



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO. 839 OF 1998**  
**IN THE MATTER OF THE ESTATE OF GACHAU NJOROGE (DECEASED)**

**RULING**

1. The deceased herein died on 7<sup>th</sup> October 1995. Representation to his estate was made on 12<sup>th</sup> June 2007 to Margaret Mbere Gachau, Stephen Maina Gachau, Charles Macharia Gachau and James Karori Gachau.
2. The grant was partially confirmed on 19<sup>th</sup> October 2010, when the parties entered into a consent to distribute some of the assets. LR No. 209/7559/75 and Location 15/Mugeka/107 were left undistributed. It was directed that the parties file written submissions to assist the court in the distribution of the said assets.
3. In compliance thereof, the 3<sup>rd</sup> and 4<sup>th</sup> administrators filed their submissions on 10<sup>th</sup> March 2011. The said submissions are dated 9<sup>th</sup> March 2011. There is nothing on record to indicate that the 1<sup>st</sup> and 2<sup>nd</sup> administrators filed their written submissions.
4. Regarding LR No. 209/7559/75 Pumwani E. 46, it is submitted that the 1<sup>st</sup> and 2<sup>nd</sup> administrators had failed to comply with an order of the court made on 3<sup>rd</sup> December 2008 which had required them to account for their management and administration of the said property. It is submitted that the deceased had not bequeathed the asset to any of his dependants during his lifetime, and that during his lifetime all the rents collected were utilized on the needs of all his children. It is stated that the deceased had not surrendered the said property to his wife and children prior to his death.
5. On Location 15/Mugeka/107, it is submitted that all the parties had built their residences on the property and therefore it ought to be distributed to all. The deceased is also said to have had pointed out to the children where they should put up residences. It pleaded that the surviving spouse be accorded a life interest.
6. The application for confirmation of grant on record is undated, but was lodged in court on 26<sup>th</sup> June 2007, at the instance of the 3<sup>rd</sup> and 4<sup>th</sup> administrators. In their affidavit sworn on an unknown date they proposed that Location 15/Mugeka/107 be distributed equally between Charles Macharia Gachau, Stephen Maina Gachau and James Karori Gachau. They swore a further affidavit on 26<sup>th</sup> April 2008 to propose that the two assets, LR No. 209/7559/75 and Location 15/Mugeka/107, be distributed in four equal parts.
7. I have carefully perused through the file of papers before me, I have not come across any affidavit by

the 1<sup>st</sup> and 2<sup>nd</sup> administrators in opposition to the proposals made by the 3<sup>rd</sup> and 4<sup>th</sup> administrators in their application for confirmation of the grant. The said application is therefore uncontested.

8. This is a case of an intestate survived by a widow and children. Distribution of the estate in the circumstances should accord with section 35 of the Law of Succession Act, Cap 160, Laws of Kenya, where the relevant portions of it provide as follows:-

*'(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to –*

*(a) The personal and household effects of the deceased absolutely; and*

*(b) A life interest in the whole residue of the net intestate estate: provided that, if the surviving spouse is a widow, that interest shall determine upon her remarriage to any person...*

*(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, remarriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.'*

9. I have noted that the deceased was survived by one (1) daughter, Rosalind Wahito Gachau. She does not appear to have been involved in the proceedings for she never executed the consent to the making of grant herein dated 11<sup>th</sup> March 1998 and lodged in court on 28<sup>th</sup> April 1998, neither was her consent obtained for the purpose of the confirmation of the grant. She does not appear to have been party to the proceedings that were conducted on 19<sup>th</sup> October 2010, which culminated in the consent order recorded that day.

10. I am conscious of the fact that at Kikuyu customary law, for the deceased seems to me to have been a member of that ethnic language group, the rights of daughters to a share of the estate of their deceased parents was not automatic. They had no right at all where they were married. Where unmarried their entitlement was to a life interest of a portion of land allocated to them by their parents to till, with a possibility of their sons inheriting the same in the event of the unmarried daughters dying before getting married. See E. Cotran: *Restatement of African Law: 2 Kenya II The Law of Succession*, London, Sweet and Maxwell, 1969 and Jomo Kenyatta: *Facing Mount Kenya: The Tribal Life of the Gikuyu*, London, Mercury Books, 1961.

11. The position stated in paragraph 10 above is with respect to the customary law of succession. Customary law does not apply to the instant estate. The deceased herein died in 1995, long after the Law of Succession Act had come into force on 1<sup>st</sup> July 1981. By virtue of section 2(1) of the Act, the said Act applies to estates of all persons dying after its coming into operation. It is Act rather than customary law that applies to the instant estate in the circumstances.

12. According to Part V of the Act, which governs intestate succession to the estate of a person dying in Kenya after 1981, reference to surviving children for the purpose of intestate distribution does not discriminate as between male and female children, or as between married and unmarried daughters. All are entitled to an equal share to the estate of their dead parents, unless of course they have renounced their interest or share in the estate.

13. Before I make the final orders regarding the distribution of LR No. 209/7559/75 and Location 15/Mugeka/107, the administrators shall first satisfy me that Rosalind Wahito Gachau has consented to her being excluded from the distribution of the estate of the deceased. It must be demonstrated that she has renounced her right to a share in the estate.

14. I shall cause the matter to be mentioned on a date to be agreed upon at the delivery of this ruling, to

confirm that the information referred to in paragraph 13 above has been furnished

15. It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 15<sup>TH</sup> DAY OF AUGUST, 2016.**

**W. MUSYOKA**

**JUDGE**