



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**SUCCESSION CAUSE NO. 1034 OF 2010**

*(IN THE MATTER OF THE ESTATE OF KARUNGO MWARIA ALIAS KARUNGO S/O KAHORA)*

**JOSEPH KAHORA KARUNG'O..... PETITIONER**

**VERSUS**

**MWANGI KARUNG'O.....PROTESTOR**

**JUDGMENT**

The deceased, Karung'o Mwaria, also known as Karung'o son of Kahora, died on 6<sup>th</sup> July, 1995 at the age of 83 years. He was domiciled in Kenya and his last known place of residence was Mbogoini in Nyeri County. A petition for grant of letters of administration of his estate was filed in this court on 15<sup>th</sup> November, 2010 by the petitioner who described himself in the petition as the son of the deceased. Apart from the petitioner, the deceased is indicated to have been survived by eight other survivors seven of whom are his children including the petitioner; the other survivor is the deceased's daughter-in-law.

Two assets are listed in the affidavit in support of the petition as comprising the deceased's estate; these are a land parcel known as **Title No. Kirimukuyu/Mbohoini/319** and **Plot No. 6 Kiamuthanga** of which the deceased held 20% share thereof.

The grant of letters of administration was made to the petitioner on 19<sup>th</sup> March, 2013. By a summons dated 6<sup>th</sup> October, 2013, he sought to have it confirmed; in the affidavit in support of the summons, he proposed that the deceased estate be shared out equally amongst seven of the deceased's survivors with each of them getting 0.50 acres. The remaining two, named as Mary Murigo and Mwangi Karungo were proposed to have 0.55 acres each.

Mwangi Karung'o was opposed to this scheme of distribution and so he filed an affidavit protesting against the confirmation of the grant. In that affidavit which he swore on his own behalf and on behalf of his three sisters and one brother, he deposed that the deceased had two houses except that the wives in the two houses were also deceased. According to his depositions, the first house had five children whom he named as follows:

1. Esther Nduta Karung'o
2. Ann Gathoni Karung'o
3. Mary Njoki Wachira
4. Mwangi Karung'o

## 5. Patrick Maina Karung'o

He named the children in the second house as:

1. Joseph karung'o
2. Nduta Muriithi
3. Mary Muringo
4. Catherine Kanuthu

The protestor also deposed that apart from the assets listed by the petitioner in his affidavit as comprising the deceased's estate, the deceased also owned **Title No. Kirimukuyu/Gachuiro/363** measuring 3.7 acres but which he registered in the name of the petitioner to hold in trust for himself and for the benefit of the members of the second house.

The first house was, on the other hand, given land parcel known as **Title No. Kirimukuyu/Mbogoini/281** which was registered in the protestor's name to hold in trust for himself and for the benefit of the members of the first house.

According to the protestor, it was the deceased's wish that **Title No. Kirimukuyu/Mbogoini/319** which is still registered in the name of the deceased, be given to the first house. His case was therefore that this particular parcel of land should not be shared out as proposed by the petitioner but that it should devolve upon the first house only.

At the hearing, the protestor testified that he is the first-born in the first house while the petitioner is the first born in the second house. As I understood him, it is by virtue of their positions in their respective houses that they were registered as owners of **Title No. Kirimukuyu/Mbogoini/281** and **Title No. Kirimukuyu/Gachuiro/363** respectively to hold in fiduciary capacity. As at the time of hearing of the protest, the first house was settled on **Title No. Kirimukuyu/Mbohoini/319** although it still utilizes **Title No. Kirimukuyu/Mbogoini/281**.

The petitioner agreed with the protestor that the deceased had two houses and also that the first house had six children although one of them was deceased. He admitted that the second house had four children. Like the protestor, he testified that the deceased made inter vivos transfers to them in respect of the parcels of land that the protestor referred to.

As far as he was concerned, the remainder of the deceased's estate which comprises **Title No. Kirimukuyu/Mbohoini/319** and **Plot No. 6 Kiamuthanga** should be shared out equally amongst the deceased's children even though the protestor lives on the former parcel of land. According to him, his own mother was buried on this parcel of land and therefore it would not be out of order if her house got a share of the land.

From what I gather, it is common ground that the deceased was polygamous; the identity of his children and beneficiaries to his estate is an issue that is also not in dispute. The petitioner and the protestor are also largely in agreement on the extent of their late father's estate. The only issue is how the estate should be distributed between the two houses that survived him.

**Section 40** of the **Law of Succession Act** sheds some light on distribution of the estate where an intestate was polygamous; it states as follows:

### *40. Where intestate was polygamous*

*(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate 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.*

*(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.*

As noted earlier, the wives in the two houses are deceased as well and therefore the issue of them being 'additional units' when the number of children in each house is considered does not arise.

The children themselves are almost evenly distributed between the two houses and in this set of circumstances I see no reason, and none was suggested to me, why one house should get a larger share of the estate more than the other. If there was any such reason, the number of children in each house would have counted only as one of the factors, and not the sole factor, that would influence the extent of the shares that each house would be eligible for in the distribution of the estate.

Although it was the testator's case that it was the wish of the deceased that the first house should retain **Title No. Kirimukuyu/Mbohoini/319** exclusively, this court is hesitant to act on such wishes when they are not formally expressed by way of a will, whether oral or written.

My conclusion therefore is that this parcel should be shared out equally between the two houses. The first house's share shall be registered in the name of Mwangi Karung'o to hold in trust for himself and for the benefit of the rest of the surviving children in that house; the second house's share shall be registered in the name of Joseph Kahora Karung'o in trust for himself and for the benefit of the rest of the surviving children in his house. The same persons shall also be registered, in the same fiduciary capacity, as owners in common of the deceased's share in **Plot No. 6 Kiamuthanga**. If I have to be clearer, the deceased estate shall be distributed as follows:

**1. Title No. Kirimukuyu/Mbohoini/319**, shall be divided in to two equal parcels and each of the parcels shall be registered in the names of:

**(a) Mwangi Karung'o** for himself and in trust for the benefit of:

**(i) Esther Nduta Karung'o**

**(ii) Ann Gathoni karung'o**

**(iii) Mary Njoki Wachira**

**(iv) Patrick Maina Karung'o**

**(b) Joseph Kahora Karung'o** for himself and in trust for the benefit of:

**(i) Nduta Muriithi**

**(ii) Mary Muringo**

**(iii) Catherine Kanuthu**

**2. Plot No. 6 Kiamuthanga; 20% shall be registered in the names of:**

**(a) Mwangi Karung'o and,**

**(b) Joseph Kahora Karung'o**

For themselves and in trust for:

- (i) Esther Nduta Karung'o**
- (ii) Ann Gathoni karung'o**
- (iii) Mary Njoki Wachira**
- (iv) Patrick Maina Karung'o**
- (v) Nduta Muriithi**
- (vi) Mary Muringo**
- (vii) Catherine Kanuthu**

Accordingly, the petitioner's protest dated 10<sup>th</sup> March, 2014 is dismissed and the grant of letters of administration made to the petitioner on 19<sup>th</sup> March, 2013 is confirmed in the foregoing terms. There shall be no orders as to costs.

**Signed, dated and delivered in open court on 18<sup>th</sup> August, 2017**

Ngaah Jairus

**JUDGE**