



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**SUCCESSION CAUSE NO. 222 OF 2011**  
**IN THE MATTER OF THE ESTATE OF ETHAN MUCHAI KINGARE (DECEASED)**

**JUDGMENT**

Ethan Muchai Kingare (hereinafter the deceased) died intestate on the 12th November, 2005. He left behind his 3rd wife Rebecca Kamene Muchai and 14 children.

Rebecca Kamene Muchai (hereinafter the petitioner) applied for and obtained letters of administration in respect of the estate of the deceased. The said letters were issued on 1st February, 2012.

Vide a summons for confirmation of grant dated 30th January, 2013 the petitioner sought confirmation of the grant.

This summons elicited a protest from Rebecca Wairimu Ndura, a daughter of the deceased. In the protest the said Rebecca challenges a purported will. Her proposal is that all the estate should be divided among the children equally.

In response, the petitioner filed a further affidavit stating that the deceased had all along his life time made known the way he would wish to have his estate distributed.

Oral evidence was adduced in support of the respective positions taken by the parties.

In her evidence, the protestor indicated that her deceased father had 3 wives with 14 children in total.

On cross-examination, she stated that property ref. Kalenjin Enterprises (Rhoda) No.127 is one (1) acre in extent and that is where petitioner lives. The property has rental rooms (65 units) each rented out at Kshs.1200/=. She added that parcel No.Miti Mingi/Baruk Block 3/40 consists of ½ acre. She would wish to have it subdivided to all the children. She added that the total number of children is thirteen (13). She offered that this plot can be given to the one with many problems.

The petitioner stated that the property Miti Mingi/Baruk/340 should have been given to the 8th daughters of the 2nd house. Plot No.354 was to be given to the eight (8) daughters of the 2nd house. The only daughter in the 1st house was given land by the father along time ago.

The Rhoda plot was to be given to her (petitioner). After her death, the same was to devolve to David, Joseph and Thomas. These were the wishes of the deceased.

Both parties filed written submissions.

I have had occasion to consider the summons for the confirmation of grant, the affidavits filed, oral evidence and submissions on record.

The deceased died intestate and that explains why the petitioner petitioned for letters of administration intestate. The purported wishes of the deceased are not supported by evidence. There is a document alluded to in the submissions of counsel for the petitioner but curiously the same is not mentioned or produced in the petitioner's evidence. Even assuming the document existed, then that would mean that the deceased had died testate in which case the petitioner would not have applied for letters of administration intestate.

As held **In the Matter of the estate of James Migwi Gakau** (Deceased), [2016] eKLR, for the wishes of a deceased person to be protected, respected and preserved, there must be expression of the wishes and intention in a clear manner and steps must be taken to ensure that the wishes are effected. The court stated:

**“The deceased in this case not only expressed his wishes but took crucial steps which left no doubts as to what his intentions were and long before he died he not only divided his land as stated above, but he also settled each wife in their respective portions.”**

In our instant case, the wishes and intention alluded to is not demonstrated in a clear manner and indeed no steps are shown to have been taken to ensure the wishes are effected. So what is the mode of distribution applicable to our instant case?

The deceased died intestate in 2005 after the commencement of the **Law of Succession Act (Cap 160 L.O.K.)**

The applicable law in distribution of the estate herein will be found in **Section 40** thereof which makes provision for the distribution of the net estate where the deceased had married more than once. **Section 40(1)** provides:

**“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 deceased herein was survived by a widow and:

- i) One (1) child from his first wife.
- ii) Eight (8) children from the 2nd wife.
- iii) Five (5) children from the 3rd wife.

Taking the widow as a unit within the meaning of **Section 40 (1)** of the **Law of Succession Act**, the estate should devolve to 14 units.

The deceased left the following properties:

- i) Plot No.29/127 Rhoda Estate
- ii) Solai Ndungiri Block 3/1965 (0.1 hectare)
- iii) Miti Mingi/Mbaruk Block 3/40 (2.6 Ha)
- iv) Nakuru/Ol Rongai phase 11/354 (2.8 Ha)

Land parcel No.Solai Ndungiri Block 3/1965 which is 0.1 hectares is already transferred to the 1st house through the daughter of the only child of the 1st house Dorcas Wamaitha. In doing the distribution, this fact must be put into account.

The distribution applicable within the meaning of **Section 40(1)** of the **Law of Succession Act** would result in a ratio of 1:8:5 based on the units in each house.

An issue arises as to the inapplicability of the above ratio to the property plot No.29/127 given that this is a commercial property in Nakuru town whose total extent is about one (1) acre. The same is not practically divisible by the fourteen (14) units and indeed the obtaining Land Laws and by-laws would not allow. This court therefore has to make a determination in what would be the most equitable way to distribute the same.

All factors considered, this court makes a determination on distribution as follows:

1. Solai Ndungiri Block 3/1965 to remain with the 1st house the property having been transferred to Leah Wairimu, a daughter of the only child of the 1st house - Dorcas Wamaitha.
2. Properties No.Miti Mingi/Mbaruk Block 3/40 and Nakuru/Ol Rongai phase 11/354 ought to be subjected to the ratio to 1:8:5 above stated. However, I have to consider that the 1st house has gotten property No.Solai Ndungiri 3/1065 exclusively. It is just and equitable to exclude the 1st house from these 2 properties. The units applicable as far as the 2nd and 3rd houses are concerned including the widow as a unit would be 8:5. Properties Miti Mingi/Mbaruk Block 3/40 and Nakuru/Ol Rongai phase 11/354 shall be shared out in the ratio of 8:5 as between the 2nd and 3rd house with each child getting an equal share of their respective shares and the widow from the 3rd house getting an equal share from the portion of the 3rd house and she is to hold a life interest in the share allocated to her.
3. Plot No.29/127 Rhoda Estate has inherent challenges on distribution as stated earlier owing to the size and the nature of the property. I also note that this is the property where the petitioner (widow) resides. It is also noted that she is advanced in age. It would not serve the interests of justice to dislocate her from her residence under the guise of distribution of the estate. I am alive to the fact that distribution need not be equal but equitable.

A fair distribution shall be achieved by having property plot No.29/127 Rhoda estate registered in the names of Rebecca Wairimu Ndura and Rebecca Kamene Muchai as tenants in common in equal shares to hold in trust for the 2nd and 3rd houses respectively. In order not to dislocate Rebecca Kamene Muchai from her residence, the house she occupies on plot No.29/127 Rhoda estate shall continue being for her exclusive use in her lifetime and forming part of the share held by her in common on behalf of the 3rd house.

**Dated, Signed and Delivered at Nakuru this 20th day of April, 2016.**

**A. K. NDUNGU**

**JUDGE**