REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

SUCCESION CAUSE NO.1509 OF 2001

IN THE MATTER OF THE ESTATE OF LATE RUFUS MUNYORI MATHA ALIAS RUFUS MUNYORI

JUDGMENT

1. The application before this court is the summons dated 10th February 2015. It is brought under Sections 47 and 71 of the Succession Act .The applicant seeks orders that, the issue/ dispute of four (4) acres comprised in **TITLE NO. OTHAYA/IHURIRIO/252** and forming part of the estate herein be determined by way of parties filling submissions.

2. The applicant **James Murithii Munyori** in his affidavit in support of the said application dated the 10/2/2015, avers that the beneficiaries are in agreement of the distribution of the estate save for a small portion of 4 acres of **TITLE NO. OTHAYA/IHURIRIO/252.** That from the said portion their father had donated a small portion of ¼ an acre for a tea-buying center and it was the beneficiaries wish that a portion of the said parcel of land be curved out for a graveyard, which brought about the issue of the size of the same resulting to the current dispute. All parties were agreeable to the said issue be disposed off by way of written submissions.

3. The respondent **Joshua Mwaniki Munyori** in reply to the said application filed their replying affidavit dated 7th April 2015. The respondent avers that parties have not agreed to dispose off the issue via written submissions nor that ¼ of the said portion of land had been donated to a tea buying center or that ¼ had been agreed to be curved for purposes of a grave yard. He avers that the parties wished that the applicant share the land in **TETU/ICHAGACHIRU/373** where they were born and brought up while they shared out the land in Othaya being ***OTHAYA/IHURIRIO/252*** with the 4 acres curved out of Othaya 4 acres cater for tea buying company and cater to the graveyard of their parents. He avers that the other beneficiaries were in agreement of this position save for the applicant who holds a contrary view. He added that their family had more members that the applicants and the Tetu land was enough for the applicant's house. He was of the view that the parties come to court to give evidence to enable this court make an informed decision.

4. When this matter came up for hearing the Court heard the parties and thereafter submissions were filed.

5. PW1 in his testimony testified that his father left two properties **Tetu/Ichagachiku/379** measuring 9 acres and **Othaya/Ihuririo/252** measuring **13 acres**. He and his siblings stay in Tetu while the second house stays in Othaya. That they are interested in Othaya 252 because the 2 properties are of different sizes one is 4 acres bigger than the other one, 252 is bigger than 379. That ***Othaya/Ihuririo/252*** is where his father and elder brother are buried and it was their wish that the said graveyard be preserved reason they sought to have ¼ acre be curved out for purposes of graveyard adding that ¼ acre had been set aside by his father for use by the local tea-buying center. He testified after the said ½ acre is removed there would be 3.5 acres remaining which he sought to have distributed equally between the two houses.

6. On cross examination he stated that he has lived in Tetu since he was 4 years to date and that they began living there in the 70's. That during the first 4 years of his life he lived in 252 and that they were moved in the early 70's. That he does not know where his step mother lived before she moved to Othaya. That the 2nd house has never lived in Tetu. That from 1973 to 1991 the 2nd house lived in Othaya and that from 1963 to 1973 his family occupied both, but his father moved them when he married again. That the

two families have not lived together neither did he divide the land into 2 pieces. That his father wished to be buried in Othaya and that his father would not have apportioned 252 as a grave yard, neither did he do so. That there is no likelihood that they will live together as they have never done so.

7. The respondent in his testimony stated that they reside in **Othaya/ Ihuririo/252** and have lived there from 1978 with the first family living in **Tetu/Ichagachiku/379**. They have never lived together. That their late father gave out apportion of the land to the tea buying center but the same was not curved out from the title and the same was not written down. That his late father said he be buried in Othaya but he never heard him say there be a graveyard. That they were not in disagreement in having a graveyard but they were yet to sit and discuss on portion of the same. That Michael Kurihi once subdivided 252 without their knowledge adding that they are claiming a portion of the said parcel of land because they have planted tea and trees.

8. In cross examination he admitted that his father gave ¼ to that tea buying center and that his father also said a grave yard be curved out of 252. That the rest of the portion was left by his father that way.

9. Both parties filed written submissions, which I have read and considered. It is not in contention that the deceased died leaving behind two wives hence his estate had two houses. It is not in dispute that the first house is in occupation of **Tetu/Ichagachiru/379** whilst the second house is in occupation of **Othaya/Ihuririo/252.** From the parties submissions parties wish each to remain in the portion of land they have been in occupation of this far. The only issue in contention is the size of the portion of land donated by the deceased towards the tea buying company and the portion where the deceased and his son are buried and where both houses agree that the same be used for purposes of a family graveyard and the extra acres left. The applicant proposes that after curving out the 1 acre from the said portion of land the remainder is shared equally amongst the two houses. The respondent on the other hand proposes that ½ to go towards the tea buying company, 1½ acres to go towards graveyard while 11 acres go towards the beneficiaries of the second house. According to the revoked confirmation certificate, the first house has nine beneficiaries while according to the application for revocation of the said confirmed grant it appears that the second house has nine children. From the said information from the court record, it contradicts the respondent's claim that the second house had more beneficiaries than the first house. From the court's record, it is clear that both houses have equal number of beneficiaries. Noting that **Othaya/Ihuririo/252** measures 13 acres and that the beneficiaries agree to curve out and give a portion to the tea-buying center and curve out a portion for a family graveyard. This court finds it fair to apportion ¼ acre from the said parcel of land for the tea buying center as was the wish of the deceased and ¼ acre be curved out for the purpose of the family grave yard to be jointly held by both houses as it appears that the remains of the deceased are laid there and it holds sentimental value for both houses. This leaves 3 ½ acres in 252. It is only fair that the said 3 ½ acres be divided equally between the two houses with each getting 1.75 acres. It is not denied that the 2 families have not lived together. I have my decision with this in mind and hope that the parties will endeavor to live in peace with one another but if they cannot then the 2nd house can considering buying the portion awarded to the 1st house at the current market value. Each party to bear its own costs. Orders accordingly.

Dated, Signed and delivered this ***29th*** day of ***January*** 2016.

R. E. OUGO

JUDGE

In the presence of;

.....For the Applicant

.....….For the Respondent

Ms. Charity **Court Clerk**