



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**PROBATE & ADMINISTRATION CAUSE NO. 218 OF 1997**  
**RE: ESTATE OF SIMEON KAMAU KURIA**

**JUDGMENT**

1. Simeon Kamau Kuria died intestate on 30<sup>th</sup> October 1995. He was survived by a widow and eight children. He had distributed a number of properties *inter vivos*. The primary issue for determination in this matter is the mode of distribution of the only free property known as Eldoret Municipality/Block 11/46. It is a piece of land measuring 0.8093 hectares or 2.0 acres or thereabouts. There are about 55 rental units erected on it.
2. The objector, Beatrice Wangui Kamau, is a daughter of the deceased. She has objected to the proposed mode of distribution in the summons for confirmation of grant on two grounds: first, that she has not been provided for; and, secondly that two grandsons of the deceased, Sammy Kariuki Ann and Simon Kamau Ann have been given a share in addition to that of their mother Ann Wanjiru Kamau.
3. The history of the litigation is relevant. The petition for letters of administration was filed on 9<sup>th</sup> September 1997 by Samuel Kabari Kamau, one of the sons of the deceased. A grant was issued on 14<sup>th</sup> November 1997. The petitioner died on 5<sup>th</sup> February 2008. On 1<sup>st</sup> August 2008, he was substituted with another son, John Kariuki Kamau. A fresh grant was issued on 1<sup>st</sup> August 2008 in favour of John Kariuki Kamau. The objector filed a notice in form 70 dated 29<sup>th</sup> April 2010 for revocation or annulment of the grant. A formal summons for revocation of the grant was filed by the objector on 1<sup>st</sup> March 2010. The objector's siblings John Kariuki Kamau, Leah Nyokabi Kamau, Nahashon Muniu Kamau, Naomi Njeri Kamau and Ann Wanjiru Kamau all filed nearly identical replying affidavits sworn on 7<sup>th</sup> July 2010 opposing the application for annulment of the grant.
4. The matter was placed before Azangalala J (as then was). After taking *viva voce* evidence from the disputants and considering rival depositions, he found that the petition was not actuated by fraud or ill motive. The learned judge found that the objection to the mode of distribution could be dealt with at the stage of confirmation of the grant. It is important to set out the relevant part of his ruling dated 18<sup>th</sup> June 2012 *in extenso*-

*“I find and hold that the omission of the objector from the petition was not actuated by fraud or ill-motive. The omission per se, therefor, is not a basis for annulment or revocation of the grant issued to the administrator.*

*“The administrator had no personal interest in the free property of the deceased and in my view he will act in the best interest of all concerned. That being my view of the matter the objector's application dated 1<sup>st</sup> March, 2010 is declined with no order as to costs.*

*“That is not however the end the matter. The administrator still has to apply for*

*confirmation of grant. When he does so, he must make provision for all beneficiaries entitled to the estate of the deceased. Where the children of the deceased are said to have had their shares during the life time of the deceased, those shares should be disclosed. Those who have already been catered for can also elect to state, in writing, that they be excluded from the distribution of the free property of the estate. It is therefore at the confirmation stage when the objector's interest/claim will be considered with the interests of her siblings”.*

5. Pursuant to that order, the petitioner filed summons of confirmation of grant dated 24<sup>th</sup> July 2012. Despite the clear guidance from the Court, the summons for confirmation of grant did not provide for some of the beneficiaries. In particular, the objector and Mary Njeri were not given any share of the property.
6. On 21<sup>st</sup> October 2014, I heard the disputants on the mode of distribution of the estate. In her sworn testimony, the objector testified that she is entitled to a share of the free property of the deceased. She testified that her marriage did not disinherit her of the share of her father's estate. She claimed that she returned to her father's property in the year 1990 and that the deceased had asked her to remain on the property. She said that from the year 2009, she has not enjoyed good relations with her brothers and sisters partly due to these proceedings.
7. Regarding distribution of the estate, she proposed that her siblings Leah Nyokabi (now deceased), Samuel Kabaru (also deceased) and John Kariuki (the petitioner) do retain the properties they were given by the deceased. She proposed that the free property, Eldoret Municipality/Block 11/46 be divided *equally* among the remaining five children, which is to say, the objector, her sisters Mary Njeri and Anne Wanjiru; and her brothers Daniel Ngugi (deceased) and Nahashon Muniu. She was of the view that the two grandsons of the deceased should not inherit the property because their mother, Ann Wanjiru Kamau, will be getting a share of the free property.
8. The petitioner, John Kariuki did not agree with the objector. He conceded that the objector and his other sister Mary Njeri had not been given any property. He was however unhappy with the conduct of the objector who kept on opposing the petition without stating categorically how the estate should be distributed. That was even after being given an opportunity by my predecessors to state her case on distribution. He testified that the only other objection was raised by his sister Mary Njeri. Regarding the two grandsons of the deceased, he testified that the deceased had indicated that they be allocated part of the property. There was a sketch plan that had been made by the deceased. It was not produced in evidence. He said that his mother (now also deceased) had confirmed it in taped recordings. The recordings were not also produced in court. He said the grandsons are not strangers and that it was offensive for the objector to describe them in those terms. He stated finally that he would leave the matter of distribution to the court.
9. Simeon Kamau (representing his mother Leah Nyokabi, deceased) told the court that he agreed fully with the petitioner. Simon Kamau (who stood in for his late father Samuel Kabari) also supported the views of the petitioner. And so did Ann Wanjiru and Nahashon Muniu. I then heard Mary Njeri, a daughter of the deceased. She confirmed that she had been left out of the estate. She said that she used to be married. She has not been enjoying good health. She now occupies one of the rooms on the free property. She said that her father had directed that she be allocated a part of the property. She was unaware of any agreement between her father and her former husband disinheriting her of a share of her father's estate. She had however not lodged a formal objection to the confirmation of the grant.
10. I have considered the evidence on the proposed distribution of the free property of the deceased. The issue for determination is whether the objector and her sister Mary Njeri are entitled to a share of the property. The second key issue is whether the two grandsons are entitled to inherit the estate of the deceased. I have studied the consent to the mode of distribution dated 24<sup>th</sup> July 2012. That consent is not executed by the objector and Mary Njeri. It is however signed by a *Naomi Njeri Ndungu*. It is not clear whether she is the same as Mary Njeri. *Prima facie*, they seem to be different persons. It is common ground that the objector and Mary Njeri are both daughters of the deceased but have not been provided for. The deceased may have expressed certain wishes but they were not condensed into a valid will. He died intestate.
11. Sections 26, 27, 38, 41, 42 and 66 of the Law of Succession Act place the objector and Mary Njeri on the same footing with all their siblings to inherit the estate. The law does not discriminate

- between sons and daughters or married daughters. The tenor of the replying affidavits of John Kariuki Kamau, Leah Nyokabi Kamau, Nahashon Muniu Kamau, Naomi Njeri Kamau and Ann Wanjiru Kamau all sworn on 7<sup>th</sup> July 2010 was that the objector was married off to one Joseph Kagunda way back in 1975; and, that she was “comfortable”. It matters little that she inherited her late husband’s estate. John Kamau deposed that when the objector returned to her father’s homestead in 2009, the siblings gave her eight residential rooms to cater for her needs. That may have been a good gesture: but the objector’s rights go beyond mere tokenism by her siblings. The law entitles her to an equal share of the free estate subject to any gifts in the lifetime of the deceased.
12. The deponents also referred to an *oral* will of their father. As I stated, the wishes of the deceased did not qualify as an oral or written will under the terms of the Law of Succession Act. See *Re Rufus Ngethe Munyua (deceased) Public Trustee v Wambui* [1977] KLR 137. The reality is that the deceased died *intestate*. His free estate can only be distributed in accordance with the Law of Succession Act. The objector and Mary Njeri, unlike some of their siblings, had not been allocated other property by their father. I have no hesitation in finding that the objector and Mary Njeri are entitled to inherit the remainder of the free property of the deceased in equal shares with qualifying siblings.
  13. A closer reading of section 29 of the Act shows that the objector and Mary Njeri rank in priority to the two grandsons, Sammy Kariuki Ann and Simon Kamau Ann. It has not been lost on me, and it was acknowledged by Ann Wanjiru Kamau, that at the time of the death of the deceased, the grandsons were very small children. There is no evidence they were *dependents* of the deceased. The recordings of the widow of the deceased to support that allegation were not presented to the court. I have also perused the original letter from the Chief Kilimani Sub-location dated 30<sup>th</sup> August 2008. It listed the following as the survivors to the deceased: Leah Nyokabi aged 60 years (daughter), Samuel Kabari (son, deceased), John Kariuki (son, 56 years), Beatrice Wangui (daughter aged 54 years), Daniel Mburu (deceased son), Ann Wanjiru (daughter 37 years) and Nahashon Muniu (son 34 years). The grandsons and Mary Njeri were not mentioned.
  14. In any event, Ann Wanjiru Kamau, the mother of the two grandsons of the deceased, is entitled to a share of the free property. Her share will finally devolve to the two. It would be unfair and unjust to allow a distribution to the two and their mother and to leave out the two daughters of the deceased. It would be discriminatory and anathema to the Law of Succession Act. The law and the evidence before me do not support the claim by the two grandsons to a direct share of the estate of the deceased.
  15. The petitioner had proposed that the free property, Eldoret Municipality Block 11/46, be divided as follows: 0.652 acres to John Kariuki Kamau and Tabitha Mburu Kamau to hold in trust for Simon Kamau Mburu, Elizabeth Wambui Mburu and Billy Kihumba Mburu. The objector had no objection. I will thus *uphold* that aspect of distribution. For the reasons I have given, the proposed distribution to the two grandsons Sammy Kariuki Anne and Simon Kamau Anne of 0.163 acres each is *not* backed by the law and the evidence. They have *no* priority to the objector and Mary Njeri and neither are they entitled to a direct share of the estate of their grandfather. Their mother, Anne Wanjiru Kamau is however entitled to a share which will finally devolve to the two.
  16. In the result, the remainder of the property (less the 0.652 acres to John Kariuki and Tabitha Mburu in trust for Simon Kamau Mburu, Elizabeth Wambui Mburu and Billy Kihumba Mburu) shall be distributed *equally* to Beatrice Wangui (daughter and objector), Mary Njeri (daughter), estate of Daniel Ngugi (deceased son), Anne Wanjiru Kamau (daughter) and Nahashon Muniu Kamau. A certificate of confirmation of grant of letters of administration shall issue in the terms of this judgment.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 18<sup>th</sup> day of November 2014.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of:-**

Mr. John Kariuki Kamau, petitioner, in person.

Ms. Beatrice Wangui Kamau, objector, in person.

Mr. Nahashon Muniu Kamau.

Mr. Simon Kamau representing Leah Nyokabi (deceased)

Ms Tabitha Mburu representing Daniel Mburu (deceased)

Ms. Ann Wanjiru Kamau.

Mr. J. Kemboi, Court clerk.