



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**Succession Cause 25 of 2005**

**IN THE MATTER OF THE ESTATE OF JAMES KINYURU MUONGI (DECEASED)**

**EDWIN GITAU KINYURU.....1<sup>ST</sup> APPLICANT**

**FRANCIS KARUGI KINYURU.....2<sup>ND</sup> APPLICANT**

**RAYMOND MBUGUA KINYURU.....3<sup>RD</sup> APPLICANT**

**PAULINE WANJIKU KINYURU.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**SAMUEL WAIRIRE KINYURU.....1<sup>ST</sup> RESPONDENT**

**BEATRICE WAMUHU KINYURU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 24<sup>th</sup> May 2011, it was recorded that the only issue to be determined in this matter is whether Miriam Waithera Kinyuru and Andrew Njenga Kinyuru were entitled to the estate herein as dependants and/or beneficiaries. Thereafter, that the issue of distribution of the estate would be addressed.
2. Parties tendered oral evidence and for the Applicants, the relevant evidence of Elizabeth Wanjiru Wairire, Miriam Waithera Kinyuru, Andrew Njenga Kinyuru, Pauline Nendaya Waithera and Benson Kinyuru Muongi can be summarized as follows;
3. That the deceased, James Kinyuru Muongi was married to one Irene Wangari Kinyuru, also deceased, and they had eleven (11) children. The deceased also had Land parcel No.Gitaru/Muguga/188 which measured 2.8 hectares. Later, he sub-divided it and according to Miriam Waithera Kinyuru, her brother, Edwin Kinyuru was given 0.25 hectares registered as title No.797 and her other brother, Francis Kinyuru got title No.798 which measured 0.25 hectares. That the deceased then retained title No.799 for himself and it measured 0.931 hectares and that is the only asset available for distribution.
4. It was the further evidence of the Applicants that the Respondents became hostile to Miriam and Andrew Njenga and chased them away from their father's Land; stopped them from getting the proceeds of sale of water from a borehole dug by the deceased; stopped them from cutting trees on the land and that they have been denied their entitlement.
5. Regarding the distribution of the estate, the Applicants argue that since Edwin and Francis were given Land by the deceased, which land they had sold off, the deceased's parcel of land No.799 should be

inherited by his surviving children except those two (2).

6. The relevant case for the Respondents as put forth by Samuel Wairire Kinyuru, Beatrice Wambui Maina, Njenga Mahiga and Edwin Gitau Kinyuru can be summarized as follows;

7. That according to Samuel Wairire Kinyuru, the deceased died on 2<sup>nd</sup> February 2001 and prior to his death, he had shown some of his children where to put up houses but he did not do so in respect of Andrew Njenga, Pauline Wanjiku, Beatrice Wamuhu and Miriam Waithera. However, according to him that fact alone did not disentitle them to the estate and he confirmed that Edwin Gitau and Francis Kinyuru were indeed given land by their father prior to his death but they later sold the land.

8. Regarding the history of Miriam Waithera and Andrew Njenga, both Samuel Kinyuru and Beatrice Wambui Maina, their elder siblings, confirmed that they were taken away while very young to go and live with their aunt, Elizabeth Wanjiru, who was working in Nairobi and had no children of her own. That evidence was also confirmed by Edwin Gitau and in addition, he stated that upon being given away to their aunt, the two had no further connection with the family and were entitled to inherit the estate of Elizabeth Wanjiru, their aunt and not their biological father, the deceased in this Cause.

9. The evidence of Edwin Gitau was wholly supported by his brothers, Francis Kinyuru and Raymond Mbugua Kinyuru as well as their sister, Pauline Wanjiku Kinyuru

10. I have read Submissions by Advocates for the parties and although none of them quoted any Law in support of their differing position, it is my understanding of the evidence that all parties agree that Miriam Waithera and Andrew Njenga are biological children of the deceased. I also accept the evidence that sometime in the early 1970s and while still very young, the two were taken away to Nairobi to be raised by their aunt, Elizabeth Wanjiru. I accept the evidence that no formal adoption proceedings were undertaken and I also accept the evidence that they did not completely cut off links with their biological parents and would visit them during school holidays.

11. It is instructive that Edwin Gitau admitted that he too would visit his aunt in Nairobi and assisted her when she retired from Kenyatta National Hospital where she worked. The picture painted is that both Elizabeth Wanjiru (*and the children she was raising*) as well as her sister's other children remained close until the death of both Irene Kinyuru and the deceased in this case.

12. Since the deceased herein died intestate, and since his spouse is also deceased, the applicable Law is **Section 38** of the **Law of Succession Act** which provides as follows;

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

13. It is imperative that **Section 41** and **Section 42** be reproduced here for reasons that I shall shortly explain. The two Sections provide as follows;

***“41) Where reference is made in this Act to the “net intestate estate”, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue or any child of the intestate who predeceased him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.***

**42) Where-**

***a) an intestate has, during lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or***

***b) property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35,***

***that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”***

14. The question that arose during the hearing is whether Miriam Waithera and Andrew Njenga can be termed “***Children***” of the deceased for purposes of the above **Sections** of the Law. “***Child***” is defined in Black’s Law Dictionary, Eighth Edition as a “***a son or daughter***” and a “***natural Child***” as a “***Child by birth, as distinguished from an adopted child – also termed biological Child; genetic Child.***”

15. There is no doubt that the two were indeed not formally and lawfully adopted by their aunt and there is no doubt that their symbiotic relationship with their biological parents was never severed. Contrary to the assertions by the Respondents save Samuel Kinyuru and Beatrice Maina, they are as entitled to the estate of their late father as the Respondents may be and I will now turn to the last issue in contest.

16. **Section 42** of the **Act** obligates this Court to take into account any gift that a deceased may have appointed to any child during his lifetime. There is no doubt in my mind that title No.Gitaru/Muguga/188 was sub-divided into three with a view to appointing two portions for the benefit of Edwin Gitau and Francis Kinyuru. They obtained 0.25 hectares each which in their wisdom was best sold. They have not denied that fact and title No.799 which was registered in the deceased’s name measures 0.931 hectares. To give them a second bite at the cherry would be unfair and unlawful. Yet again, they live on the suit Land and have built houses thereon. To evict them would be unreasonable and so while noting that they are not entitled to an equal portion of the Land as the other children of the deceased, the only reasonable order I can make is as follows;

***1) Miriam Waithera and Andrew Njenga are lawful children of the deceased and are entitled to the estate.***

***2) Land parcel No.Gitaru/Muguga/799 shall be shared equally among the children of the deceased with Pauline Nendaya Waithera taking her deceased’s mother’s portion save that Edwin Gitau and Francis Kinyuru shall be entitled to the Land where their houses stand and access thereto only.***

***3) The District Surveyor, Kiambu shall implement this order at the cost of each beneficiary save Edwin Gitau and Francis Kinyuru.***

***4) Each party shall bear its own costs.***

17. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY, 2012.**

**27/1/2012**

**CORAM:**

**I. LENAOLA – JUDGE**

**Court Clerk – Miron**

**Mrs. Morara for Respondent**

**Miss Khisa for Applicants**

**ORDER**

**Ruling duly read**

**ISAAC LENAOLA**  
**JUDGE**