



**REPUBLIC OF KENYA**

**High Court at Nyeri**

**Succession Cause 468 of 2004**

**IN THE MATTER OF THE ESTATE OF**

**HEZEKIAH THUKU KIHARA..... DECEASED**

**AND**

**CHARLES GITONGA THUKU**

**JULIA WANJIRU THUKU.....PETITIONER**

**RULING**

1. The petitioners **Charles Gitonga Thuku** and **Julia Wanjiru Thuku** petitioned for grant of letters of administration to the estate of Hezekiah Thuku Kihara and named the following as beneficiaries.

- a. JULIA WANJIRU THUKU - WIDOW
- b. BERNARD NGATIA THUKU - SON
- c. THEURI THUKU - SON
- d. CHARLES GITONGA THUKU - SON

2. They cited Bernard Ngatia Thuku to accept or refuse to apply for letters of administration who in his affidavit of acceptance filed on 12th November 2006 stated that the deceased had two wives namely:

- a. JULIA WANJIRU THUKU - 1ST WIFE
- b. HANNAH NJOKI THUKU - 2ND WIFE

3. He further stated that the 2nd wife did not have children and that during the land demarcation his father divided his land into two portions for each wife and asked him to cultivate the portion of the second wife.

4. That in 1980 at a family meeting the second wife adopted the citee as her son to inherit her land.

5. On 20th December 2011 the Citee applied for confirmation of grant herein and proposed distribution as follows:

**1. L.R. THEGENGE/KARANGIA/127**

- a. Bernard Ngatia Thuku - 1.9 acres
- b. Charles Gitonga Thuku - 0.95 acres
- c. Mary Wambui Theuri - 0.95 acres

**II. TETU HOUSING SACCO SHARES**

- a. Bernard Ngatia Thuku - Half share
- b. Charles Gitonga Thuku -
- c. Mary Wambui Theuri - jointly in equal shares

### **III. NYERI FARMERS SACCO SHARE**

- a. Bernard Ngatia Thuku - Half share
- b. Charles Gitonga Thuku -
- c. Mary Wambui Theuri - jointly in equal shares

1. To this proposed mode of distribution Charles Gitonga Thuku filed an affidavit of protest in which he proposed that the estate of the deceased as stated above and to which he added 227 coffee trees be shared equally between the three beneficiaries identified herein.
2. Directions were given in this matter that the same be disposed off by way of affidavit evidence and written submissions.
3. On behalf of the applicants Raphael Mutharu Munyori swore an affidavit on 3rd July 2012 in which he deponed that he was an Assistant chief of Karangi sub location between 1991 to 1992 and that he could recall that the deceased called him to his home and informed him that his wife Hannah had adopted the applicant as her child. This confirmed the content of the affidavit of Samuel Mwehe Woru sworn on 26th June 2012.
4. The applicant also swore an affidavit in which he deponed that he is in actual and physical possession of the half of the suit land.
5. On behalf of the protesters Samuel Giita Nyanga swore an affidavit and stated that his grandfather is married to a sister of the deceased and that at one time the deceased called the clan and stated that the land should be shared equally between his three sons.
6. That the deceased also indicated that his land in Naivasha be shared out equally between his three sons this has also been confirmed by protests herein though his affidavit filed on 5th February 2013.

### **SUBMISSIONS**

7. On behalf of the applicant it has been submitted that the applicant has been in possession of half of the estate before the demise of the deceased and his first wife and that his contention is supported by the affidavit of the sub chief who is a government representative.
8. On behalf of the protest it is submitted that the affidavit of Samuel Mwehe Woru and Raphael Mutharu Munyori can not be relied upon since there are no documents in support thereof it is further submitted that the applicant has not produced any letter of administration to the estate of the 2nd wife.

### **ISSUES**

9. From the affidavit evidence and the submissions herein there is only one issue for the courts determination and that is whether the deceased had in his life time apportioned the suit land into two between his two wives and whether the applicant had been given the said land by the deceased second wife in her life time.
10. This court has pointed before that disputes of this nature are best determined by way of oral evidence and not by affidavit evidence and submissions.

11. From the affidavit evidence I have noted that the deceased had expressed his wish on equal distribution as regards the Naivasha property and therefore if his intention was that the suit property be shared equally between his sons nothing would have been easier than for him to say so.

12. I have also noted that the protester has not controverted the applicants allegation either by affidavit or documentary evidence but has attempted to do so in his submissions which is not proper place for evidence.

13. I would therefore believe the evidence of the applicant and his two witnesses as regards L.R THEGENGE/KARANGIA/217 only.

### **DETERMINATION**

14. In the final analysis I allow the application herein dated 16th December 2011 and order that the estate of the deceased HEZEKIAH THUKU KIHARA be divided as follows:

#### **1. L.R. THEGENGE/KARANGIA/127**

- a. Bernard Ngatia Thuku - 1.9 acres
- b. Charles Gitonga Thuku - 0.95 acres
- c. Mary Wambui Theuri - 0.95 acres

#### **II TETU HOUSING SACCO SHARES**

- a. Bernard Ngatia Thuku -
- b. Charles Gitonga Thuku - in equal shares
- c. Mary Wambui Theuri -

#### **III. NYERI FARMERS SACCO SHARE**

- a. Bernard Ngatia Thuku -
- b. Charles Gitonga Thuku - in equal shares
- c. Mary Wambui Theuri -

15. Each party shall meet their own cost this being a family dispute.

Dated and delivered at Nyeri this 16th day of May 2013.

**J. WAKIAGA**

**JUDGE**

Mr. Kariuki for the applicant.  
Protester in person.

Court: Ruling read in open court in the presence of the above named.

**J. WAKIAGA**

**JUDGE**