



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT CHUKA**  
**SUCCESSION CAUSE NO.637 OF 2015**  
**(FORMERLY SUCCESSION CAUSE NO. 25 OF 2015)**  
**IN THE MATTER OF THE ESTATE OF NDII ITUGA ALIAS NDEI ITUMA (DECEASED)**  
**AND**  
**LOYFORD NDIGA MBURIA.....PETITIONER**  
**J U D G M E N T**

[1] The late Ndiituga ("the deceased") died on 9th April, 1984. According to the letter by the Chief of Kirumi Location dated 2nd February, 2015, the deceased left the following surviving him:-

- (a) Mugo John Mburia - grandson
- (b) Loyford Ndiga - grandson
- (c) Pamela Mugure - daughter
- (d) Hellen Gaaji - daughter
- (e) Evelyn Kanini - daughter
- (f) Kellen Kageni - daughter
- (g) Jedida Kanini - daughter
- (h) Pamela Kajira Jason - buyer

[2] In that letter of introduction, the Chief indicated that Mugo John Mburia and Evelyn Kanini were mentally challenged. He also indicated that Pamela Kajira Jason was a buyer.

[3] Pursuant thereto, on 4th February, 2015, Loyford Ndiga Mburia ("the Petitioner") petitioned for letters of administration intestate. In form no. P & A5, the Petitioner disclosed Josphine Gatiria as the only beneficiary and the estate as comprising two properties; Mwimbi/North Magumango/308 and 340, respectively. From the Certificates of Official Search lodged with the petition, these properties measured 15.49 and 12.0 acres, respectively. Accordingly, the estate consisted of approximately 27.49 acres.

[4] On 24th July 2015, the Petitioner was issued with a grant of letters which he sought to be confirmed vide his application dated 10th December, 2015. In that application, he proposed to distribute the estate as follows:-

Mwimbi/North Magumango/308

Loyford Ndiga Mburia - 15.49 acres

Mwimbi/North Magumango/340

(1) Evelyn Karimi Mburia - 1.00 acre

(2) David Munene Patrick - 1.00 acre

(3) Pamela Mugure Josphat - 1.00 acre

(4) Loyford Ndiga Mburia - 3.50 acres

(5) Pamela Kajira Jason - 1.00 acre

(6) Felix Muthomi Mugo

(7) Jenniffer Gatwiri Mugo

(8) Fridah Mukiri Mugo - 3.5 acres - jointly

(9) Moses Muthukumi Mugo

The distribution excluded Hellen Gaaji, Kellen Kageni, Jedida Kanini and Mugo John.

**[5]** At the hearing of the application Hellen Gaaji attended and informed the court that she was not claiming anything from the estate. The Petitioner informed the court that Kellen Kageni and Jedida Kanini were also not claiming any share in the estate. He further told the court that Evelyne Karimi and Mugo John were mentally challenged. That he was taking care of Evelyne Karimi and that Mugo John Mburia has four children. That he had distributed one (1) acre to the said Evelyne Kanini and he was proposing to distribute a total of 3.5 acres to the children of Mugo John.

**[6]** The court was not satisfied with the proposed distribution and sought to know the actual mental status of Mugo John. The court directed that the said Mugo John be mentally assessed and a report be filed. Through the assistance of the Deputy Commissioner, Maara Sub-County, the said Mugo John was mentally assessed at the Meru Level 5 Hospital. A report dated 13th July, 2016 from the said institution was lodged in this court on 15th July, 2016 which confirmed that the said Mugo John suffers from a mental disorder. Being satisfied that the said Mugo John Mburia was mentally challenged, this court appointed one of his sisters, one Pamela Mugure as the Manager of his estate under the provisions of the Mental Health Act Chapter 254, Laws of Kenya. The said appointment was undertaken after due examination and satisfaction as to the suitability of the said Manager. Having been satisfied that the estate of John Mugo was properly represented, as his children are still minors, this court can now venture into the distribution of the estate.

**[7]** The court took evidence of the Petitioner who insisted that his proposed distribution should be upheld. Mr. Mutani learned counsel for the Petitioner submitted that the appointment and management by Pamela Mugure should be restricted only to the property Mwimbi/North Magumango/340. That the same should not extend to Mwimbi/North Magumango/308. He urged the court to retain the latter property as distributed by the Petitioner.

**[8]** I have considered the record, the number of the beneficiaries and the size of the estate. Three of the beneficiaries, who are daughters of the deceased, Hellen Gaaji, Kellen Kageni and Jedida Kanini are said not to be interested. Hellen Gaaji appeared in court on 4th May, 2016 and renounced her interest on the estate. The other two (2) did not attend but the Petitioner assured the court that they had indicated their unwillingness to inherit anything from the estate. This court decided to hold the Petitioner to his word.

[9] The entire estate is in excess of 27 acres. The Petitioner proposes to allocate the primary beneficiaries, the daughters of the deceased a total of 3.5 acres. He proposes (1) acre to one David Munene Patrick. The sons of Mugo John have been allocated three and half (3.5) acres. The rest of the estate amounting to approximately nineteen acres is proposed to be inherited by the Petitioner. I asked the Petitioner the rationale of his proposed distribution but he did not explain. It defeats logic why he would want to take three quarters (3/4) of the estate and leave the rest with negligible portions.

[10] Section 38 of the Law of Succession Act provides:-

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

In this regard, since all the other beneficiaries of the estate are not complaining and are satisfied with what has been proposed to them, this court's concern was the share that was proposed for the estate of Mugo John. The court wondered whether, if the said Mugo John was not mentally challenged his brother, the Petitioner, would have distributed to him 3.5 acres only while he takes approximately 19 acres. Since the children of the said subject (Mugo John) are still minors, this court must rise to the occasion and protect their interest as per the law provided. It is more likely than not that the subject would have pressed for an equal share in the estate. In my view, it will be gross breach of Article 27 of the Constitution to discriminate against the subject because of his mental status or his children because of their age.

[11] Mr. Mutani did not give any special reason why the management of the subject's interest should not extend to Mwimbi/North Magumango/308. There was nothing compelling that was presented to this court to leave the proposed distribution of property undistributed. Since the Petitioner wishes to have portions in both Mwimbi/North Magumango/308 and 340, there is no reason why Mugo John's interests should also not extend to both properties. His estate is likewise entitled to equal share as the Petitioner. Had the Petitioner given up his interest in plot 340 the court would have been minded to consider Mr. Mutani's proposal favourably. Once the children of Mugo John grow up, they will definitely ask why those who were responsible for them did not consider their interests when the estate to which their father was entitled to was being distributed.

[12] Accordingly, taking all the circumstances into consideration and for the reason that Mwimbi/North Magumango/308 is approximately 15.49 acres, considering that the Petitioner has already proposed to get 3.5 acres in 340 the same acreage as Mugo John's estate, I hereby parcel out 5.49 acres from Mwimbi/North Magumango/308 in favour of the estate of Mugo John. The estate is therefore distributed as follows:-

Mwimbi/North Magumango/308

1. Loyford Ndiga Mburia - 10 acres
2. Pamela Mugure Josphat - 5.49 acres

to hold in trust for:-

- (a) Felix Muthomi Mugo
- (b) Jennifer Gatwiri Mugo
- (c) Fridah Mukiri Mugo
- (d) Moses Muthukumi Mugo until all reach the age of 18 years, in equal shares.

Mwimbi/North Magumango/340

- (1) Loyford Ndiga Mburia - 1 acre  
to hold in trust for Evelyne Mburia
- (2) David Munene Patrick - 1 acre
- (3) Pamela Mugure Josphat - 1.5 acres
- (4) Loyford Ndiga Mburia - 3.5 acres
- (5) Pamela Kajira Jason - 1.00 acre
- (6) Pamela Mugure Josphat - 3.5 acres

to hold in trust for :-

(a) Felix Muthomi Mugo

(b) Jenniffer Gatwiri Mugo

(c) Fridah Mukiri Mugo

(d) Moses Muthukumi Mugo until all reach the age of 18 years, in equal shares.

It is so decreed.

**DATED and delivered at Chuka this 22<sup>nd</sup> day of September, 2016.**

**A. MABEYA**

**JUDGE**

Judgment is read and determined in open court in the presence of Mr. Mutani for the Petitioner.

**A.MABEYA**

**JUDGE**

**22/9/2016**