



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**SUCCESSION CAUSE NO. 1394 OF 2002**

**IN THE MATTER OF THE ESTATE OF EZEKIAH MWAURA KAGWI (DECEASED)**

**MOSES MWAURA KAGWI**

**JAPHAT NJUE MWAURA**

**ISAAC NGARI MURIMI .....PETITIONERS**

***VERSUS***

**VIRGINIA WAKATHAIYA NJUKI**

**JESSIE CATHRINE KATHII MATU.....PROTESTORS**

**RULING**

1. This protest is in response to the mode of distribution of the estate of the deceased. The petitioners/administrators are the sons of the deceased. The original protestor, the late Albert Matu Mwaura was also the son of the deceased. Following his death, he was substituted with leave of the court by the two protestors. The issue in contention is that both the petitioners and the protestors presented two conflicting modes of distribution of the estate of the deceased.

2. The protestors position is that the estate should be distributed equally among all the beneficiaries without taking into account the parcels of land which had been given to Albert Matu Mwaura and Mathew Njagi Mwaura, both of whom are now late. The petitioners' position is that the parcels of land which were given to Albert Matu Mwaura and Mathew Njagi Mwaura by the Agathithia clan through the efforts of their late father should be taken into account in the final distribution of the estate. This is the bone of contention between the petitioners and the protestors.

3. The protestors called three witnesses in support of their case. Their first witness was Albert Matu Mwaura (PW1), who gave evidence before the late Lady Justice Khaminwa. The 2nd witness was John Gutu Njagi (PW 2) who testified before Lady Justice Karanja (as she then was). The protestors third witness was Harrison Murimi Matu (PW 3), who testified before me. The evidence of Albert Matu Mwaura, was that the deceased was survived by seven children and himself being the eighth child. He also testified that each of the surviving children should hold equal shares in respect of their deceased father's estate. He further testified that he disagreed with the proposed mode of distribution of the petitioners. According to him, each of the eight children of the deceased including himself should get an equal share in land parcel No. Ngariama/Thirikwa/27, on which are grown cash crops, macadamia nuts, coffee and avocados.

4. The evidence of Albert Matu Mwaura is supported by that of John Gutu Njagi (PW 2). PW 2 is the



4.Rose Njoki Gachanja

5.Caren Kuthii Kamau

6.Isaac Ngari Murimi

7.Elizabeth Murangi Njono

8.John Gutu Njagi

9.Sera Lilly Wawira Njagi

10.Alice Muthoni Njagi

11.Lucy Wangari Njagi Jointly shared (1share)

12.Ruth Wangui Njagi

13.Susan Njoki Njagi

**(c) Land parcel No. Thirkwa/Ngiriama/718 (approximately 0.8 Ha) to be shared equally (8 portions) to :-**

1.Albert Matu Mwarua

2.Moses Mwaura Kagwi

3.Japhat Njue Mwaura

4.Rose Njoki Gachanja

5.Caren Kuthii Kamau

6.Isaac Ngari Murimi

7.Elizabeth Murangi Njono

8.John Gutu Njagi

9.Sera Lily Wawira Njagi

10.Alice Muthoni Njagi

11.Lucy Wangari Njagi Jointly shared

12.Ruth Wangui Njagi

13. Susan Njoki Njagi

**Land Parcel No. Thirikwa/Ngariama/770 (approximately 0.4 Ha) to be given to**

Isaac Ngari Murimi.

**(b) Plot No. 56 Kiamutugu Market – Undeveloped – to be sold and shared among the beneficiaries equally as shown below (8 shares)**

1. Albert Matu Mwarua
2. Moses Mwaura Kagwi
3. Japhat Njue Mwaura
4. Rose Njoki Gachanja
5. Caren Kuthii Kamau
6. Isaac Ngari Murimi
7. Elizabeth Murangi Njono
8. John Gutu Njagi
9. Sera Lily Wawira Njagi
10. Alice Muthoni Njagi
11. Lucy Wangari Njagi
12. Ruth Wangui Njagi
13. Susan Njoki Njagi

Jointly shared

**( C ) Lock up plot No. 34 Kiamutugu Market - shares only to be distributed equally to**

1. Albert Matu Mwaura
2. Moses Mwaura Kagwi
3. Japhat Njue Mwaura
4. Rose Njoki Gachanja
5. Caren Kuthii Kamua
6. Isaac Ngari Murimi
7. Elizabeth Murangi Njono
8. John Gutu Njagi
9. Sera Lily Wawira Njagi
10. Alice Muthoni Njagi
11. Lucy Wangari Njagi
12. Ruth Wangui Njagi
13. Susan Njoki Njagi

Jointly shared.

**1. Plot No 25 Kiamutugu Market – shares only to be given to**



- 3.Japhat Njue Mwaura
- 4.Rose Njoki Gachanja
- 5.Caren Kuthii Kamua
- 6.Isaac Ngari Murimi
- 7.Elizabeth Murangi Njono
- 8.John Gutu Njagi
- 9.Sera Lily Wawira Njagi
- 10.Alice Muthoni Njagi
- 11.Lucy Wangari Njagi
12. Ruth Wangui Njagi
13. Susan Njoki Njagi

Jointly shared.

**(H) Motor vehicles to be sold and amount shared among the beneficiaries as shown below:-**

1. KXN -864 Peugeot 5JO4, Pick Up
2. KAJ – 003e Peugeot 505, Station Wagon
3. KZY – 584, Ford 3610, Tractor
4. ZB – 2198, Tractor Trailer

- 1.Albert Matu Mwaura
- 2.Moses Mwaura Kagwi
- 3.Japhat Njue Mwaura
- 4.Rose Njoki Gachanja
- 5.Caren Kuthii Kamua
- 6.Isaac Ngari Murimi
- 7.Elizabeth Murangi Njono
- 8.John Gutu Njagi
- 9.Sera Lily Wawira Njagi
- 10.Alice Muthoni Njagi
- 11.Lucy Wangari Njagi
- 12.Ruth Wangui Njagi

Jointly shared.

13.Susan Njoki Njagi

1. Miscellenous Machinery and other items – to be sold and shared among the beneficiaries as shown below:-

1. Coffee Pulping Machine

2. Water Pumps – Hydram blake (two)

No. 27043/44 & 27129/43

3. Two stone walled water tanks (storage)

4. Ten cows and four calves

5. Engine – Robin- Water pump

6. Engine – Honda – water pump

7. Metal water tank – one capacity 4000lts

8. Hard, sprayer engine (100 litres)

9. CP3 hand Sprayer (Knap sunk) 20 litres

10. Five water tanks 100ltd (each)

11. One wheel-barrow (DATIN)

Be distributed to (equally)

1.Albert Matu Mwaura

2.Moses Mwaura Kagwi

3.Japhat Njue Mwaura

4.Rose Njoki Gachanja

5.Caren Kuthii Kamua

6.Isaac Ngari Murimi

7.Elizabeth Murangi Njono

8.John Gutu Njagi

9.Sera Lily Wawira Njagi

10. Alice Muthoni Njagi

11. Lucy Wangari Njagi

Jointly shared.

12. Ruth Wangui Njagi

13. Susan Njoki Njagi



2006 is as follows:

**(a) Nthawa/Riandu/Land Parcel No 1489 to be given to:**

1. Albert Matu Mwaura - 5 ½ acres (2.2 Hectares)
2. Moses Mwaura Kagwi - 5 ½ acres (2.2 Hectares)
3. Japhat Njue Mwaura - 5 ½ acres (2.2 Hectares)
4. Rose Njoki Gachanja - 5 ½ acres (2.2 Hectares)
5. Caren Kuthii Kamau - 5 ½ acres (2.2 Hectares)
6. Isaac Ngari Murimi - 5 ½ acres (2.2 Hectares)
7. Elizabeth Murangi Njuno - 5 ½ acres (2.2 Hectares)
8. John Gutu Njagi
9. Sera Lily Wawira Njagi
10. Alice Muthoni Njagi 5 ½ acres
11. Lucy Wangari Njagi jointly
12. Ruth Wangui Njagi
13. Susan Njoki Njagi

**(b) Ngariama/Thirikwa, Land Parcel No. 27 to be given to**

1. Moses Mwaura Kagwi - 8 ¼ acres (3.3 Hectares)
2. Japhat Njue Mwaura - 3 ¾ acres (1.95 Hectares)
3. Rose Njoki Gachanja - 8 acres (3.2 Hectares)
4. Caren Kuthii Kamau - 8 acres (3.2 Hectares)
5. Isaac Ngari Murimi - 7 acres (2.8 acres)
6. Elizabeth Murangi Njuno - 8 acres (3.2 Hectares)

**(c) Ngariama/Rungeto, Land Parcel No. 361 to be given to**

1. Albert Matu Mwaura - ¾ acres (0.3 Hectares)
2. Moses mwaura Kagwi - 1 ¾ acres (0.7 Hectares)
3. Rose Njoki Gachanja - 2 acres (0.8 Hectares)
4. Caren Kuthii Kamau - 2 acres (0.8 Hectares)
5. Elizabeth Murangi Njuno - 2 acres (0.8 Hectares)

6 John Gutu Njagi

7. Sera Lily Wawira Njagi

8. Alice Muthoni Njagi                      ½ acre

9. Lucy Wangari Njagi                      jointly

10. Ruth Wangui Njagi

11. Susan Njoki Njagi

**(d) Ngariama/Thirikwa, Land Parcel No. L.R. 718 to be given to**

1. Isaac Ngari Murimi                      -    2 acres (0.8 Hectares)

**(e) Ngariama/Thirikwa, Land Parcel No. L.R. 770 to be given to**

1. Isaac Ngari Murimi                      -    1 acre (0.4 Hectares)

**(f) Other plots – shares only:**

**(a) Embu Township/246 share to be given to:**

1. Rose Njoki Gachanja

2. Caren Kuthii Kamau

**(b) Plot No 25 Kiamutugu – shares only:**

2. Isaac Ngari Murimi

**(c) Plot No. 27 Kiamutugu – shares only**

1. John Gutu Njagi

2. Sera Lilly Wawira Njagi

3. Alice Muthoni Njagi

4. Lucy Wangari Njagi

5. Ruth Wangui Njagi

6. Susan Njoki Njagi

**(d) Plot No. 5, Kiamutugu – shares only**

1. Albert Matu Mwaura

**(e) Lock-up No 34 Kiamutugu Market to be given to:**

1. Elizabeth Murangi Njuno

**(f) Plot No 56, Kiamutugu**

1. Albert Matu Mwaura - 1/8
2. Moses Mwaura Kagwi - 1/8
3. Japhat Njue Mwaura - 1/8
4. Rose Njoki Gachanja - 1/8
5. Caren Kuthii Kamau - 1/8
6. Isaac Ngari Murimi - 1/8
7. Elizabeth Murangi Njuno
8. John Gutu Njagi
9. Sera Lily Wawira Njagi
10. Alice Muthoni Njagi 1/8
11. Lucy Wangari Njagi jointly
12. Ruth Wangui Njagi
13. Susan Njoki Njagi

**(G) Other shares Kenya Planter's Co-operative Union – Share No 1979, 0830, 0014101**

1. Albert Matu Mwaura - 1/8
2. Moses Mwaura Kagwi - 1/8
3. Japhat Njue Mwaura - 1/8
4. Rose Njoki Gachanja - 1/8
5. Caren Kuthii - 1/8
6. Isaac Ngari Murimi - 1/8
7. Elizabeth Murangi Njuno - 1/8
8. John Gutu Njagi
9. Sera Lily Wawira Njagi
10. Alice Muthoni Njagi
11. Lucy Wangari Njagi 1/8 jointly
12. Ruth Wangui Njagi
13. Susan Njoki

**(h) Motor vehicles – to be sold and amount shared among the beneficiaries as shown below:**

- a) KXN 864, Peugeot 504, Pick-up
- b) KAJ 003E, Peugeot 505 station wagon
- c) KZY 584 Ford, Tractor, 3610
- d) Z-2198, Tractor Trailer

- 1. Albert Matu Mwaura - 1/8
- 2. Moses Mwaura Kagwi - 1/8
- 3. Japhat Njue Mwaura - 1/8
- 4. Rose Njoki Gachanja - 1/8
- 5. Caren Kuthii Kamau - 1/8
- 6. Isaac Ngari Murimi - 1/8
- 7. Elizabeth Murangi Njuno - 1/8
- 8. John Gutu Njagi
- 9. Serah Lily Wawira Njagi
- 10. Alice Muthoni Njagi 1/8 jointly
- 11. Lucy Wangari Njagi
- 12. Ruth Wangui Njagi
- 13. Susan Njoki Njagi

**(I) Miscellaneous Machinery and Other Items: To be sold and shared among the beneficiaries as shown below:**

- a) Coffee pulping machine
- b) Water pumps – hydram blake (two)
- c) Water storage tank
- d) Wheel barrow
- e) Engine – Honda
- f) Engine – Robin
- g) CP – 3, 20 Its spray pump
- h) Three cows and calve
- i) Metal tank – one
- j) Hardy sprayer pump

1. Albert Matu Mwaura - 1/8
2. Moses Mwaura Kagwi - 1/8
3. Japhat Njue Mwaura - 1/8
4. Rose Njoki Gachanja - 1/8
5. Caren Kuthii Kamau - 1/8
6. Isaac Ngari Murimi - 1/8
7. Elizabeth Murangi Njuno - 1/8
8. John Gutu Njagi
9. Serah Lily Wawira Njagi
10. Alice Muthoni Njagi 1/8 jointly
11. Lucy Wangari Njagi
12. Ruth Wangui Njagi
13. Susan Njoki Njagi

16. DW 1 further testified that the immediate above mode of proposed distribution took into account land parcels that had been given to their late brothers namely Albert Matu Mwaura and Mathew Njagi Mwaura. His further evidence in this regard is that their late father had wished his two late brothers to move to the parcels of land that he had given to them through their clan committee of which their deceased father was a member. It is important to point out that in 1957 Albert Matu Mwaura was about 10 years old and was in primary school. Their deceased father used fees and paid the clan elders to get the land for Albert Matu Mwaura, measuring 9 acres. Their late father also used his position and had 9  $\frac{3}{4}$  acres given to Mathew Njagi Mwaura by the clan elders. As regards Japheth Njue, their late father bought 6  $\frac{1}{4}$  acres for him. This Japheth Njue was allocated 3  $\frac{1}{4}$  acres out of land ref No. Ngariama/Thirikwa/27 making a total of 10 acres. It is also his evidence that the majority of the family members agreed to share equally all the parcels of land amongst the eight survivors of the deceased. It is also his evidence that only Albert Matu opposed the mode of sharing equally the estate of their late father.

17. The further evidence of DW 1 is that Albert Matu Mwaura and Mathew Njagi Mwaura got land because of their father's efforts and not through their own efforts. He finally testified that they have provided for the siblings of the late Albert Matu Mwaura and Mathew Njagi Mwaura by giving them equal shares in respect of their father's estate. In doing so, they took into account that Albert Matu Mwaura and Mathew Njagi Mwaura had been given land by virtue of the efforts of their late father.

18. The evidence of DW 1 is supported by Japheth Njue Mwaura (DW 2), who adopted the evidence of DW 1. Under cross-examination, he admitted that the family of Mathew Njagi Mwaura reside on land ref No. Ngariama/Thirikwa/27 and have stayed on that land since 1969. Isaack Ngari Murimi (DW 3) also adopted the evidence of DW 1 and DW 2. He testified that the family of Mathew Njagi Mwaura are free to move to the parcels of land that they have proposed to be allocated to the family of Mathew Njagi, so that they can move out of land ref No Ngariama/Thirikwa/27.

19. Counsel for both parties filed written submissions in support of the cases of their clients. The protestor's counsel submitted amongst other matters that land parcels that were registered in the name of Albert Matu Mwaura and Mathew Njagi Mwaura cannot be taken into account in distributing the estate of

their late father. He further submitted that these parcels of land are their own private properties, which are outside the estate that is sought to be administered. He relied on **In Re Estate of S B S (2014) eKLR** in which it was held that the private properties of the beneficiaries do not form part of the estate for purposes of distribution.

20. He further submitted that the family of **Mathew Njagi Mwaura** live and reside on land ref No. Ngariama/Thirikwa/27 and have lived on that parcel of land during the lifetime of **Mathew Njagi Mwaura**. Additionally, he submitted that it is the only home that the children of Mathew Njagi Mwaura have known during their lifetime. Finally, counsel submitted that the biggest acreage given to the family of Mathew Njagi Mwaura is 500 acres out of land ref No Nthawa/Riandu/1489, which is located in Mbeere district. He submits that that parcel of land is in a dry place and the children Mathew Njagi Mwaura are unlikely to engage in their farming activities. It is for these reasons that the protestors oppose the proposed mode of distribution that is filed by the petitioners.

21. The petitioners' counsel also filed written submissions. It is the petitioners' submission that the land parcels given to Albert Matu Mwaura namely Ngariama/Nyangeni/106 measuring 9 ½ acres and the one given to Mathew Njagi Mwaura namely Mutithi/Strip/76 measuring 10 acres and the land given to Japheth Njue Mwaura out of land ref No Ngiriambu/Thirikwa/27 measuring 6 acres were parcels of land that they were given by their late father either by the clan or direct purchase by their late father. These parcels of land were not acquired by their brothers through their own efforts. They took this into account in distributing the estate of their late father. Counsel submitted that the court ought to consider the equity and not necessarily the equality in the mode of distribution.

22. Finally, they submitted that the petitioners gave good reasons as to why the children of the late Mathew Njagi Mwaura were not given any portion in land ref. Ngariama/Thirikwa/27.

23. I have considered the evidence of both parties. I have also considered the rival submissions of both counsel. I find that there is one main issue for determination namely which of the two proposed modes of distribution is fair. The second and last issue for determination is in relation as to who should bear the costs of this application.

24. Having considered the entire evidence tendered during trial, the rival submissions of both counsel in the light of the issues for determination, I find that the evidence tendered by the petitioners through DW 1, DW 2 and DW 3 is credible and I believe it. I find that the petitioners' proposed mode of distribution is fair. The reason is that it took into account the parcels of land given to Albert Matu Mwaura and Mathew Njagi Mwaura by the clan elders through the efforts of their deceased father. It also took into account the parcel of land that was bought for Albert Njue by their deceased father. Thereafter the petitioners proceeded to share the estate in an equitable manner. It seems that their decision was influenced by the fact that the petitioners held a family meeting in which they were themselves proposed to be appointed as administrators and were eventually appointed to that office. The minutes of that meeting dated 14th July 2001 were put in evidence as exhibit as "DEX 3". I find that the protestors mode of distribution is not fair. If their mode of distribution were to be adopted the estates of Albert Matu Mwaura, Mathew Njagi Mwaura and Albert Njue would benefit twice from the estate of their late father at the expense of the other beneficiaries. This will be unfair.

25. In the circumstances, the answer to the first issue for determination is that the petitioners' proposed mode of distribution is fair and I hereby approve it. It is for this reason that I find that the proposed mode of distribution of the protestors is not fair and I hereby reject it. It did not take into account the land parcels that were given to Albert Matu Mwaura and Mathew Njagi Mwaura by the clan elders through the efforts of their late father. It is to be remembered that as at that time Albert Matu Mwaura and Mathew Njagi Mwaura were minors attending primary schools.

26. The last issue is in respect of costs. This is a family dispute that has dragged in the courts since 2002. In the circumstances, I make no orders as to costs.

**RULING DELIVERED, DATED and SIGNED** in open court at **EMBU** this 31st day of August **2016**.

In the presence of Mr Kathungu for the Petitioners and Ms Fatuma holding brief for Mr. Magee for the Respondents

Court clerk Njue

**J.M. BWONWONGA**

**JUDGE**

**31/08/2016**