



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 457 OF 2004**

**IN THE MATTER OF THE ESTATE OF M'MAIRANYI M'KIENGO – DECEASED**

**AND**

**SAMUEL M'MBIJIWE**

**M'MAIRANYI M'KIENGO..... PETITIONER**

**VERSUS**

**FRANCIS KANYUURU..... PROTESTOR**

**(CORAM: J. A. MAKAU – J.)**

**JUDGMENT**

1. The petitioner herein **Samuel M'mbijiwe M'mairanyi M'Kiengo** son to the deceased **M'mairanyi M'kiengo** petitioned for Letters of Administration intestate in respect of the deceased's estate on 7th October, 2004. The Petitioner was on 16th December 2004 issued with Grant of Letters of Administration intestate in respect of the deceased's estate.
2. The Objector herein **Julius M'mungania M'mairanyi** through an application of 8th April 2006 sought leave to file an objection out of time. The Petitioner filed a replying affidavit to the Objector's application. The Objector's application was on 16th October 2006 dismissed for non-attendance with costs.
3. The Petitioner subsequently filed summons on 17th October 2006, seeking confirmation of the grant to which summons Francis Kanyuuru filed an affidavit of protest dated 6th November 2006 and his mode of distribution. The Court during pre-trial conference directed the issue of distribution of the deceased's estate be determined by way of *viva voce* evidence.
4. The Objector/Protestor **Francis Kanyuuru** was represented by Mr. Gichunge learned Advocate, while the Petitioner was represented by Mr. Mokua, learned Advocate. The protestor gave evidence and called two witnesses, while the Petitioner gave evidence and called no witness.
5. The **Protestor, Francis Kanyuuru OW1** testified briefly that the deceased was his father that the Petitioner is his younger brother. That the deceased assets comprised of parcels number:- **Ntima/Igoki/4188, 4189, 4190, 4191, 4192** and **4193** and during his lifetime he gave plot **No. 4191** to the Petitioner. Plot **4188** was sold to secure money for subdivision of his land, plot **4189** was given to Joseph Kibiti son of Protestor's brother one Vitongo M. Murinya (deceased). Plot **4190** to Kithia son of Julius Mungania (deceased) brother to the Protestor, Plot **4191** to Samuel M'mbijiwe (*Petitioner*) plot **4192** remained in the name of the deceased, Plot **4193** to Stanley Mwiti Kanyuuru son to the Protestor. OW1

testified the deceased had 6 children, thus 5 sons and 1 daughter. He stated when their father was giving land to his sons was only Samuel M'mbijiwe who was given land directly, whereas the shares of other sons went directly to their children, but their sister was not given directly or through her children.

6. The plot that the deceased did not share is plot No. **4192** and subject of distribution herein. The protestor sought to have the plot shared equally, **Francis Kanyuuru M'mairany (son)**, **Julius M'mungania M'mairanyi (son)**, **M'mwirichia Mairangu M'mairanyi (son)** **Delvina Gaciuki (daughter-in-law)**, **Samuel M'mbijiwe M'mairanyi (son)**, **Pauline Makena (grand daughter)** as joint owner with **Era Gacheri Mairanyi (grand daughter)** in equal shares, and **Mucece Mairanyi (daughter)** Nil. He added out of the deceased's children the ones who are deceased are as follows:- **M'mwirichia Julius, Delvina (wife to protestor's brother late Peter M'mwarania)** who are survived by children. He proposed their shares be given as follows:-

**(a) M'mwirichia Mairanyi to – Grace Kathiire, M'Mwirichia**

**(b) Julius M'mungania to – Stella Kiraiti M'mungania.**

**(c) Delvina Gachiuki to - Kirima Peter Mwarainia,**

**Jared Peter Mwarenia,**

**Koome Peter Mwarenia adding**

**Era Gacheri Mairany and**

**Pauline Makena**

**(d) Mucece, M'mairany (deceased) to get nothing because she was married and is now deceased.**

7. In the nutshell the Protestor's prayer is that all the deceased's children save Mucece M'mairanyi who was married and is now deceased should each get equal shares as per mutation form of the subdivision exhibit 0 1. He prayed for costs of this case. During cross-examination OW1 testified that their father's original title deed before subdivision was 482 which was subsequently subdivided into 6 portion being plot Nos. 4188 – 4193 who shared the land before his death in 1996. He stated at the time of death of the deceased plots No. 4192 was being used by Samuel M'mbijiwe who has a rental rooms therein, which are constructed on one side, which were constructed after the deceased's death. That none of other deceased's children have developments on plot No. 4192. OW1 testified the deceased had an account with Migamiru Farmers Co-operative Society Ltd, which had Ksh.1000/= and to which account he had not appointed the Petitioner to operate the account during his life time. On being shown a copy of authority OW1 stated it was not signed by his deceased father and it was a forgery. He stated MFI – 1 is dated 6.5.1997. He further stated letter from Migamiru Farmers Co- operative Ltd dated 17.5.2005 naming the deceased nominees as:

**(a) Mrs Elizabeth Nkuene. (wife)**

**(b) Samuel M'mbijiwe (son)**

but signed by Secretary/General George Karemu Muthuri was also a forgery. He stated the Ksh.1000 in the deceased's account was given to their sister after the death of their father after the agreement was reached by all of them. He denied that plot No. 4192 is not a share of inheritance of Samuel M'mbijwe. He added the Petition was filed secretly and without other beneficiaries being aware. He stated his protest was on behalf of all other beneficiaries. On being Re-examined OW1 stated MFI – 1, authority to operate the deceased account, was made on 6.5.1997 after the death of the deceased which had occurred on 24.6.1996 and further stated the letter of nominees was not relevant as they are not seeking anything from the Society. On plot 4192 OW1 stated the Petitioner got into occupation by force after deceased's death and that the deceased had told his children to share the plot equally.

8. **OW2, Grace Kathira** sister-in-law to the Petitioner and the Protestor testified that her husband Victorio M'mwirichia (deceased) was son to the deceased herein. She stated the subject matter is over the deceased's plot whose number she does not know, that the plot is not petitioner's but a family property and should be shared equally among all 5 children of the deceased as per the deceased wishes. OW1 supported OW1 mode of distribution. During cross-examination OW2 testified she has no works on plots No. 4192 but two of her deceased children were buried on plot No. 4192. She stated the deceased told them to share plot 4192 before he died but the petitioner refused. She stated that the deceased died a month after telling his children to share the land. On re-examination she stated the land at Naari was not bought with money from the sale of Joseph Kibiti's land which was his share.

9. **OW3, Stella Mungania's sister-in-law** to both the Petitioner and the Protestor testified that the deceased was her father-in-law and that she was staying at plot No. 4192 before she bought a land at Naari. She supported OW1 evidence, that the deceased shared his land during his life time remaining with plot No. 4192. She supported OW1's proposal on distribution adding the deceased during his life time told his children to share equally plot No. 4192 including two grand daughters.

10. **PW1, Samuel M'mbijiwe M'miranyi**, the Petitioner herein testified that the deceased, his father died on 25.6.1996 and agreed with OW1 that the deceased had 5 sons and 1 daughter being as follows:-

**(1) Victorio M'mwinchia (deceased)**

**(2) Julius M'mungania (deceased)**

**(3) Francis Kanyuuru (Protestor)**

**(4) Peter M'mwirania (deceased)**

**(5) Samwel M'mbijiwe (Petitioner)**

**(6) Mucece M'mairanyi (deceased)**

11. The Petitioner also agreed with OW1 on the assets of the deceased. He stated the deceased distributed his assets during his life time but remained with plots of No. Ntima/Igoki/4192 meaning  $\frac{3}{4}$  acres. He also agreed with OW1's evidence on allocation of plots numbers **4188 –4193**. That he was given plot No. 4191 and that he was the only son of the deceased given plot directly whereas the others had their shares given to their children directly as they were named after the deceased. He added that his brothers do not stay on plot number 4192. PW1 stated this succession case is only over plot number 4192 and PW1 claimed that he is the only child entitled to plot number 4192 because when he petitioned for the grant no one objected to his seeking the grant and secondly the deceased left it to the petitioner through a Will but that he does not have a copy of the Will. He added the deceased left coffee trees and the land to him in presence of witness in 1996 namely Rari M'muchena and M'boi Kagwaro on 25.5.1996. He claimed that he is the one using plot No. 4192 by harvesting coffee and having constructed on the plot and using  $\frac{1}{4}$  of an acre of the flat area. He added his home is on plot No. 4191 which his father gave him but on plot No. 4192. PW1 testified he has 9 rental plots which he constructed in 2000 and no one raised any objection. He stated his father was buried on plot No. 4192 but their mother on plot No. 4191. He added his father's other assets included 4 local heard of cattle and money in the bank of KShs2665/22 in Meru Central Farmers Co-operative Union Ltd which later changed to Ntiminyakiru Savings and Credit Rural Sacco Society Ltd which account was closed as per the deceased written authority exhibit P 1. He disagreed with OW1, OW2, and OW3 evidence on mode of distribution of plot No. 4192 thus the same is family property claiming he was given the plot by the deceased in 1989 but which the deceased could not transfer and he was residing on the said plot as had he given all his lands his children would have left him without support. He testified if court decides to share the land he would suffer substantial loss as his father said he be given the said plot, and further claimed there was an objection by Julius M'mungania who is now deceased. During cross-examination PW1 testified he was the only son given plot number 4191 and others were given none save Mwerenia who was given land elsewhere. He agreed he had no document to support his allegation nor had he disclosed that fact in his summons. PW1 stated further during the life

time of the deceased all used to use plot No. 4192 through harvesting coffee and getting the money. PW1 stated he constructed on plot No. 4192 after the death of the deceased herein and before petitioning for the grant. He stated his father left a Will with the Society exhibit P 1 which document the petitioner stated his father used to bequeath him with plot Number 4192. He agreed the document is purportedly signed after the death of his father and not by the deceased but by the Petitioner.

12. I have carefully considered the pleadings, the Petitioner's Summons for Confirmation of the Grant, the Affidavit of Protest, the evidence by the Protestor and his witnesses, the evidence by the Petitioner and Petitioner's counsel, written submissions dated 23rd November 2015. Having considered the above, the issues emerging out of the pleadings and the evidence can be summarized briefly as follows:-

***(a) What assets of the deceased's estate are subject of this dispute?***

***(b) Was plot No. 4192 bequeathed to the Petitioner or any of the deceased's child or children?***

***(c) Who are entitled to Ntima/Igoki/4192 and how should the same be shared?***

***(d) Who is entitled to costs?***

13. The first issue for consideration is what assets of the deceased are subject of this dispute? OW1, OW2, and OW3 and PW1 agree the deceased subdivided his original plot number Ntima/Igoki/483 into land parcels number Ntima/Igoki/4188, 4189, 4190, 4191, 4192 and 4193. He allocated Plot number 4191 to the Petitioner and the rest of the plots to his son's children leaving himself with plot Ntima/Igoki/4192. The said plot is still in the name of the deceased. I therefore find as per parties pleadings and evidence that Ntima/Igoki/4192 is the only deceased's asset subject of this dispute.

14. Was plot number Ntima/Igoki/4192 bequeathed to the Petitioner or any of the deceased's child or children? OW1 testified that the deceased did not allocate nor give plot number Ntima/Igoki/4192 to anyone. That the deceased used to occupy the said plot. OW2 and OW3 corroborated the evidence of OW1 and stated the whole family used to stay on plot 4192 before they moved to different portions and indeed they also buried their loved ones on the said plot. OW1, OW2 and OW3 stated the deceased before his death called all his family members and stated that upon his death the plot be equally shared amongst all his children.

15. PW1 claimed the deceased bequeathed the plot to him in 1989 and the deceased refused to transfer the land as he feared his children may render him landless and stop supporting him. PW1 claimed he is the only person entitled to plot number 4192 as the deceased left a will bequeathing him plot number 4192. He stated he did not have a copy of the Will which he claimed was made in presence of Rari M'muchena and M'boi Kagworo. That none of the two witnesses was called as a witness by the Petitioner.

16. That during cross-examination PW1 testified that exhibit P 1 was the Will that his father made and bequeathed him plot number 4192. The said exhibit P 1 reads:-

**MIRIGAMIERU FARMERS CO-OPERATIVE SOCIETY LIMITED AUTHORITY TO OPERATE AN ACCOUNT.**

***I, LUKA M'MAIRANYI OF MIRIGAMIERU SOCIETY***

***A/C Number 0036-03-0133 do authorise***

***Mr. Samwel M'mbijiwe who is my son to operate my account until such time that I withdraw this authority from him.***

***Min No. 12/97 (3)***

***Signed Luke M'mairaanyi(Deceased) Account Owner.***

**Signed Samwel M'mbijiwe M'mairanyi Authorised Operator**

**Signed 6th May 1997.**

17. PW1 during cross-examination admitted exhibit P 1 was made after the death of the deceased and signed by the petitioner. The said exhibit is not witnessed by the witnesses named by the Petitioner. The document is a forgery because the deceased died on 25th June 1996 and was signed on 6th May 1997. There was no way the deceased would have signed the document on 6th May, 1997 as he was dead and buried. It is in my view a clear case of forgery by the Petitioner. The document do not mention plot number 4192. It does not state how Plot No.4192 should be shared. I believe OW1, OW2, and OW3 that the deceased died intestate but only told his family members that they should share plot no. 4192 equally. That the petitioner as stated by the Protestor forcefully took possession of Plot No. 4192 and built flats for rental in 2000 after the deceased's death before the grant had been confirmed. His action do not give him better title than the other beneficiaries nor can his wishes be a basis to de-entitle the other beneficiaries as provided by the Law of Succession Act.

18. **Section 11 of the Law of Succession Act** on written Will provides:-

***“No. written will shall be valid unless:-***

***(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;***

***(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;***

***(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”***

19. The Petitioners purported Will exhibit P 1 is not a Will as it does not comply with the provision of **Section 11(a) (b) and (c) of the Law of Succession Act.** as pointed out a forgery.

20. Who is entitled to Ntima/Igoki/4192 and how should the estate be shared? The deceased had five sons and 1 daughter. That only two of the deceased's son are alive, the deceased sons also have wives and children surviving them, however the daughter got married and is now deceased. The beneficiaries in view of the above are the surviving sons of the deceased and the deceased daughters-in-law who survived their husbands (sons of the deceased) and children of Peter M'mungania.

21. The Law of **Succession Act Under Section 38** sets out the principles to be followed in distributing estate of a deceased person where an intestate has left children surviving him but no spouse. The said **Section 38** provides:

***“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”***

22. In the case of **Stephen Gitonga M'murithi V. Faith Ngira Murithi Civil Appeal No. 3 of 2015 at Nyeri** the Court of Appeal stated:-

***“Applying the above principles to both the learned trial Judges' reasoning and distribution, it is our finding that the learned trial Judge fell into an error when he failed to accord equal***

***distribution to all the children of the deceased in violation of section 38 of the laws of Succession Act by discriminating against the married daughters of the deceased. See Rono versus Rono & Another [2008] 1KLR (G&F) 803.***

21. In view of the provisions of **Section 38 of the Law of Succession Act**, I direct that the deceased's estate be shared equally amongst the deceased surviving sons, the share of deceased son' s of the deceased to go to their wives, and where wives or wife is deceased then the deceased's children, save Mucece who is deceased and was married and did not lay any claim over the deceased's estate during her life time.

22. The upshot is that the protest succeeds and I make the following orders:

**(a) The Petitioner's mode of distribution is discriminatory and against the Law of Succession and the Constitution of Kenya 2010 and is dismissed.**

**(b) The Protestors' protest succeeds.**

**(c) The deceased's estate comprising of Ntima/Igoni/4192 be shared equally among the deceased's surviving sons, the surviving wives or wife of the deceased sons of the deceased who are alive, and the deceased grandchildren whose both parents are deceased and as Mucece was married and now deceased and did not lay any claim over the deceased's estate during her lifetime her estate shall get nothing out of the deceased estate.**

**(e) The Protestor gets costs of this application.**

**DATED AND SIGNED THIS ..... DAY OF ..... 2016.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT THIS 19TH DAY OF APRIL, 2016.**

In the presence of:

Mr. Gichunge for Protestor

Mr. Mokuia for Petitioner

**By: FRANCIS GIKONYO**

**JUDGE**

**On behalf of:**

**J. A. MAKAU**

**JUDGE**