



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**SUCCESSION CAUSE NO. 209 OF 2012**  
***IN THE MATTER OF THE ESTATE OF***

***MAGIRI MUKINDIA S/O MUKINDIA alias MAGIRI MUKINDIA (DECEASED)***

**ROBENSON KIRIMI MAGIRI.....APPLICANT**

**Versus**

**NKOROI MAGIRI.....1<sup>ST</sup> RESPONDENT**

**FESTUS MURIITHI MAGIRI.....2<sup>ND</sup> RESPONDENT**

**RULING**

[1] Before me is a Summons for Confirmation of Grant of Letters of Administration Intestate dated 10<sup>th</sup> March 2015 which seeks the following orders:

1. **THAT the Grant of Letters of Administration made to Nkoroi Magiri and Jane Kinanu Magiri on 24<sup>th</sup> September 2014 be now confirmed.**
2. **THAT the Estate of the deceased be distributed as per paragraph 6 of the supporting affidavit.**
3. **THAT costs of this application be in the cause.**

[2] This matter came up for confirmation of the grant on 30<sup>th</sup> June 2015 before Makau J, but there was no agreement on distribution. Indeed, parties had filed two different sets on mode of distribution. Consequently, it was agreed among the parties and the court directed thereto that the matter be heard by way of written submissions. Parties filed their respective submissions, albeit Mr. Mutegi placed his submissions in the file on the day I reserved this case for ruling and before the court had retired to the chambers. I will, therefore, consider what each party says in their respective submissions and affidavits on the preferred mode of distribution, the law and then make a decision.

[3] The Petitioner/1<sup>st</sup> Respondent in his application dated 10<sup>th</sup> March 2015 proposed in the affidavit in support that the Estate of the deceased should be distributed as follows:

**LR NO.ABOGETA/U-CHURE/130**

**1<sup>ST</sup> HOUSE -3.2 ACRES**

- a. **RAEL GAITI MAGIRI-1.20 Acres**
- b. **FESTUS MURITHI MAGIRI-1 Acre**

**c. NKOROI MAGIRI-1 Acre**

**LR.NO.ABOGETA/U-CHURE/130**

**2<sup>ND</sup> HOUSE-4.54 ACRES**

- A. BETH GAKIIRU MAGIRI-1.54 Acres to hold jointly and in trust for JANE KINANU MAGIRI, PAMELA KAJUJU MAGIRI, EMILITA KIENDE and KARAMBU MAGIRI.**
- B. ROBENSON KIRIMI MAGIRI- 1 Acre**
- C. DANCAN GITONGA MAGIRI-1 Acre**
- D. KIMATHI MAGIRI- 1 Acre**

The Objector/Applicant on the other hand sought to have the Estate distributed as follows:

- a. RAEL GAITI MAGIRI.....0.703 ACRES**
- b. BETH GAKIIRU MAGIRI.....0.703 ACRES**
- c. FESTUS MURIITHI MAGIRI.....0.703 ACRES**
- d. NKOROI MAGIRI.....0.703 ACRES**
- e. PAMELA KAJUJU MAGIRI.....0.703 ACRES**
- f. JANE KINANU MAGIRI.....0.703 ACRES**
- g. EMILITA KIENDE.....0.703 ACRES**
- h. DANCAN GITONGA MAGIRI.....0.703 ACRES**
- i. KARAMBU MAGIRI.....0.703 ACRES**
- j. KIMATHI MAGIRI.....0.703 ACRES**

**THE REMAINING BALANCE TO BE SHARED EQUALLY (WHICH IS A FEW POINTS)**

[4] The Petitioner /1<sup>st</sup> Respondent supported the above proposed mode of distribution of the estate and gave the following reasons: That the deceased was polygamous and so the applicable Law would be the Law of Succession Act CAP 160 of the Laws of Kenya and specifically sections 40 and 35 of that Act. The two widows namely Rael Gaiti Magiri and Beth Gakiiru Magiri are still alive. Each of them has children. Further, the deceased prior to his death left his two houses living in their respective land parcels and that the 1<sup>st</sup> Respondent's proposed mode of distribution is in accordance with that reality. Specifically, the 1<sup>st</sup> house lived on LR NO. ABOGETA/130 which measures 3.2 acres and the 2<sup>nd</sup> house lives on 4.5 acres. According to the 1<sup>st</sup> Respondent, distribution of the estate should be done equitably and not equally. And that their proposed mode of distribution is equitable. It was submitted that the 2<sup>nd</sup> house gets a larger share but it is equitable as they were in occupation of the said portion and are the larger family.

[5] On the other hand it was submitted for the objector/applicant that the deceased left nine children who compose the two houses. Therefore, the most equitable and just distribution of the estate of the deceased would be for the estate of the deceased to be shared equally amongst all the dependants of the deceased.

**DETERMINATION**

[6] I have carefully considered the proposed modes of distribution by both parties. The fact that the deceased was polygamous prior to his death is not in any dispute; it is a major consideration in succession of this estate. Accordingly, the court should be guided by the provisions of Section 40 of the Law of Succession Act CAP 160 of the Laws of Kenya which provides as follows:

**40.**

**Where intestate was polygamous**

(1)

**Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.**

[7] In the circumstances of this case, what is the most equitable mode of distribution of the estate of the deceased? First of all, let me correct the impression being created by the by Petitioner/1<sup>st</sup> Respondent that the deceased left 2 parcels of land namely; LR NO.ABOGETA/U-CHURE 130 and LR NO. ABOGETA/U-CHURE/130. There is only one parcel of land namely; LR NO.ABOGETA/U-CHURE 130 which is the estate property and on which the heirs herein lived. That issue rests and I move to the substance of the matter. Under Section 40 of the Law of Succession Act, distribution of the estate of a person who was polygamous is influenced by the number of houses, the number of children in those houses and any living spouse. In this case, the first house of Rael Gaiti has two (2) children, namely Festus Magiri and Nkoroi Magiri. The other house off Beth Gakiiru has 7 children, namely Jane Kinanu, Pamela Kajuju, Emilita Kiendi, Karambu Magiri, Robernson Kirimi, Duncan Gitonga and Kimathi Magiri. By law, the estate should at first instance be divided between the two houses taking into account the number of children in each house but also adding the wife surviving him as an additional unit to the number of children in each house. I am content to cite a work of Makhandia J (as he then was) in the case of **Stephen Macharia Munuhe vs. Gichunge Munuhe & Another Nyeri Succession Cause No. 54 Of 1996 (2010) eKLR** that:

**“It would appear therefore that in distributing the estate of the deceased who was polygamous, it has to be on the basis of the number of children in each house. In other words, such estate cannot be distributed equally between the houses without taking into account the number of children in each house. It would indeed cause absurd results if such position was to be taken. Supposing one house had one child and another had 10. Can it be said that it would be fair to distribute such estate equally between the two houses without taking into account the number of children in each house. One house would end up having a huge chunk of the estate to the detriment of the other. “**

[8] In the present case, both wives of the deceased are living and it becomes much easier to deal with the estate under section 40 of the Law of Succession Act. Each wife is added as an additional unit to the number of children in each house. I note that the 1<sup>st</sup> Respondent’s proposal seems to allocate a mean share of 1.54 acre to the 4 daughters of the deceased. To make matters worse, the proposal that the said share of the daughters is to be held in their trust by their mother does not make any sense because these daughters are of the age of majority and it has not been shown that they suffer from any form of incapacity recognized by law as to warrant their share to be held in trust for them. It has not been established at all that they intended to set up a trust. Such trust should be created by them in accordance with the law on trusts; that is not the case here. I doubt that kind of utter discrimination will have a place in modern world where constitutional supremacy and justice for all regardless of gender is the polity in the reign. The 1<sup>st</sup> Respondent also argues that the fact that the two families were already living in a designated portion of the estate property the said occupation should not be disturbed. I am aware that occupation of the land before the death of the deceased is a factor which the court may consider in distribution of the estate of a deceased, except, however, it should not be taken as a hard and fast rule of recognition especially if it will lead to injustice to some of the heirs of the estate. I note that distribution need not be equal but equitable; however, what is just and fair will depend on the circumstances of the case. I have not seen any objection from the daughters although that should not deny them their entitlement. I will, therefore add .20 acres to the share of the daughters. And now, after considering all factors, the law and the respective submissions and affidavits filed by the parties, the most fair, just and equitable way of distribution of the estate, i.e. **LR NO.ABOGETA/U-CHURE/130** is as follows:

**1<sup>ST</sup> HOUSE -3.00 ACRES**

a. **RAEL GAITI MAGIRI-1.Acre**

- b. **FESTUS MURITHI MAGIRI-1 Acre**
- c. **NKOROI MAGIRI-1 Acre**

**2<sup>ND</sup> HOUSE-4.74 ACRES**

- d. **JANE KINANU MAGIRI, PAMELA KAJUJU MAGIRI, EMILITA KIENDE and KARAMBU MAGIRI- 1.74 Acres to share equally (in common).**
- e. **ROBENSON KIRIMI MAGIRI- 1 Acre**
- f. **DANCAN GITONGA MAGIRI-1 Acre**
- g. **KIMATHI MAGIRI- 1 Acre**

[9] Accordingly, the Grant of Letters of Administration Intestate made to Nkoroi Magiri and Jane Kinanu Magiri on 24<sup>th</sup> September 2014 is hereby confirmed as prayed for in the application dated 10<sup>th</sup> March 2015. Distribution of the estate property shall be as above. This being a family matter I make no order as to costs. It is so ordered.

**Dated, signed and delivered in court at Meru this 7<sup>th</sup> day of December 2015.**

-----

**F. GIKONYO**

**JUDGE**

**In the presence of:**

**Mr. Mutwiri Advocate for Nyangire Advocate for Objector**

**Mr. Mutegi advocate for Respondent**

-----

**F. GIKONYO**

**JUDGE**