidence tendered confirmed that the transfers of the properties had not been formally effected prior to the deceased's death; and that there was a letter to support the deceased's intentions; though it is noted this letter was never tendered into evidence.

47. This evidence was not controverted by 2<sup>nd</sup> Protestor who even stated that the deceased had even shown her where to bury her late husband and had told her that this was the family's portion; the evidence of **PW3** that all the sons were given 2acres is further validated by the fact that the 2<sup>nd</sup> protestor and the

3<sup>rd</sup> protestor being both widows of the sons of the deceased were each allotted acreage commensurate to the surviving sons; whereas the daughters had gotten less acreage.

48. That from the forgoing evidence and the act of the deceased apportioning a parcel for interment of the late George's body this court is satisfied that the deceased's intention was that this portion Othaya/Kiaguyu/31 vests in the family of the late George;

49. As for the ½ portion in Othaya/ K/ 33A there was no evidence adduced by either the 1<sup>st</sup> Protestor or her witnesses to controvert the evidence of the 2<sup>nd</sup> protestor that she had derived this benefit by virtue of the deceased's benevolence and not by reason of being the wife of the late George; this court is satisfied that this portion does not form part of the interest the late George derived from his father;

50. The only portion that constitutes the interest derived by the late George from his late father is therefore the 2acres in Othaya/ Kiahagu /31; which this court is tasked with distributing;

### **Distribution of the late Georges interest.**

51. The evidence points to the fact that the late George was a polygamist and had two wives and therefore there were two households in existence.

52. This court finds that Section 40 of the Law of Succession to be the applicable law and distribution shall be subjected in line with the said provisions; the Section reads as follows;

**“Where an interstate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house but also adding any wife surviving him as an additional unit to the number of children.”**

53. This court is also guided by the Court of Appeal decision of **Rono vs Rono and Anor (2005) 1 EA 363**; where it was held that the estate of a polygamous deceased should be distributed according to the number of children and not the number of houses.

54. Any claim of inheriting any part of the estate herein can only by virtue of being a child of the deceased or on proof of dependancy; the 1<sup>st</sup> Protestors child named Juliana unfortunately does not qualify as a dependant of the late George as the evidence tendered by the 1<sup>st</sup> protestor in the form of the Birth Certificate is self-defeating as it clearly does not indicate the name of the late George as being her father; and there was no evidence tendered on adoption or dependency;

55. Therefore the first house is found to comprise of two children and the 1<sup>st</sup> protestor being the extra unit which translates to three units;

56. The second house comprises of four surviving children and the 2<sup>nd</sup> protestor being the extra unit bringing the total to five units; the ratio of distribution is therefore determined to be 3/8 for the first house and 5/8 for the second house; this court will therefore apply these ratios in distributing the 2acres in Parcel No. Othaya/Kiahagu /31.

### **FINDINGS AND DETERMINATION**

57. For the afore-going reasons this court finds that 1<sup>st</sup> protestor and 2<sup>nd</sup> protestor are beneficiaries and are both entitled to benefit from the deceased's estate;

58. The 1<sup>st</sup> protestors application is found to be meritorious and is hereby allowed;

59. The two portions held in trust by the administrator shall be distributed as follows;

i. Othaya/Kiahagu /31 – comprising of the 2acres shall be divided on a ratio of 3/8 for the first house; and 5/8 for the second house; the 1<sup>st</sup> protestor and the 2<sup>nd</sup> protestor shall each hold a life interest in their units; the life interest to terminate upon their deaths and the units shall then be shared equally between their respective surviving children of the late George Gichuki.

ii. The ½ portion in Othaya/ Kihigiru /33A- to the 2<sup>nd</sup> protestor

60. The Grant is hereby confirmed on the terms as ordered.

61. Each party shall bear their own costs.

It is so ordered.

**Dated, Signed and Delivered at Nyeri this 22<sup>nd</sup> day of June, 2017.**

**HON. A. MSHILA**

**JUDGE**