



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 40 OF 2009

**IN THE MATTER OF THE ESTATE OF JOHN KIIRU KIMONDO ALIAS JOHN KIIRU ALIAS
KIIRU KIMONDO-DECEASED**

JUDGEMENT

John Kiiru Kimondo alias **John Kiiru** alias **Kiiru Kimondo** (herein after referred to as the deceased) died intestate in 18th April 2006. On 12th January 2009 **Martha Nyaguthii Karigu** and **Stephen Kinuthia Kiiru** (herein after referred to as the Petitioners) and in their capacity as the deceased's wife and son petitioned for letters of administration intestate to the deceased's estate.

The petitioners listed the following as the persons surviving the deceased:-

- a. Martha Nyaguthii Karigu.....Wife
- b. Stephen Kinuthia Kiiru.....Son
- c. Beatrice Wanjiru Kiiru.....Daughter
- d. Evanson Kimondo Kiiru.....Son
- e. Edwin Kiragu Kiiru.....Son
- f. Erastus Kimondo Kiiru.....Son
- g. Joseph Muchuku Kiiru.....Son
- h. Lydia Mweru Kiiru.....Daughter
- i. J K K.....Son

Annexed to the said petition is a letter from the local chief dated 28.11.2008 naming the above named persons as the persons who survived the deceased. The consent to the petition is shown as signed by the above persons except **Edwin Kiragu Kiiru** and **Joseph Muchuku Kiiru**.

The properties listed in the affidavit in support of the said petition are **Othaya/Kiahagu/[particulars withheld], 2 shares with Wiyumiuririe Farmers Co-op Society Ltd, Shares with K. C. B. Ltd, Shares with ICDC Investment Co. Ltd and KTDA Farmers Co. Ltd Shares.**

The Petition was gazetted on 13th March 2009 and the grant of letters of administration was issued on 14th April 2009. On 27th September 2012, **Beth Mweru Kimondo** applied for the revocation of the said grant but the said application was marked as withdrawn on 18th July 2014 and the court directed that her interest be noted during the confirmation and the petitioners were directed to apply for confirmation within 21 days from the said date.

On 8th August 2014, the petitioners herein applied for the confirmation of the said grant and proposed distribution of title number **Othaya/Kiahagu/[particulars withheld]** as follows:-

- a. *Martha Nyaguthii Karigu.....0.125 acres*

- b. *Stephen Kinuthia Kiiru*.....0.2 acres
- c. *Beatrice Wanjiru Kiiru*.....0.2 acres
- d. *Evanson Kimondo Kiiru*.....0.2 acres
- e. *Edwin Kiragu Kiiru*.....0.2 acres
- f. *Erastus Kimondo Kiiru*.....0.2 acres
- g. *Joseph Muchuku Kiiru*.....0.225 acres
- h. *Lydia Mwera Kiiru*.....0.225 acres
- i. *J K K*.....0.225 acres..(*Minor- to be held trust of the administrator*).

The petitioners also proposed that the KTDA shares be shared equally among the children, that KCB Shares and ICDC shares be transferred to **Martha Nyaguthii Karigu**, that Wiyumiririe Co-op Shares to be shared among the children and the tea bushes on the above land to be shared equally among the children,

On 3rd December 2014, **Beth Mweru Kimondo** filed an affidavit of protest to the making of the grant stating *inter alia*:-

- a. *That the deceased is her son and that her deceased husband a one **Erastus Kimondo Kiiru** prior to his death transferred his land whose number she cannot recall and the same was registered in the name of **John Kiiru Kimondo**.*
- b. *That **John Kiiru Kimondo** was left with land parcel number **Othaya/Kiahaga/[particulars withheld]** measuring **1.8 acres** or thereabouts and she was to remain with **1/2 acre** out of the said land while the family of her son were to retain **1.3 acres** to share as they wished.*
- c. *That before the deceased in these proceedings died he wrote the document marked **BM 1a & b** annexed to her affidavit stating what she was to get out of the said land, which document was witnessed by among others **Stephen Kinuthia Kiiru** and that she has stayed on the said portion with her daughter and granddaughter even prior to her husband's death.*
- d. *That she has 500 tea bushes on the said land and after the death of her son his family became hostile because of the said land and that herself and her daughter were dependants of the deceased and that they are the only ones residing on the land.*

In response to the above **Stephen Kinuthia Kiiru** swore the affidavit dated 27th February 2014 stating *inter alia* that:-

- a. *That he is the first born son of the deceased, and has three brothers and one sister, that his late mother was the first wife of the deceased herein, while the protestor was the second wife to his late grandfather.*
- b. *That the grandfather divided the land into 7 portions and gave a portion to each son and retained a portion measuring 2 acres for himself and that each son obtained a title deed for their respective portions prior to his grandfathers death.*
- c. *That the protestors claim is not true and that the alleged document is dated 4. 3. 2001 while the deceased died in 2006, and that the document is dated just one day after their mother was buried.*
- d. *That the protestor is being misled by other parties.*

Also on record is the affidavit of **Martha Nyaguthii Karigu**, the second wife to the deceased, and a daughter in law to the protestor. She states that:-

- a. *That in 1987, **Erastus Kimondo Kiiru** subdivided his land among his six sons and himself and that her husband, the deceased was one of the said sons and each one of them obtained a title deed for their respective portions.*
- b. *That her claim that she was given land by her late husband is not true, that the protestor is over 80 years old and has a life interest on the land.*

The protestors advocate submitted that the protestor has not been named as a beneficiary or a person interested in the estate of the deceased, hence her reasons for the protest, that the application for confirmation of grant did not include her or her daughter who lives on the land and has tea bushes on the

said portion. Counsel reiterated that the deceased left instructions for her to get **1/2 an acre**. That it is not disputed that the protestor lives on the said land and has tea bushes and that the applicants only prefer to give her a life interest, that all what the protestor wants is a title to the land as opposed to a life interest as suggested.

The first petitioner filed submissions and strongly opposed the document relied upon by the protestor. Similar position was held by the second protestor who submitted that the petitioner has failed to prove the veracity of the said document and cited authorities to prove that the said document is not a will.

The petitioners have spared no energy while contesting the veracity of the document relied upon by the protestor to the extent that they have overlooked other crucial evidence. For example, even without considering the contested document, it is admitted that the protestor, aged 80 years lives on the land and uses her portion, and has been in occupation over the years. That was the position by the time the grandfather died, and also by the time the deceased in this case died. It is not disputed that she has planted tea on the land. The petitioners insist that she is only entitled to a life interest on the land. At least they admit that she has an interest in the land, but they insist that she can only use the land during her life time. In other words, they are comfortable with her using the land as long as she lives. They have not explained why they prefer her to use the land as long as she lives but they do not want her to be issued with a title deed. The positive point to note in the position adopted by the petitioners is that no one is denying that she has an interest in the estate, hence a beneficiary. What is disputed is the nature of her interest, whether it should be a life interest of an absolute interest.

“*Life interest*” is not defined in the Law of Succession Act. *Black’s Law Dictionary*^[1] defines it as “*an interest in real or personal property measured by the duration of the holders or another person’s life.*” Discussing the same issue, **Justice Musyoka** in the case of *Tau Katungi vs M. T. Katungi & Antother*^[2] had this to say:-

“In the context of Section 35 it is an interest held by the surviving spouse during their life ‘in the whole of the residue of the net interest estate.’ Its effect is that the surviving spouse first enjoys rights over the property and at his or her death the property passes to other persons.”

The protestor is not a spouse of the deceased. She is a mother to the deceased and a grandmother to the petitioners, so the life interest described under Section 35 cited above cannot apply. I find no legal basis upon which the petitioners insist on conferring to the protestor a life interest.

Life interest confers a limited right to the surviving spouse over the estate. In the present case, life interest cannot apply. The protestor is not claiming as a spouse, but as a mother to the deceased. She has sworn that she is a beneficiary to the deceased's estate and its is instructive that this has not been denied. In particular she has stated in her affidavit that she was a dependant of the deceased. This averment was not disputed. The petitioners concentrated on disputing the document produced by the protestor instead. She is in my view entitled to enjoy absolute ownership over the property as opposed to the life interest being offered.

Section 47 of the Law of Succession Act^[3] enjoins the High Court to entertain any application and determine any dispute under the Law of Succession Act and pronounce such decrees and make such orders therein as may be expedient.

Further under Rule 73 of the Probate and Administration Rules it is provided:-

“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Having carefully considered the law, the evidence on record and the submissions and bearing in mind that it is admitted that the protestor lives on the land, I find that the protestor is entitled to the **1/2 an acre** of land she occupies out of **Othaya/Kiahagu/[particulars withheld] plus the tea bushes on the said**

portion.

I also note that the protestor is not claiming any of the other assets of the deceased, hence I allow the rest of the distribution as proposed in the application for confirmation of the grant.

I accordingly find that the protest has merits, allow it and order as follows:-

- i. *That the grant of letters of administration made on 14th April 2009 to John Stephen Kinuthia Kiiru and Martha Nyaguthii Karigu be and is hereby confirmed.*
- ii. *That the portion of land currently occupied by the protestor Martha Nyaguthii Karigu being part of Othaya/Kiahagu/[particulars withheld] measuring approximately 1/2 an acre be excised out of the said title and the same be transferred to her to own absolutely.*
- iii. *That the protestor is the lawful proprietor of all the tea bushes on the said portion measuring 1/2 an acre.*
- iv. *That the remaining portion after excising the 1/2 an acre referred to above be shared equally among the following:-*

Martha Nyaguthii Karigu.

Stephen Kinuthia Kiiru.

Beatrice Wanjiru Kiiru.

Evanson Kimondo Kiiru.

Edwin Kiragu Kiiru.

Erastus Kimondo Kiiru.

Joseph Muchuku Kiiru.

Lydia Mweru Kiiru.

J K K..... Minor- to be held by Martha Nyaguthii Karigu and Stephen Kinuthia Kiiru in trust by the minor).

v . *That administrators are hereby ordered to sign such documents as may be necessary to facilitate the sub-division and transfer of the above land as herein above ordered.*

vi. *That in the event both administrators or one of them fail or refuse to execute the said documents **within fourteen days** from the date of being so requested, then the Registrar of this court shall proceed to sign such documents as may be necessary to facilitate the sub-division and transfer of the said land to the beneficiaries herein.*

vii. *That KTDA shares shall be shared equally among the children of the deceased, namely, Stephen Kinuthia Kiiru, Erastus Kimondo Kiiru, Joseph Muchuki Kiiru, Lydia Mweru Kiiru, Julius Kiarie Kiiru, Beatrice Wanjiku Kiiru, Evanson Kimondo Kiiru Edwin Kiragu Kiiru*

viii. *KCB Shares and ICDC Shares to be transferred to Martha Nyaguthii Karigu.*

ix. *Wiyumiririe Co-operative Shares to be shared equally among the children of the deceased, namely, Stephen Kinuthia Kiiru, Erastus Kimondo Kiiru, Joseph Muchuki Kiiru, Lydia Mweru Kiiru, J K K, Beatrice Wanjiku Kiiru, Evanson Kimondo Kiiru Edwin Kiragu Kiiru.*

x. *No orders as to costs.*

Right of appeal 30 days

Dated at Nyeri this 17th day March of 2016

John M. Mativo

Judge

[1] Nineth Edition, West, 2009

[2] {2014} eKLR

[3] Cap 160 Laws of Kenya