



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**SUCCESSION CAUSE NO. 14 OF 1999**

***In the matter of the Estate of GEORGE KWENJA MUTHANG'ATO (Deceased)***

**ALBERT MWANIKI KWENJA.....ADMINISTRATOR**

**VERSUS**

**EPHANTUS M. KWENJA**

**JAMES MWIKAMBA NJAGI.....PROTESTORS**

**AND**

**JERNADO NJOKA KWENJA.....APPLICANT**

**J U D G M E N T**

1. The deceased George Kwenja Muthangato died on 10<sup>th</sup> May 1978 at Nguviu village, Kathangariri sub-location in Embu County. He was married to three wives, one of which predeceased him leaving two widows surviving him. The widows were named as Teresiah Wanjuki Kwenja and Monicah Gikuu Kwenja. At the time the hearing of the case commenced in the year 2005 Teresiah had passed on leaving Monicah as the only surviving widow.

2. The deceased was survived by the following children:-

- (i) Christopher Njagi Kwenja – son
- (ii) Jenardo Njoka Kwenja – son
- (iii) Alexander Njogu Kwenja – son
- (iv) Albert Mwaniki Kwenja – son
- (v) Bernard Kiura Kwenja – son
- (vi) Eustace Njaga kwenja – son
- (vii) Ephantus Mvuria Kwenja – son
- (viii) Lenard Ileri Kwenja – son

- (ix) Muthanje Kwenja – daughter
- (x) Francisca Kori – daughter
- (xi) Cecilia Maitha – daughter
- (xii) Catherine Wakini – daughter
- (xiii) Joan Weveti – daughter

3. The first administrator Christopher Njagi Kwenja was the first born son of the deceased who was later substituted with the current administrator Albert Mwaniki Kwenja. During the pendency of this case, four (4) of the deceased's sons had passed on namely:-

- (a) Christopher Njagi survived by widows Bibian Ruguru and Wamwea Njagi and several children.
- (b) Eustace Nyaga survived by widow Helenia Wanjira Nyaga and their children.
- (c) Alexander Njogu survived by his widow Sabina Kaumu, and their children.
- (d) Ephantus Mvuria survived by Fides Kairu Mvuria and their children.

4. The deceased assets are listed as follows:-

- (a) L.R. Ngandori/Nguvuu/1402 – 29.3 acres
- (b) L.R. Ngandori/Nguvuu/1353 – 8.0 acres
- (c) Plot No. 12 Kibugu market
- (d) Cash at KCB A/C Nos. 100000296 and 100140058

5. The parties filed the following issues for determination:-

- (i) Whether the deceased died intestate on one part or partly testate and partly intestate on the other hand.
- (ii) Whether the deceased had given gifts *inter vivos* to some of their heirs.
- (iii) Whether the distribution of the estate should be guided by Embu Customary Law or by the Law of Succession Act.

6. In the course of hearing the parties informally agreed on some of the issues which is reflected in their submissions and in minutes of the family meetings annexed to the administrator's submissions. Firstly, that plot No. 17 Manyatta market had been given to Jenardo Njoka and his brothers. It is registered in the name of Jenardo Njoka in the records of the now defunct Embu County Council now County Government of Embu. This removed the asset from the list of the deceased's assets available for distribution.

7. The deceased co-owned Plot No. 12 Kibugu market with other people. He gave one of his sons Eustace Nyaga his share to develop and have exclusive use of it. This evidence was not disputed and was admitted by the administrator in his submissions.

8. The administrator argued that the actions of the deceased of giving gifts to his sons is that he had distributed part of his estate during his lifetime. The deceased left no will and he therefore died intestate.

9. The family had agreed in a family meeting to use funds in the KCB account funds in the name of

deceased to facilitate sub-division of the assets L.R. Ngandori/Nguviu/ 1353 and 1402 and any balance to be shared equally among the beneficiaries. This was a good idea and has not been opposed by any of the parties.

10. The only issues for determination are only two:-

(i) Whether the estate should be distributed under Kiambu customary law or under the Law of Succession Act.

(ii) Whether the funds held by Jernado Njoka and Bernard Kiura being income from Plot No. 17 Manyatta and Plot No. 1112/317 should be accounted for and shared by all the heirs.

11. It is important to mention that this case was heard by Lenaola, J and Khaminwa J before I took it over. The parties were in agreement that the case proceeds from where it had reached when Khaminwa, J was transferred to another station.

12. The administrator asked the court to reject the submissions of the protesters which were filed late. The court gave the parties 21 days within which to file their submissions. As a matter of practice, the protesters were to file their submissions and the administrator was to follow. It happened that the administrator filed and served his on 29/3/2016 after he failed to receive the protesters.

13. The protesters submissions were finally filed on 18/4/2016 which was 1½ months after the order was made. This was not right for the protesters to ignore the directions of the court. Had this been a civil case, the protesters would have been penalized by way of costs.

14. However, the court has a duty to give each party a hearing, and a fair hearing for that matter. Although the delay was not explained, it would be contrary to the principles of natural justice to reject the submissions. I therefore decline to reject the protesters' submissions.

15. The only person who disputed that the plot had been given to Jernado Njoka and his brothers was the administrator. However, he admitted that the plot belonged to Jernado Njoka and brothers in his submissions and even produced a document from former Embu County Council showing that the deceased had effect the transfer.

16. This being the position, the court finds that the income from the plot belongs to Jernado and brothers and so does the income. The income does not, therefore form part of the deceased's assets.

17. It was alleged that the income of Embu Plot No. 1112/317 were mixed and banked together with those for Plot No. 17 Manyatta. The administrator asked the court to order Jernado Njoka to account for the income and that it be shared among the beneficiaries. This plot does not feature on the list of assets of the deceased. The administrator did not produce any documents to prove that the deceased owned such a plot. The protesters and Jernado Njoka did not mention anything to do with such a plot. For these reasons, the court concludes that the existence of such a plot or its income has not been proved. I find that the claim of the administrator has no basis.

18. The submissions of the administrator was to the effect that the deceased had removed himself from Kiambu customary law by conduct. His late father's estate was not subject to sharing between houses but between his sons. Further, that the deceased had distributed his assets to his sons and not to his wives during his lifetime and that he gave land and animals only to his sons.

19. In his testimony, the administrator DW1 proposed the following distribution of the two parcels of land:-

(a) Ngandori/Nguviu/1402

Teresiah Wanjuki - 3.1 acres

Jernado Njoka - 5 acres  
Alexander Njogu - 5 acres  
Albert Mwaniki - 3.5 acres  
Bernard Kiura - 3.5 acres  
Eustace Nyaga - 4 acres  
Ephantus Mvuria - 5 acres

Teresiah Wanjuki was the mother of the administrator who died before the hearing of this case commenced.

(b) Ngandori/Nguvuu/1353

Christopher Njagi - 5 acres  
Albert Mwaniki - 1.5 acres  
Bernard Kiura - 1.5 acres

In his submissions the administrator proposed that each of the deceased's son gets a total of 5.3 acres of land from the estate's two parcels given that Teresiah Wanjuki who he had proposed she takes 3.1 acres had since passed on.

20. It was explained by the administrator that one of the deceased's sons Leonard Ileri should not be included in the distribution because he was given 9 acres of land by the deceased during his lifetime. This evidence was not disputed by any of the parties.

21. DW1 called the surviving widow Monicah Gikuu as a witness. Her testimony was that the assets of the deceased should be distributed among the three houses of the deceased.

22. The protesters Christopher Njagi Kwenja and Jernardo Njoka testified that the deceased's estate was subject to distribution under Kiambu customary law with each house getting 12.3 acres. The deceased was a Muembu by tribe and died in 1978 rendering his estate subject to distribution under Kiambu customary law.

23. The protesters called two witnesses who were elderly and told the court that the deceased was a Muembu and that under Kiambu customary law, land is divided according to the number of houses who in turn distribute to the children.

24. A document from Embu County Council was produced by the protesters indicating that Plot No. 17 Manyatta market had been given to Jernardo Njoka and his brothers.

25. The administrator produced a copy of the same document at submissions state agreeing with the protesters that the plot had been given to Jernardo Njoka and his brothers.

26. The law applicable is Section 2(2) of the Law of Succession Act which provides:-

*"The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act."*

27. In the case of **NYAGA GEORGE VS SAMUEL NYAGA GEORGE [2014] eKLR** the court held as

follows;

*The deceased died in 1979 before the commencement of the Law of Succession Act on 1 st July 1981. Under Section 2(2) of the Law of Succession Act:*

*The estate of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estate shall commence or proceed so far as possible in accordance with this Act.*

The Law applicable in respect of the estate of the deceased is therefore Kiambu Customary Law.

28. In the case of **ERASTUS GICHINGIRI MUHORO VS GERISHON GICHINGIRI MUHORO & 2 OTHERS [2014] eKLR** the deceased died in 1974. The court held that Kikuyu Customary Law is what was applicable under Section 2(2) of the Law of Succession Act.

29. In the case of **SAKINA SOTE KAITTANY & ANOTHER VS MARY WAMAITHA [1995] eKLR** the court held that

*The difficulty remains how are these customary laws to be established as facts before the courts? In some cases the court will be able to take judicial notice of these customs without further proof as for instance in cases where the particular customary law has been the subject of a previous judicial decision or where the customary law is set out in a book or document of reference as provided in sub-s. (2) above, but usually in the High Court or in a magistrate's court, the relevant customary law will, as a matter of practice and of convenience, have to be provided by witnesses called by the party relying on the particular customary law in support of his case.*

30. In the instant case, the protestors called two witnesses one aged eighty five years and the other one over eighty. They both testified on the applicability of Kiambu Customary Law where the deceased is polygamous. Both stated that Kiambu customary Law which they were well conversant with required that the property be divided among the houses of the deceased and that each widow be given property for her house. Where the widow is deceased, her sons would take their house's share.

31. It is worth noting that the administrator did not rebut the evidence on applicability of Kiambu Customary Law in this case. All he did was to express his preference of its application in the belief that it would be fair to all the heirs based on the number of children in each house. It was not in dispute that the deceased had a polygamous household with three wives and several children.

32. The argument by the administrator was that the deceased had removed himself by conduct from the application of customary law. The conduct or actions of a person cannot supersede the law. The law is very clear that the estate of persons who died before the commencement of the Law of Succession Act shall be distributed under customary law.

33. It is not in dispute that the following are the assets available for distribution:-

- (i) L.R Ngandori/Nguviu/1402 -29 acres
- (ii) L.R Ngandori/Nguviu /1353 - 8 acres
- (iii) ½ share of Shop/Butchery at Kibugu Market co-owned with deceased's nephews (Plot No 17 Kibugu Market)
- (iv) Cash at KCB Bank Account No. 100000296 in KCB Embu as of 21/7/1990 jointly held in deceased's name and that of Jernado Njoka Kwenja.
- (v) Half share of cash at Account No. 100140058 in KCB Embu jointly held with Ben Kibati.

34. It was not denied that Leonard Ileri Kwenja had been given 9 acres by the deceased. It is therefore fair and just to the others to leave him out of the distribution of the estate as the administrator proposed. He is a brother to the administrator together with Jernado Njoka, Bernard Kiura and Alexander Njogu. Subject to Section 40 of the Law of Succession Act, Lenard Ileri will not be entitled to get a further share in the estate of the deceased.

35. The heirs in this estate have been identified as the three houses of the deceased and their children. I proceed to make distribution as follows:-

(i) Ngandori/Nguviu/1402

(a) *Teresiah Wanjuki Kwenja's house – 1/3 share*

(b) *Monicah Gikuu Kwenja – 1/3 share*

(c) *Njoki Kwenja – 1/3 share*

(ii) Ngandori/Nguviu/1353

*Each house to get 1/3 share*

(iii) *Deceased's share co-owned with others on Plot No. 12 Kibugu Market to go to Eustace Nyaga.*

(iv) *Cash at Bank in the Kenya Commercial Bank Accounts – be used for sub-division and other expenses in this cause and the balance to be shared equally between houses.*

36. Eustace Nyaga, the beneficiary of ½ share of the Plot No. 12 Kibugu Market will forfeit ½ acre to his brothers in his mother's house in one of the parcels of the agricultural land where his share falls in accordance with the provisions of Section 40 of the Act.

37. It has been established that some of the deceased's sons have passed on since this case was filed. Their shares will be taken up by their own children who will share equally if they are more than one. It is important to note that the particulars of the children were not given. The widows in the houses of the deceased children will have life interest in the shares of their late husbands.

38. Each party to meet their own costs of this cause.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF AUGUST, 2016.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Mr. Kathungu for protesters**

**Administrator present in person**