REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

SUCCESSION CAUSE NO. 58 OF 2015

(Formerly Naivasha CM Succession No. 53 of 2007)

IN THE MATTER OF THE ESTATE OF MAINGE KARINGE

MAINGE alias MAINGI KARINGE MAINGE alias MAINGE

KARINGE alias MWANGI KARINGE (DECEASED)

MARIA KABOO MAINGI.....1ST PETITIONER/APPLICANT

DANIEL MAINA MAINGI.....3RD PETITIONER/APPLICANT

AND

JOSEPH MAINA MAINGI.....2ND PETITIONER/OBJECTOR

R U L I N G

1. This Petition for a grant of letters of administration was filed jointly by **Maria Kaboo Mainge** (1st Petitioner wife of deceased, **Mainge Karinge Mainge also known as Maingi Karinge Mainge alias Mainge Karinge alias Mwangi Karinge**) in conjunction with her step-son, **Joseph Maina Maingi** 2nd Petitioner, turned Objector, and her own son **Daniel Maina Mainge** [3rd Petitioner].

2. Pursuant to this court's ruling delivered on 21st April, 2016 on the objection made by the 2nd Petitioner, a fresh grant was issued in the names of the three Petitioners. The parties were granted leave to apply for Confirmation of Grant within 3 months, the court noting that the real bone of contention was the mode of distribution of the estate.

3. On 24th March, 2017, the 1st Petitioner filed Summons for confirmation of the grant in which she proposed her preferred mode of distribution. This was opposed by the Objector (2nd Petitioner) by way of an affidavit filed on 30th June, 2017. Parties also relied on previously filed affidavits and submissions made in respect of the initial ruling.

4. The court has now read through the material relied on by the parties. From the affidavits filed previously by the parties in connection with the objection proceedings, and their recent affidavits, several facts are not in dispute.

5. The deceased was first married to the mother of the Objector, one **Lucy Muthoni** who died in 1961 or thereabouts, leaving behind three children, namely **Teresia Wachuka Giterio** (born around 1948), **Paul Kimani Maingi** (born around 1958) and the Objector who was born in between his two siblings. The deceased then took on the 1st Petitioner as a second wife in or about 1962. In 1997, he solemnized his marriage to the 1st Petitioner under the Christian Marriage and Divorce Act. (now repealed)

6. At the time of his death in 2006 the deceased had eight children with the 1st Petitioner. These are:-

a) Teresia Wacuka Maingi

b) Joram Mugi Maingi

c) Hannah Wangari Maingi

d) John Wachira Maingi

e) Daniel Maina Maingi

f) Peter Mwaniki Maingi

g) Margaret Wanjiku Maingi

h) Zakary Njuguna Maingi

7. In 2006, the deceased's estate comprised of the following properties:-

a) **Nyandarua/Muruaki/295** – 44 ½ acres acquired in 1975.

b) A commercial plot number **Nyandarua/Weru – Township/13** – a plot acquired jointly with one Njuguna Muchiri in 1977. This plot has some rental units from which monies collected have been deposited in the bank pursuant to a court order herein. The latest statement filed on 19th July, 2017 indicates that a total sum of Shs 340,832.79 (inclusive of interest) has been earned from the rentals.

c) A commercial **Plot No. Karati No. 27** acquired around 1982.

8. The issue in dispute regards the distribution of these properties among the beneficiaries. The 1st Petitioner proposes that the land parcel **Nyandurua/Muruaki/295** be shared equally between herself and all the children of the deceased, excluding the 2nd Petitioner (Objector) who according to her already benefited from a gift *intervivos* from the deceased.

9. The said gift is identified as a land parcel number **Naivasha/Maraigushu Block 4/1253** (Maraigushu Land) which measures 3.49 hectares (about 8 acres) registered in the name of the 2nd Petitioner in 1987. According to the 1st Petitioner this gift having been given to the Objector by the deceased the said Objector was not entitled to claim any further inheritance from the estate.

10. Asserting her contribution in acquiring the wealth comprising the deceased's estate, the 1st Petitioner contends that she should be allowed to retain the deceased's half portion of the Weru Township plot to cater for her needs, while the Karati Plot should be sold and proceeds thereof, including rents deposited in the bank be shared by all beneficiaries equally.

11. For his part, the 2nd Petitioner (Objector) takes issue with the above proposals. He disputes that he was a beneficiary of an *intervivos* gift from the deceased, asserting that being a businessman he acquired the Maraigushu land independently. He further disputes the joint ownership of the Weru plot between his father and a third party. Thus in his view, the land parcel **Nyandarua/Muruaki/295**, proceeds from the sale of the **Karati Commercial plot** and rental proceeds in the bank should be shared between the two houses; his mother's and the 1st Petitioner's.

12. Besides, he argues that there is no justification for the 1st Petitioner to solely inherit the entire plot at Weru Township. He argues that his father did not leave any will, oral or written. Thus the 1st Petitioner's assertions in respect of alleged last wishes of the deceased should be ignored.

13. The parties' submissions are in many ways a rehash of the material contained in their respective affidavits. The 1st Petitioner has only addressed the point of law that both male and female children are recoginsed as equal under Section 3 (2) of the Law of Succession Act.

14. Also cited in support of the positon that both male and female children of the deceased are entitled to equal shares of his estate are the decisions of the Court of Appeal in **Peter Karumbi Keingati & 4 Others -Vs- Dr. Ann Nyokabi Nguthi & 4 Others Nairobi Civil Application Number 235 of 2014; [205] eKLR**.

15. The Objector elected to highlight the fact the deceased married two wives under Kikuyu Customary law and therefore the estate ought to be shared into two equal parts going to each house. He relied on the case of Estate of **Chumo Arusei, Eldoret Probate and Administration Case Number 26 of 1978, [2003] eKLR** where Section 28 of the Law of Succession Act was applied.

16. I think therefore the first question to be considered in this matter is what law is applicable to this case. The deceased herein died intestate and whatever statements he may have made in his lifetime concerning the distribution of his estate do no amount to an oral will as prescribed under Section 9 of the Law of Succession Act. Further, the argument that the Kikuyu Customary law ought to apply in this case has no factual basis whatsoever. At the time of his death, the deceased resided at Kahuru, Nyandarua then in Central Province.

17. The case of **Chumo Arusei** cited by the Objector was before **Nambuye J.A.**, then a High Court Judge. The dispute involved two widows of the deceased who survived the deceased alongside their children. In reaching its decision the court relied on Section 28 of the Law of Succession Act, and not the Nandi Customary Law which was urged by one party but ultimately found inapplicable. Thus, the court did not apportion the estate of Chumo Arusei in the ratio of 50:50 between the two houses.

18. Although the authority cited by the 1st Petitioner (**Peter Karumbi Keingati**) involved a dispute between female children of the deceased on one hand and male children of the deceased and his widow on the other, Kikuyu Customary Law was urged by the Appellants as the law applicable in the administration of the deceased father's estate.

19. This is what the Court of Appeal observed:-

"The deceased died in 1990, long after the *Law of Succession Act* came into force. By *Section 2(1)* of the Act, the provisions thereof constitute the universal law of Kenya in all cases of intestate or testamentary succession to estates of persons dying after the commencement of the Act. The decision to formulate and adopt a universal succession law for Kenya was informed by a deliberate policy to achieve some level of uniformity and equity in succession matters.

Where necessary, the Succession Act provides for continued application of customary law in succession matters in specified Districts. The District of the deceased, Kiambu District, is *not* one of the areas where customary laws of succession still apply.

There is nothing in the Constitution to suggest that reference therein to culture, customary and personal laws was intended to substitute the universal law of succession of Kenya, with customary law. That would be an absurd assertion, which could easily be extended to, for example, replacing the universal penal law of Kenya with customary penal laws."

20. Section 32 of the Law of Succession Act does not contain in its schedule any District in Nyandarua as among those excluded from the application of the Law of Succession Act. Thus Section 33 of the Law of Succession Act which applies Customary Law in cases of intestacy in the excluded districts cannot apply to the case before us.

21. It is unfortunate that neither counsel for the parties pinpointed relevant specific provisions of the Law of Succession Act or decided cases to guide distribution in this case. At different points, the parties' submissions appeared to suggest that the deceased was a polygamous man. That is not correct. The deceased had one wife until **1961.** Upon her death, he married the 1st Petitioner in **1962.** The latter union was solemnized as a monogamous marriage in **1997**.

22. Thus the reference to 'house' and the proposed distribution at the ratio of 50:50 based, clearly on Section 40 of the Law of Succession Act is misplaced, in my view. While the definition of 'house' in the Law of Succession Act may include a dead wife, and her children, the term house seems to be reserved only in instances where the deceased was polygamous.

23. Moreover the definition of the term 'wife' in the Act does not include a deceased wife. What is not in dispute in this case is that at his death, the deceased had a total of eleven children by his deceased wife and the 1st Petitioner. In my considered opinion therefore Section 35 of the Law of Succession Act ought to apply.

24. Section 35 of the Law of Succession Act states:

"(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to-

(a) the nature and amount of the deceased's property;

(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;

(c) the existing and future means and needs of the applicant and the surviving spouse;

(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;

(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;

(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and

(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children."

25. In the case of **Rono -Vs- Rono [2005] eKLR** the Court of Appeal considered whether equality in distribution is synonymous with equity. The court expressed itself as follows:-

> **"I had the advantage of reading in draft form the judgment prepared by Waki, J.A., and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned Judge to be laying down any principle of law that the Law of Succession Act, Cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr. Gicheru. I can find no such provision in the Act.**
>
> **My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has discretion to take into account the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each hose be taken into account.**
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> **Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in a case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality."**

26. The above case was decided prior to the coming into effect of the 2010 Constitution. Article 45 (3) of the Constitution provides that:

> **"(1) ……..;**
>
> **(2) ……..;**
>
> **(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.**
>
> **(4) ……..."**

27. Article 27 guarantees for the equality of all before the law and the right to equal protection and the benefit of the law. The Article further proscribes discrimination on grounds including race, sex and marital status. These articles bind this court while applying Section 35 of the Law of Succession Act to ensure that all beneficiaries are treated equally, though that may not mean, for purposes of distribution of an estate, a surgical precision in sharing the assets of the estate.

28. In this case, it is obvious that all the properties acquired by the deceased were registered in his name at least a decade after the death of his first wife. That however does not exclude the possibility that though she died young, the first wife helped the deceased lay a foundation for future acquisitions.

29. Undoubtedly 1st Petitioner lived longer with the deceased and played a role in solidifying the estate. The 1st Petitioner had eight children while the deceased had three before her death. Were the court to agree with the method of distribution proposed by the Objector, the 1st Petitioner and her children would be disadvantaged and equity would not have been done. Because, three siblings including the Objector would end up receiving the lion's share of the 44 ½ acres, for instance as compared to the share to the 1st Petitioner and her children. Clearly the latter family's parcels after subdivision would end up being very small as compared to the former family.

30. Such a mode of distribution not only negates the widow's standing as a wife/woman but also deprives her children of their father's due inheritance. While on this point, it is evident to me from the fact laid before me that the 2nd Petitioner has been less than candid as regards his land at Maraigushu. First of all, it is incorrect to say that the 1st Petitioner did not tender evidence that this land was a gift from the deceased. The 1st Petitioner attached to her affidavit filed on 1st October, 2015, three receipts issued by **New Karati Farmers' Co-operative Limited [MKM 7a and b]** as evidence that the Maraigushu land was acquired by the deceased through a land buying company in 1975.

31. Secondly, she annexed the green card in respect of **the Maraigushu land (MKM4)** which shows that the land was registered in the name of **Joseph Maina Maingi ID Number 2928559/65** of **Post Office Box 42 North Kinangop** in **1987**. Her contention is that in that period the 1st Objector was barely 19 years old.

32. Apart from making mere denials, the Objector has not tendered any sort of proof that he bought the said land himself, or from which entity and how. What I found most disingenuous is the fact that the Objector was quick to state at paragraph 34 of his affidavit filed on 7th October, 2015 that his biological siblings were aged 49 and 39 years respectively in 1997 when his father formalized his marriage to the 1st Petitioner, but fails to state his own age at the time. He had stated that in the initial phase of the proceedings, he entrusted this matter to the 1st Petitioner out of trust. In subsequent depositions, particularly the affidavit filed on 7th October, 2015 the Objector vilified the 1st Petitioner claiming that she had always schemed to disinherit his side of the family.

33. Evidently the Objector was born in years between 1948 and 1958 when his first and last biological sibling were born. The 1st Petitioner has asserted that the said Objector was six years old in 1961 at the time his mother died. Even assuming that he was aged 10 years in 1961, he would have been about 24 years old in 1975 when the company shares in respect of the Maraigushu land were bought. He ought to have some evidence, being a businessman to show how he acquired the Maraigushu land. I do not therefore accept the argument that this land is

not to be reckoned in this case, because in my view it was a gift *intervivos* to the Objector from the deceased.

34. Section 42 of the Law of Succession Act provides 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."**

35. In the circumstances, I am inclined to believe that the Maraigushu land was property given to the Objector by the deceased prior to his death. That property must be borne in mind by the court while distributing the estate.

36. That said, I take the position that under the Law of Succession Act there is no distinction made between children of a deceased, whether male or female, whether born of a first, second or deceased wife. All are equal children of the deceased person. Therefore, all the eleven sons and daughters of the deceased stand in similar position.

37. With regard to **Plot Karati 271** the parties agree that it ought to be sold and proceeds shared equally between the surviving spouse (1st Petitioner) and the 11 children of deceased. That to my mind seems to be sensible proposal.

38. Regarding the Weru Township plot, the court did on 15th June, 2015 allow by consent the motion brought to enjoin **Njuguna Muchiri** as a beneficiary, claiming half portion thereof. The title document, a certificate of lease issued in February 1977 indicates that the said party and the deceased were joint owners thereof. Thus the Objector's resistance towards **Njuguna Muchiri** seems to lack any basis there being no material to controvert the title documents exhibited by the 1st Petitioner.

39. Admittedly, the portion of the said plot belonging to the deceased is developed and is the source of the monies now lying in the estate account. The 1st Petitioner was a dependent of the deceased. She requires a home and some form of income for her sustenance in the remaining days of her life. In my own view, the income from the **Weru Plot** and the half portion of the plot itself ought to exclusively devolve upon her absolutely for the latter purpose.

40. Considering that the Objector has already benefitted from a gift *intervivos* consisting of 8 acres of land at Maraigushu, I would distribute the 44.5 acres of **Nyandarua/Muruaki/295** as follows:-

	Name	**Share**
1.	**Joseph Maina Maingi**	**2 Acres**
2.	**Maria Kaboo Maingi**	**4 Acres**
3.	**Paul Kimani Maingi**	**3.85 Acres**
4.	**Teresia Wacuka Gitero**	**3.85 Acres**
5.	**Teresiah Wacuka Maingi**	**3.85 Acres**
6.	**Joram Mugi Maingi**	**3.85 Acres**
7.	**Hannah Wangari Maingi**	**3.85 Acres**
8.	**John Wachira Maingi**	**3.85 Acres**
9.	**Daniel Maina Maingi**	**3.85 Acres**
10.	**Peter Mwaniki Maingi**	**3.85 Acres**
11.	**Margaret Wanjiku Maingi**	**3.85 Acres**

12.	**Zakary Njuguna Maina**	**3.85 Acres**

41. Concerning the sum of **Shs 340,000/=** in the bank, the same is to be **shared equally** among all the 12 beneficiaries. The confirmed grant is to issue in accordance with the above distribution, noting further the rectification of the name of the deceased, vide the application allowed on 15th June, 2015.

42. Each party will bear own costs.

Delivered and signed at Naivasha this 24th day of October, 2017.

In the presence of:-

Mr. Njuguna holding brief for Mr. Gichuki for the 1st and 3rd Petitioner

Mr. Kimani for the Objector/2nd Petitioner

Court Assistant – Barasa

C. MEOLI

JUDGE