



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 682 OF 1991**

**IN THE MATTER OF THE ESTATE OF SAMUEL NDEGWA JOSHUA (DECEASED)**

**ELIZABETH WANGECHI NDEGWA.....APPLICANT/  
OBJECTOR**

**VERSUS**

**FREDRICK JOSHUA NDEGWA.....1ST  
RESPONDENT**

**TIMOTHY JOSHUA MUGO.....2ND  
RESPONDENT**

**RULING**

Samuel Joshua Ndegwa died intestate on 26th May 1989.

He was survived by three wives (the Applicant (3<sup>rd</sup> Widow) and Fridah Wangui Ndegwa and Virginia Nyambura Ndegwa (deceased) and 29 children. They comprise of 8 children in the 1<sup>st</sup> house, 11 children in the 2<sup>nd</sup> house and 10 children in the 3<sup>rd</sup> house as outlined in the petition. The 3 widows petitioned this court for a grant of letters of administration intestate on 20th May 1991. The same was issued jointly to them on 3rd June 1992.

On 23<sup>rd</sup> May 1994, the Respondents filed summons for confirmation of grant issued to them and in the supporting affidavit proposed a mode of distribution in which each of the three widows would get equal shares of the properties forming the estate of the deceased, being;

- a. L.R No.LOC 16/ Ndunyu Chege/339,
- b. L.R No.7/ Gakoigo/1166,
- c. L.R No. Loc 16/ Ndenyu Chege/ 794 and
- d. Plot No.21/ Ndunyu Chege Market.

Additionally, one beneficiary of the estate, Timothy Joshua Mugo, being the eldest child of the deceased by his 1<sup>st</sup> wife Fridah Wangui Ndegwa was to get 0.52 acres of L.R No. LOC 16/ Ndunyu Chege/339. The parcel of land was bequeathed to the 1<sup>st</sup> born son of the deceased as gift *intervivos*.

On 13<sup>th</sup> June 1994, the Applicant filed a notice of objection to the summons for confirmation as well as an affidavit in protest to the proposed distribution on the grounds that her two co-administrators had failed to consult her and she had not consented to the proposed distribution. She deponed that the proposal to give Timothy Joshua Mugo 0.52 acres of Loc 16/Ndunyu Chege/339 is tantamount to giving him preferential treatment. It was her case that the three administrators had agreed to all share the estate properties equally amongst themselves and that the children were to inherit from their respective mother's houses according to Kikuyu Customary Law.

Before the summons for confirmation and the objection therein could be heard, the 2<sup>nd</sup> widow passed on 18<sup>th</sup> June 2006. On 22<sup>nd</sup> April 2015, the Court substituted the deceased widow, Virginia Nyambura Ndegwa with her son Fredrick J. Mugo Ndegwa as one of the administrators in an application dated 2<sup>nd</sup> July 2013 and the grant of letters of administration amended accordingly.

The parties filed their respective submissions in support of their cases. It was submitted for the objector there was no valid reason for one of the children of the deceased being given preferential treatment over all the other beneficiaries some of whom were still minors. It was further submitted that Kikuyu customary law was applicable which stipulates that the estate should be divided among the three widows each representing the three houses. Lastly that the deceased had not bequeathed any of the beneficiaries any portion of his estate.

The children from the 1<sup>st</sup> and 2<sup>nd</sup> houses filed affidavit in support of the summons for confirmation and written consents stating that the deceased during his lifetime gave the eldest son Timothy 0.52 acres of parcel No.16/Ndunyu Chege/339 and thus were not in objection to him being given the said share as proposed in the summons for confirmation. Fredrick J.Mugo Ndegwa, the eldest son of the 2<sup>nd</sup> widow the late Virginia Nyambura Ndegwa also filed a supplementary affidavit in support of the Summons for confirmation and the proposed mode of distribution.

This court, on 1<sup>st</sup> February 2016 directed that each party files their proposals for distribution of specifically the suit property L.R No. Loc 16/Ndunyu Chege/339 whose distribution is in dispute. The same has been filed with the objector proposing that be divided equally among the three houses of the deceased. The 1<sup>st</sup> and 2<sup>nd</sup> widows children, consented to the proposal that Timothy Joshua Mugo Ndegwa be given 0.52 acres of L.R No. Loc 16/Ndunyu Chege/339, with the remainder of the parcel being subdivided equally among the three houses. It was stated that this mode of distribution was in accordance with the wishes of the deceased and a sketch-mapped allegedly drawn by the deceased attached in support.

The deceased died intestate in the year 1989. He was a polygamous man with three wives and a total of 29 children. Succession to his estate should thus be in accordance to **section 40 of the Law of Succession Act** provides that:-

***“(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.”***

The applicable law is **Law of Succession Act cap 160** as the deceased died after July 1981 when the Act came into force. The mode of distribution should be as prescribed by **Section 40 of the Act**. However, in light of the fact all beneficiaries have agreed to distribute all properties per each house or home equally between 3 homes, the Court finds their agreed proposal fair enough and endorses it.

All the beneficiaries are in agreement on how to share all the other properties among the three houses equally except for parcel No.LOC 16/ Ndunyu Chege/339; which the members of the 1<sup>st</sup> and 2<sup>nd</sup> houses are in agreement that Timothy Joshua Mugo Ndegwa should be given 0.52 acres of it as had been allotted to him by the deceased during his lifetime, and the remainder be shared equally among the three houses. The objector is against this proposal stating that it is preferential treatment of one beneficiary as the

deceased had not distributed any portion of his property in his lifetime.

I find the proposal by the Respondents which majority of the beneficiaries are in support of to be the most favourable and will uphold the same. From the evidence it seems that the deceased apportioned 0.52 acres of No.LOC 16/ Ndunyu Chege/339 to his eldest son Timothy Joshua Mugo Ndegwa as gift *intervivos* under **Section 42 of the Law of Succession Act**.

The fact that more than half of all the siblings consent to this portion of land be hived off for their brother and step brother respectively convinces the Court that the deceased actually did allocate him this portion of land during his lifetime. The children losing beneficial interest in this portion to the 2<sup>nd</sup> Respondent are not only those of the Applicant but all the children including those who gave their consent to the mode of distribution.

That is why the Respondent had started putting up his home thereon before being stopped by an injunction issued by this court vide the Consent of 26<sup>th</sup> April 1994 until the grant is confirmed. It would be unfair for him to be denied his right as bequeathed to him by the deceased.

### **COURT ORDERS**

- 1. The grant issued on 3<sup>rd</sup> May 1992 is confirmed in terms of the affidavit in support of the summons for confirmation of grant, the consents of beneficiaries of the 1<sup>st</sup> and 2<sup>nd</sup> houses and the mode of distribution.**
- 2. The Applicant's protest is denied as most of the beneficiaries have consented to the mode of distribution; that part of the suit property was bequeathed to the 2<sup>nd</sup> Respondent as gift *intervivos*.**
- 3. I order that the properties be distributed in accordance to the mode proposed by the Respondents in their summons for confirmation dated 23<sup>rd</sup> May 1994.**
- 4. The 2<sup>nd</sup> Respondent may continue with construction of the said house taking into account the other beneficiaries interests on the suit property.**
- 5. The subdivision shall ensure each beneficiary remains where they have developed constructed or are cultivating.**
- 6. This being a family matter there shall be no order as to costs.**

**READ AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31<sup>ST</sup> DAY OF MARCH, 2016**

**MARGARET W. MUIGAI**

**JUDGE**

**In the presence of;**

**Wangombe holding brief Mbabu for the Applicant.**