



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO 427 OF 2013**

**IN THE MATTER OF THE ESTATE OF M'MUGUNA M'ARIMI ALIAS MUGUNA ARIMI  
(DECEASED)**

**JOYCE KATHINKI.....PETITIONER**

**Versus**

**ANTONY MWIRIGI ..... INTERESTED  
PARTY**

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**JUDGMENT**

**Distribution of the estate**

[1] Antony Mwirigi objected to the confirmation of the grant herein. Consequently, the court deferred confirmation of the grant and directed Antony Mwirigi to file either a protest or mode of distribution within 21 days from 17<sup>th</sup> June, 2015. The court also directed the Petitioner to file a further affidavit in answer to the distribution that may be proposed by Antony Mwirigi. Pursuant to these orders of the court, Antony Mwirigi filed an affidavit sworn on 6<sup>th</sup> July, 2015 on his preferred mode of distribution of the estate. The Petitioner also filed a further affidavit sworn on 23<sup>rd</sup> July 2015. Parties then appeared before me, albeit late, on 27<sup>th</sup> October 2015 and requested for a judgment date on this matter. And the following is that judgment.

**Antony's preferred mode of distribution**

[2] Antony Mwirigi in his affidavit averred that he has no objection to the Petitioner administering the estate except his major quarrel was on the proposal that he be registered jointly with his son EUTICUS THURANIRA in respect of his share of the estate property. His arguments were that;

- (1) He is a direct beneficiary of his father's estate;
- (2) His said son is neither a direct beneficiary of the estate nor the only child of his;
- (3) He has other three children who should benefit too from his entitlement in the estate;

- (4) His sisters sold 0.25 acres without his consent; and
- (5) The estate should be distributed fairly and equitably to the beneficiaries listed in the Chief's letter.

He therefore, proposed that:

LR. NO. NYAKI/MUNITHU/676 to be shared equally among:

- a. **Joyce Kathinki**
- b. **Purity Kairuthi M'Muguna**
- c. **Pricilla Kagete Peter**
- d. **Janerose Kajigi and**
- e. **Antony Mwirigi**

He was of the opinion that after distribution of the estate is carried out as proposed by him, the purchaser herein should receive his 0.25 acres from the share of persons who sold it to him. He believes this is most fair and just distribution to all the beneficiaries of the deceased.

**Petitioner's preferred mode of distribution**

[3] The Petitioner refuted claims by Antony Mwirigi and averred that neither the Petitioner nor her sisters who sold 0.25 acres to Isaiah Maingi Mbaya; the said portion of land was sold by their mother with the consent of all family members in order to raise funds for this succession cause. The Petitioner also termed it as false the allegations by Antony that EUTICUS THURANIRA is not a direct beneficiary yet it was the deceased who said that he should get a share from his land. The Petitioner, therefore, proposed the following distribution:

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- a. **Isaiah Maingi Mbaya . . . . .0.25 acres**
- b. **Antony Mwirigi & Euticus Thurania . . . 0.18 acres jointly**
- c. **Joyce Kathinki }**
- d. **Purity Kairuthi M'Muguna }.....0.18 acres jointly**
- e. **Pricilla Kagete Peter }**
- f. **Janerose Kajigi }**

[4] The Petitioner decried that Antony Mwirigi is just delaying the distribution of the estate and that his affidavit should be seen in that light.

**DETERMINATION**

[5] The only point of contention is the mode of distribution which the court shall determine and confirm the grant that was issued on 15<sup>th</sup> October, 2014. The protestor Antony Mwirigi has, however, raised some pertinent legal issues which demand immediate determination. These issues are that:

- a) **He is the son of the deceased and, therefore, a direct beneficiary of the deceased's estate. He is thus entitled to his own share; and**
- c) **That part of the estate was sold without his consent and should be derived from the share of those who sold it.**

**Antony is a child of the deceased**

[6] There is no dispute or doubt that Antony is the son of the deceased, and, therefore entitled to

a share in the estate of the deceased. But Antony's proposal that the entire estate be distributed equally among all the surviving children of the deceased is to be seen in light of other factors and the law. For instance, and if I understood his submissions well, it is wholly wrong if he meant that a grandson can never have a right to the estate of his grandparent. The correct position of the law is that grandchildren may also be entitled to a share of the estate of a deceased person especially where; such grandchild or grandchildren are dependants in the sense of Section 29 of the Law of Succession; or the deceased provided for them in a will or codicil; or the deceased had during his lifetime paid, given or settled any property to or for the benefit of such grandchild or grandchildren or where there are no living children of the deceased. That aside, I agree with him on one thing; that he entitled to a separate share of the estate and which should be registered solely in his own name. He is an adult and of sound mind; he is not under any legal deficiency or incapacity. Therefore, there is no any legal necessity or requirement that demands his share to be in the joint names with his son; I dare say, even if both were entitled to a share of the estate, their respective shares are distinct and devolve upon each one of them as separate entitlements. I am not aware of any change of this law. But, to complete the argument, a father may be registered in a property in trust of a grandson who is a minor. However, this is not the case here. Nonetheless, the question is:

**Whether the grandson namely EUTICUS THURANIRA is entitled to a share of the estate in the first place.**

**Is Euticus Thurania entitled to the estate?**

[7] The Petitioner has averred in her affidavit sworn on 23<sup>rd</sup> July 2015 that the deceased said that EUTICUS THURANIRA should be given a share of his land. Antony Mwirigi, the father of EUTICUS THURANIRA averred that it is him who is entitled to a share of the estate of his late father and not EUTICUS THURANIRA. I note that the letter by the Chief does not mention EUTICUS THURANIRA as a beneficiary. It is only in the Affidavit in support of Summons for Confirmation of Grant and the Further Affidavit where it was proposed that Antony Mwirigi be registered jointly with EUTICUS THURANIRA. Despite these averments, there is really no any other evidence to prove that the deceased had given or identified or settled a share of his property for the benefit of or to be given to the said EUTICUS THURANIRA. The Petitioner did not provide sufficient material to support her averment in paragraph 6 of her further affidavit sworn on 23<sup>rd</sup> July, 2015. Therefore, there is absolutely no basis for the Petitioner's proposal that the share of Antony Mwirigi to be registered in their joint names with EUTICUS THURANIRA. I will, therefore, disallow the Petitioner's proposal that Antony Mwirigi and EUTICUS THURANIRA shall be registered jointly in respect of Antony's share of the estate. But I must quickly add that these proceedings relate to the estate of the deceased, the father of Antony, Joyce, Purity, Pricilla and Janerose. They do not relate to Antony- of course he is living. As such, his argument that he has other children other than EUTICUS who are also entitled to his share does not hold sway on or affect distribution of his father's estate. Similarly, and I stated this earlier, Grandsons would only make a claim of the estate in the circumstances I have discussed at paragraph 6 above. But before I close and give my final orders, let me determine the other issues and arguments that were raised in the affidavits filed by the parties herein.

**On Sale of part of estate**

[8] Antony stated that 0.25 acres was sold to one Isaiah Maingi Mbaya by his sisters and without his consent. The Petitioner on the other hand argued that it was their mother with the consent of all family members who sold 0.25 acres to Isaiah in order to raise money to file these succession proceedings. The law gives a surviving spouse the power to sell any property subject to his life interest except under Section 37 and 82 sale of immovable property before confirmation of grant shall be with the consent of the court. When I look at these provisions of the law, one thing comes into my mind and soon, I believe it will become a huge constitutional matter: Article 45 (3) of the Constitution on rights of parties in a marriage vis-à-vis succession law. The question of article 45 (3) of the Constitution is still a live debate amongst eminent scholars, jurists, lawyers

and judicial officers. It is not in issue in these proceedings and nothing I will say which prejudices the debate except that further research, interrogation or judicial interpretation is needed to unravel the questions; Does it matter that by law the surviving spouse may be entitled to some portion of their properties of marriage? And should such property be discerned and treated as separate from the estate of the departed spouse? And should this be quite apart from the spouse's life interest in the residue of the entire estate? The debate becomes even more discriminating especially where all properties of the couples are in the name of the deceased spouse; does it mean all such properties form part of the estate of the departed spouse, and nothing belongs to the surviving spouse except life interest under the law of succession? I have no answers for these questions but with time, I suspect more questions than answers shall sprout. The foregoing discussion is a health detour but it is not the basis of my decision. I now go back to the main course of the ruling. From the material before me, Antony gave his consent to the entire process of this succession cause. He has not told the court where funds to file the cause came from. At least on these matters, he is not honest. He is being faithful to the intuitive characteristic of humans; being selfish, and he is only trying to get the most he can of the estate to himself. All indications are that he was fully aware of the sale of 0.25 acres; why did he not take any appropriate action in law or even file proceedings for protection of the estate from intermeddling with the free property of the deceased under Section 45 of the Law of Succession Act if his allegations are true? Withholding consent for such sale would be unreasonable exercise of discretion. I will not withhold my consent to the sale of 0.25 acres for it was for good reason. Accordingly, 0.25 acres of the estate property shall devolve upon Isaiah Maingi Mbaya. It is so ordered.

**Ultimate Distribution by Court**

[9] Now that I have determined that 0.25 acres of the estate i.e.LR. No. NYAKI/MUNITHU/676 shall devolve upon Isaiah Maingi Mbaya, what shall be most fair and equitable distribution of the remainder? Antony had suggested that all children of the deceased should get equal shares except that 0.25 acres should be derived from the share of the others. I have settled that 0.25 acres shall come from the gross estate. Therefore, subject to the life interest of the widow in the whole residue of the estate, all the children of the deceased; namely (1) Antony Mwirigi (2) Joyce Kathinki (3) Purity Kairuthi M'Muguna, (4) Priscilla Kagote Peter; and (5) Janerose Kajigi shall share equally the remainder of LR.NYAKI/MUNITHU/676 after 0.25 acres is hived off for Isaiah Maingi Mbaya. Accordingly, distribution of the estate property shall be as follows:-

**LR NO.NYAKI/MUNITHI/676**

- a. **Isaiah Maingi Mbaya** ..... **0.25 acres**
- b. **Antony Mwirigi** }
- c. **Purity Kairuthi M'Muguna** }
- d. **Pricilla Kagote Peter** } **Shall share equally the balance**
- e. **Janerose Kajigi** } **(approximately 0.36 acres)**
- f. **Joyce Kathinki** }

**Confirmation of grant**

[10] In light thereof, I hereby confirm the grant that was issued on 15<sup>th</sup> October, 2014. Distribution of the estate property shall be in accordance with paragraph (9) of this judgment. It is so ordered.

**Dated, Signed and Delivered in open court at Meru this 23<sup>rd</sup> November, 2015**

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**F. GIKONYO**

**JUDGE**

**In the Presence of:**

**Petitioner in person - present**

**Antony Mwirigi (interested party) in person – present**

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**F. GIKONYO**

**JUDGE**