



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 529 OF 2006**

**IN THE MATTER OF THE ESTATE OF NAFTALLY MUREGE MUTHIGANI-DECEASED**

**JOHNSON A. MWANGI MUREGE.....PETITIONER**

**VERSUS**

**OBED MUOYA MUREGE.....PROTESTOR**

**JUDGEMENT**

**Naftali Murege Muthigani** (herein after referred to as the deceased) died intestate on 26<sup>th</sup> April 1993 at the age of 79 years and on 13<sup>th</sup> day of July 2007, **Johnson A. Mwangi Murege** a son to the deceased (herein after referred to as the petitioner) took out citations and served ten persons beneficiary entitled to the estate of the deceased and pursuant thereto **Margaret Muthoni Nyambu** filed an entry of appearance and on 2<sup>nd</sup> December 2009 the Petitioner petitioned for letters of administration intestate to the deceased's estate. No consent from the beneficiaries was annexed to the petition.

The petition was gazetted on 21<sup>st</sup> April 2011 and the grant was issued on 24<sup>th</sup> May 2011 and on 19<sup>th</sup> June 2012, the petitioner filed a application for confirmation of the said grant and proposed distribution s follows:-

a.

- i. Joseph Kige Murege-1.47 acres in trust for 2<sup>nd</sup> house.
- ii. Samuel Maina Murege-1.47 acres in trust for the 1<sup>st</sup> house.
- iii. Johnson A. Mwangi Murege -2 acres- in trust for the 3<sup>rd</sup> house.
- iv. Judy Wagithi Murege-1.47 acres- in trust for the 4<sup>th</sup> house.
- v. Eunice Withira Murege-1.47 acres-in trust for the 5<sup>th</sup> house.

b. K.C.B. Muranga Account No. 272887596, K.C.B Shares, Motor vehicle Registration number KMA 404 Pickup, K.B.L Shares and Bicycle to be transferred to the following jointly in equal shares in trust for their respective houses:-

- i. Joseph Kige Murege.
- ii. Samuel Maina Murege.
- iii. Johnson A. Mwangi Murege.
- iv. Judy Wagithi Murege.
- v. Eunice Withira Murege.

The protestor herein filed an affidavit of protest dated 17<sup>th</sup> February 2012 arguing *inter alia* that the deceased had five wives and that he distributed and settled his family as follows:-

- a. First house represented by Samuel Maina inherited land at Githii Mukurweini.
- b. Second house to inherit 5 acres from Kiinie/Rukanga/1596.
- c. Third house to inherit land at Githii, Mukurweini.
- d. Fourth house represented by Judy Wagithi to inherit land at Kiinie/Rukanga.
- e. Fifth house represented by Eunice Waithira to inherit 3 acres in Kiinie/Rukanga/1596.

The protestor states that he has extensively developed his portion and erected a permanent house, planted coffee and other cash crops, but adds that in case the petitioner is not satisfied, then the entire estate ought to be consolidated and redistributed. The protestor also states that the deceased had in his life time transferred motor vehicle KAM 404 to him and that he bought the bicycle to cater for the deceased's travelling and that he took it back after his demise.

However, whereas both parties are in agreement that the deceased owned the above vehicle, the protestor never presented any cogent evidence in support of his averment that the deceased sold the vehicle to him and in absence of such evidence, I find that the said vehicle remains part of the deceased's estate.

At the hearing of the protest, the protestor stated that he was given **Kiinie/Rukanga/1596** by the deceased, and that he build his house thereon and connected electricity, planted trees and that his children have also build on the said land. He also stated that the deceased was born in Nyeri but shifted to Kirinyaga in 1950's and that in Nyeri, he had two wives and in Kirinyagsa he married three others. He stated that no other child of the deceased has build on the land except himself and his children. He maintained that the land for his step brothers from Nyeri is at Mukurweini, Nyeri where the deceased came from and that his step brothers in Nyeri live on a parcel of land left to them by the deceased. He also testified that the deceased had charged the land at Kirinyaga to a bank, that he was unable to re-pay the loan and that he persuaded the bank to allow him sell two acres to redeem the title. The remaining land is now 8 acres. He insisted that the deceased had left clear instructions that the family at Nyeri would remain at Nyeri and the family at Kirinyaga would remain at Kirinyaga. On the Kirinyaga side there are the following, William Maina Murege, Johnstone Mwangi, Joseph Kiige, Obed Mwaura Murege and four sisters while on the Nyeri side there is John Mwangi, Titus Muchoki and Samuel Wachira. He maintained that after their father died, the family at Nyeri had started claiming land at Kirinyaga side.

Joseph Kiige Murege testified that the deceased never divided his land prior to his death, but left part of his family at Nyeri and the other family at Karatina.

The petitioners case was that the deceased had five wives and maintained that the deceased never had any land at Mukurweini and that his only parcel of land was at Kirinyaga being **Kiine/Rukanga/1596** and that the deceased owned a vehicle being **KMA 404** which he claimed was taken by the protestor. The deceased also owned KCB Bank account, Shares and a bicycle. Esther Muthoni who occupies part of her father's land at Kirinyanga gave a moving account of her ordeal narrating instances of harassment by the

protestor and his children. The evidence DW5 was clear that the deceased never owned any land at Mukurweini and produced a title deed for **Lower Muhito/Mutundu/105** registered in the name of a one **Samuel Maina Naftali Murege**. The said title is a first registration and no evidence was tendered to show that it was ever registered in the name of the deceased.

Thus, in absence of evidence in support of the protestors assertion that the deceased owned land at Mukurweini, I find myself persuaded by the petitioners evidence and that of his witnesses that the deceased never owned any land at Mukurweini.

This leads us to one key issue, namely, what properties comprised of deceased's estate as at the time of his death. A deceased's estate comprises of the real and personal property that an individual owns upon his or her death.[1] Black's Law Dictionary defines a deceased's estate as the property that one leaves after death, the collective assets and liabilities of a dead person.[2] I am satisfied that the evidence adduced established that the only asset owned by the deceased and comprising of his estate is title number **Kiine/ Rukanga/1596** and that no cogent evidence was adduced to prove that the deceased owned any parcel of land at Mukurweini or elsewhere. I also find that there is no evidence to show that the deceased ever distributed his land or any of his properties among his beneficiaries prior to his death.

On the question of distribution, it is not disputed that the deceased had five wife's. In my view, the spirit of Part V of the Law of Succession Act[3] is equal distribution of the estate amongst the beneficiaries of the deceased. My reading of these provisions is that they envisage equal distribution. The word used in Section 35 (5) and 38 is "equally" as opposed to "equitably." [4] This is the plain language of the provisions. The provisions are in mandatory terms-"the property shall.....be equally divided among the surviving children." Equal distribution is envisaged.

I find the protest has no merits, it is totally unfair and tilted in favour of the protestor. I accordingly dismiss the protest and guided by the above legal provisions I find that the deceased beneficiaries are entitled to equal shares of the deceased's estate. I have scrutinized the proposal by the petitioner contained in the affidavit in support of the summons for confirmation of the grant dated 14<sup>th</sup> January 2012 and I find the same to be fair, equitable and maintains equality among the houses. I therefore order as follows:-

**a. That** the grant of letters of administration made in this cause on 24<sup>th</sup> May 2011 to **Johnson A. Mwangi Murege** be and is hereby confirmed.

**b. That** title number **Kiine/Rukanga/1596** comprising of approximately **3.19 Ha** be divided into **five** equal portions among the following:-

- i. **Joseph Kige Murege** to get **0.638 Ha.** to hold in trust for himself and the children of **Sophie Wakaria Murege**-deceased, the second wife of the deceased.
- ii. **Samuel Maina Murege** to get **0.638 Ha** to hold in trust for himself and the children of **Milka Wanjiru Murege**-deceased, the first wife of the deceased.
- iii. **Johnson A. Mwangi Murege** to get **0.638 Ha** to hold in trust for himself and the children of **Sophie Wakaria Murege**, the second wife of the deceased.
- iv. **Judy Wagithi Murege**, the fourth wife to get to **0.638 Ha** old in trust for herself and her children.
- v. **Eunice Waithira Murege**, the fifth wife to get to **0.638 Ha** hold in trust for herself her children.

c. Any cash in **Kenya Commercial Bank Ltd**, Muranga Account No. **272887596**, to be shared equally among the above persons in trust for themselves and their respective houses.

d. **Kenya Commercial Bank Ltd** Shares to be shared equally among the above persons in trust for themselves and their respective houses.

e. **KMA 404** Pickup and the bicycle to be sold and the proceeds shared equally among the above

*persons in trust for their respective houses.*

**f. That the protestors do pay the costs of this case.**

Right of appeal 30 days

Signed, Delivered and Dated at Nyeri this **27<sup>th</sup>** day **July** of 2016.

**John M. Mativo**

**Judge**

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[1] The Free Dictionary, <http://legal-dictionary.thefreedictionary.com/decedent>

[2] Black's Law Dictionary, Eight Edition, 2<sup>nd</sup> Reprint, 2007.

[3] Ibid

[4] See Musyoka J in Succ Cause No 399 of 2007, In the Estate of John Musambayi Katumanga-Deceased.