



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**SUCCESSION CAUSE NO.1159 OF 2010**  
**IN THE MATTER OF THE ESTATE OF KANYINGI KIGONYE (DECEASED)**

**ROSEMARY WANGUI KANYINGI.....PETITIONER**

**VERSUS**

**ROSEMARY WAMBURA WACHIRA**

**JANE MURINGI KANYINGI**

**GEORGE NDIRANGU KANYINGI**

**STEPHEN MAINA KANYINGI.....} PROTESTERS**

**JUDGMENT**

Kanyingi Kigonye alias Willy George Kanyingi Kigonye died on 23<sup>rd</sup> September 1959 leaving a widow Rose Wangui Kanyigi and seven children namely

- Peter Wachira Kanyingi
- Jane Muringi Kanyingi
- George Ndirangu Kanyingi
- Jackson Githigi Kanyingi
- Immaculate Wambui Kabutha
- Stephen Maina Kanyingi
- Ester Wanjiru Gathogo

The deceased left one parcel of land AGUTHI/GAKI/156 2.2 acres which was registered in his name on 19<sup>th</sup> December 1958 as per the official search dated 24<sup>th</sup> November 2008 and filed in court on the 22<sup>nd</sup> December 2010.

Grant of letters of administration intestate was made on the 10<sup>th</sup> October 2011 to Rose Wangui Kanyingi. On 15<sup>th</sup> September 2015 she filed summons for confirmation of the grant. In the affidavit in support of the summons, she deponed at paragraph 5 that ‘the identification and shares of all persons beneficially

entitled to the said estate have been ascertained and determined as follows; the AGUTHI/GAKI/156 to be share equally among herself and all her children. Each beneficiary would get 0.275 acres. It is noteworthy that the consent was signed by Immaculate, Jackson and Ester only.

As at the time of writing this judgment none of the children was below the age of 40 years and Ester Wanjiru Gathogo and Immaculate Wambui Kabutha were married.

Sure enough an affidavit of protest was filed by Rose Wambura Wachira, Jane Muringi Kanyingi, George Ndirangu Kanyingi, and Stephen Maina Kanyingi, sworn by George Ndirangu on behalf of the others.

The main point of contention is that their mother the administrator had prior to these proceedings in 1978 distributed the estate into five equal portions of 0.440 acres occupied by

Rose Wambura Wachira, Jane Muringi Kanyingi and Rose Wangui Kanyingi, George Ndirangu Kanyingi, Stephen Maina Kanyingi and Jackson Githigi Kanyingi respectively. That therefor the grant ought to be confirmed in those terms.

The other contention is that the married sisters have no business inheriting land from their father; one because they are married and have their own matrimonial properties; two, because they were married under the old constitution and hence cannot benefit under the new one.

Joseph Mundia Kamana, Livingstone Wakibia Wachira and Wilson Mwangi Githigi, claiming to be the step uncles of the deceased swore an affidavit in support of the protest. Mainly that the petitioner subdivided the land in 1978, and confirmed the boundaries in 2015.

The Petitioner responded by affidavit filed on the 1<sup>st</sup> February 2016 denying having distributed the estate in 1978, and asserting that regardless of their marital status her daughters had a right to inherit their father's property.

The protesters responded by affidavit filed on the 17<sup>th</sup> February 2016 to which was annexed a document in Kikuyu to the effect that the Petitioner had distributed the land on 12<sup>th</sup> September 2015. In that mode she had given herself a larger portion to take care of any returnee daughters and the unmarried ones. She denied the same in her response filed on the 19<sup>th</sup> February 2016.

The matter was part heard before Mativo J and I took over at PW4.

PW1 Rosemary Wambura Wachira was a daughter in law of the Petitioner having been married to her son Peter Wachira Kanyingi who died in August 2010, since 1972. her position simply confirmed what was in the affidavit of protest, adding that since 1978 she and her family had settled on their portion, put up permanent structures and planted trees. That the proposed subdivision would force her to demolish her house.

She however never attended the alleged meeting in 1978. She did not know where Stephen Maina was in 1978, and no one in the home had a stone house, and that the land was subdivided again in 2015.

PW2 George Ndirangu's testimony was that his mother called him and his brother Stephen Maina, and the elders in 1978 where she shared the land into 5 portions, making hers larger by 5feet so that any daughter who returned home would have somewhere to live. That they planted trees to mark the boundaries and she put the seal of a curse on the same. Adopting the contents of his affidavit of protest.

He objected to her proposal to divide the land into 8 portions.

With regard to the alleged meeting of 12<sup>th</sup> September 2015, and document, he confirmed that neither himself nor his siblings had signed it, that only the elders and his mother did. He had no explanation why the document was not mentioned in the affidavit of protest or by the other protesters.

He also confirmed that only one brother had put up a stone house. He denied creating hostility in the home but conceded that he no longer visited his mother. His objection to the 8 equal portion because his mother had subdivided the land in 1978.

PW3 Stephen Maina told the court that he adopted the evidence of PW1 and PW3. Under cross examination he said in 1978 he was in high school in Garissa living with his elder brother Peter Wachira (deceased), PW2 was in Mandera and another brother in Wajir.

PW4 Joseph Mundia Kamana testified that the deceased was his step brother though he could not remember when he passed away. He told the court that the petitioner had subdivided the land in 1978, and in 2015, and both times she called him and others as clan elders.

That the land was subdivided into 5 portions and no daughter was given a portion they were expected to live on and utilize their mother's portion which was larger than the rest by one foot.

In addition, he made a revelation that the petitioner did not treat her children equally and together with two of her children Jackson Githigi Kanyingi and Immaculate Wambui Kabutha had sold a piece of land GATARAKWA/GATARWAKWA BLOCK III/356 in exclusion of the others.

It however turned out that the said parcel of land was registered in the name of the Petitioner in 1987 and was not a part of the deceased's estate. He denied preparing minutes of the meeting alleged to have been held on the 12<sup>th</sup> September 2015 in collusion with PW2, conceded that none of the parties herein signed the purported minutes, which he said were supposed to be a will to be signed by the petitioner only. He stated that he was not aware of the case in court, and that since the petition was filed, the petitioner had her children had stopped talking to him. In the end he said the only problem he has with the proposed distribution was that the petitioner never told him about it, except that by doing it differently from 1978 she would carry the curse of her 1<sup>st</sup> born son.

On the other hand, the petitioner appeared to hold two positions at the same time. One that she wanted her daughters to get a share of the land because they were the ones who took care of her to that end she wanted her land divided equally among herself and all her children. She filed documents in court to tell the court her position. She denied calling PW4 to assist her share out the land because she had raised her children by herself.

The other position was that she had divided the land into five portions and her daughters were comfortable where they were and did not land from her. However, they could have her portion of land, because they were the ones who assisted her.

DW2 Immaculate Wambui Kabutha's testimony was objected to because she was seated in court throughout hearing of the protester's case. I gave directions that I would rule on the matter within the judgment so I might as well deal with it right now. Immaculate Wambui Kabutha was not a witness for the petitioner but also a beneficiary to the estate and hence a party to the petition and the protest, and even more importantly, the protest is against her getting a share of her father's property. How then can she be treated as a witness? I find the objection by the protesters' counsel untenable.

Immaculate's testimony was that it was her mother who had proposed the equal distribution among her children, and that even if she had property elsewhere, and being married for 41 years, she was entitled to inherit from her father. She denied that PW4 was her step uncle or that he had any close relationship with her family, that in 2015, it was PW2 who invited PW4 to the home, and in 1978 PW4 could not have been an elder as they were almost age mates.

DW3 Jackson Githigi Kanyingi's view was that everyone should get a portion of their father's property. He said that the alleged 1978 subdivision could not have happened. He and his brothers were in North Eastern-Two in Garissa, one in Wajir and one in Mandera.

Further that there is nothing to hinder the subdivision of the property because the houses are on about a

quarter of the land, on the upper part, leaving the lower part available for subdivision, and except for him everyone else has built a temporary house. He said he did not support the status quo though it would give him a bigger portion because it was everyone's right to get a portion of the estate. He denied that anyone was taking advantage of his mother's age. That she was the one who decided that the land be shared equally.

Parties then filed submissions through their counsel- petitioners through Muchiri wa Gathoni, Protesters through Kebuka Wachira.

I have carefully considered the evidence before me and the submissions filed. The Only issue is how the property AGUTHI/GAKI/156 ought to be shared.

The protesters rely on their affidavits, the evidence on record and stand on three grounds;

1. That the petitioner shared the property into 5 portions in 1978.
2. The petitioner confirmed that sharing in 2015
3. The two married sisters are not entitled to anything.

In response the petitioner raises two issues;

1. Whether the petitioner had powers to subdivide the estate in 1978
2. Whether married daughters are entitled to a share of their father's estate

There are two main issues for determination;

1. Whether the Petitioner ever shared the deceased property before this succession cause.
2. Whether married daughters are entitled to a share of their father's estate.

Section 2 of the Law of Succession Act provides for its application *inter alia in the following*;

*(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.*

*(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act. (emphasis added)*

The deceased died intestate in 1959 before this Act commenced. The laws and customs pertaining at the time of his death are applicable but the succession shall *commence or proceed so far as possible in accordance with this Act*. Under the Law of Succession Act there is neither boy nor girl, neither married nor unmarried – it speaks at S.35 of where an intestate has left a surviving spouse **and child or children**. This is revamped by our Constitution which abhors any form of discrimination at Article 27. Hence the mere argument that because two of the protesters are married daughters and hence should for that reason alone be excluded from inheriting from their father, cannot stand. It is archaic, based on ignominious patriarchy that has no place in the present environment of non-discrimination and equality before the law. Marriage does not change one's DNA. It remains an acquired status available to sisters and brothers equally but not everyone may be blessed with a marriage partner, some may choose not to, others may get in and get out, once or severally- it is no wonder then that it should not be a basis for discrimination. In any event it is now settled by a host of cases, that married daughters are entitled to inherit from their parents. see **Naomi Wangeci Munene & Another v Dorcas Wanjiru Gitonga [2016] eKLR**, citing **In**

## **Re Estate of Solomon Ngatia Kariuki.**

That settles the 2<sup>nd</sup> issue. Coming to the first issue, there is first of all no evidence that the petitioner subdivided her land into five portions of 0.044 acres. Nothing was documented. PW2 and PW4 also gave contradicting evidence, one saying that the Petitioners portion was larger by 5 feet, the other by 1 foot to accommodate the daughters. DW2 who stands to benefit from the alleged 5 portion distribution denied that it ever took place, and even though he is the only one who has put up a stone house, he has no objection to everyone getting his or her share.

With regard to the purported distribution of 12<sup>th</sup> September 2015, PW4 stated it was intended to be the will of the Petitioner. PW2 said it was a meeting called by the petitioner. In any event the document was suspect as it was never mentioned in the affidavits of protest, or at any time before the hearing of the protest.

It was submitted that the Petitioner herself was not responsible for the proposed 8 portion distribution as she had already done it twice.

Granted the Petitioner was an elderly lady hard of hearing, she stated that she wanted her daughters to get their shares because they were the ones who assisted her. PW2 stated under cross examination that he never visited his mother. It was submitted that the petitioner, without saying when, stated under cross examination that she had already shared out her land. I was also asked to interpret her body language to mean that she was being misled by some of her children.

The Petitioner told the court that she had filed papers in court to tell the court how she wanted the land shared. She could easily have been referring to this when she said she had already subdivided the land. In any event the only document indicating how the property was to be shared were the court papers.

Could the petitioner distribute her husband's estate without grant of letters of administration? The Protesters did not address this issue.

### **Section 79 of the Law of Succession Act**

*The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.*

Section 80(2) provides

*A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant.*

Clearly the Petitioner had no capacity to share out the deceased property before representation was granted to her. It is only after the grant had been issued that she became empowered to share out her husband's property. There is no evidence that the Protesters had been gifted with specific portions by the deceased before he died. Short of that, he died intestate and his estate became liable for distribution according to the Law of Succession Act.

I am persuaded by the cited authorities **Re Katumo and Another [2003]2EA 509, John Kasyoki Kieti v Tabitha Nzivulu Kieti & Another** which take the forgoing position.

Hence having considered the evidence on record, the submissions by counsel, I find that protest has no merit and is hereby dismissed accordingly.

The grant is confirmed as per the paragraph 5 of the affidavit in support of the Summons for confirmation of grant filed on 15<sup>th</sup> September 2015, into 8 equal portions.

There will be no orders as to costs.

Dated this 14<sup>th</sup> Day of August 2017, at Kiniu, Makueni.

Teresia Matheka

Judge

Delivered and Signed at Nyeri this 28<sup>th</sup> Day of August 2017

Teresia Matheka

Judge

In the presence of;

Parties

Kebuka Wachira for protesters

Mshila holding brief for Muchiri wa Gathoni for petitioner

C/A Harriet