



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**SUCCESSION CAUSE 415 OF 2002**

**(IN THE MATTER OF THE ESTATE OF GILBERT NJERU KARANGORI - DECEASED)**

**AND**

**JANE RWAMBA NJERU.....1<sup>ST</sup> APPLICANT**

**KELLEN WANJA NJAGI.....2<sup>ND</sup> APPLICANT VERSUS**

**EGLAS CIURUNJI NJERU.....RESPONDENT/ADMINISTRATOR**

**R U L I N G**

This is the application dated 2/3/2011 brought under Section 35(3) Laws of Succession Act and Rule 46(1) Probate and Administration Rules for variation in the apportionment in the shares herein made in relation to land parcel No. KAGAARI/KANJA/2920. The applicants who are daughters of the deceased have filed a proposed variation of the mode of distribution of the net estate of the deceased. The applicants have sworn affidavits in support of their application.

The 1<sup>st</sup> applicant says she was unaware of the confirmation of the grant. That she only learnt about it when she was called to the Land Control Board. The 2<sup>nd</sup> Applicant also denies knowledge of the confirmation of the grant.

Both counsels have filed their rival submissions which I have read very keenly. Before the Hon. Justice Khaminwa were Protests against the confirmation of the grant by 4 of the beneficiaries herein. She heard them by way of *viva voce* evidence and in her Ruling dated 15/7/2009 dismissed their protests.

The 2 Applicants herein were not among the protesters in this matter. She further indicated that the administratrix's interest in the land was a life interest and once it was extinguished the beneficiaries would share out the interest in the estate equally. This cannot be the case when she has already distributed the estate and she wants papers signed in order to have each one's share registered. The only share that would be shared among the children is what she has allocated to herself as 0.20 hectares.

There is no dispute that all the beneficiaries listed are children of the deceased. The distribution by the the administratrix which was approved by this court was as follows:-

**Sons**

1. Mwaniki Gilbert - 0.60 ha

2. Antony Ndwiga Gilbert - 0.80 ha
3. Silas Njeru Gilbert - 0.80 ha
4. Truphosa Maitha Mugo - 0.60 ha

### **Daughters**

1. Jane Rwamba - 0.10 ha
2. Kellen Wanja Njagi - 0.10 ha
3. Berther Muthoni Gilbert - 0.60 ha

### **Administratrix**

Eglas Ciurunji Njeru - 0.20 ha

The Applicants are saying they just wish to be given a slightly larger portion than they were given as daughters. In her affidavit in support of her application for confirmation, the administratrix did not explain the disparity in the allocation of the tiniest shares to the 2 applicants. It is given that the 2<sup>nd</sup> Applicant is married but what of the 1<sup>st</sup> Applicant who is even physically challenged? It is not clear why of the 3 daughters Berther got a very big share.

Under Section 35(2) of the Laws of Succession Act, the surviving spouse has the power of appointment of all or any part of the capital of the net intestate estate. Section 35(3) of the Laws of Succession Act gives an aggrieved child to apply to court for variation of the share. Section 35(4) of the Laws of Succession Act gives the Court the power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made. The parameters are set out in Section 35(4) - (4g) of the Laws of Succession Act. Under Rule 46(1) Probate and Administration Rules and this applies to a grant that has been confirmed.

The Respondent in her replying affidavit states that she distributed the estate fairly and that the Applicants never protested and yet they were in court. There is nothing on the record to show that the 2 Applicants were in court when the protests were being heard by the court.

The Administratrix has not shown that the Applicants had been given any gifts or other allocations during the deceased's lifetime. She has not given any reason at all for discriminating against her daughters by giving one daughter more land than the others. It would have been a totally different case if she took for herself a share comprising the shares of the 3 daughters and hers to hold in trust for the daughters. Since she decided to distribute the estate then it has to comply with the Law. There should be no discrimination. What the Applicants are asking for is not outrageous, and it's within their right as children of the deceased.

The 2<sup>nd</sup> applicant who is married is only asking for 0.20 hectares. The 1<sup>st</sup> Applicant is asking for 0.50 hectares. Since there is no rationale for Bertha getting 0.60 hectares, I strongly believe her share should be reduced to provide for those who had been disfavoured by their mother. Even there is disparity among the sons shares.

Since she was apportioning this estate under Section 35(2) of the Law of Succession Act, then I find that the Applicants are squarely in order by coming under Section 35(3) of the Laws of Succession Act to complain. Section 35(4) of the Laws of Succession Act gives this court the power to assess and vary or not vary apportionment.

Rule 46(1) of the Probate and Administration Rules provides for the procedure of making an application under Section 35(3) of the Law of Succession Act. And acting within those provisions, I find

that the applicants have demonstrated that their mother discriminated against them when she exercised her power of appointment under Section 35(2) of the Law of Succession Act.

I will therefore under Section 35(4) of the Law of Succession Act make the following variations.

üKellen who on her own volition wishes to have 0.20 hectares will have that.

üBerther will have 4.0 hectares

üJane Rwamba - 4.0 hectares

üEach son will have 0.65 hectares and so will Truphosa Maitha Mugo whose husband was a son of the deceased.

The distribution will therefore be as follows;-

Mwaniki Gilbert - 0.65 ha.

Antony Ndwiga - 0.65 ha.

Truphosa Maitha - 0.65 ha.

Silas Njeru - 0.65 ha.

Bertha Muthoni - 0.4 ha.

Jane Rwamba - 0.4 ha.

Kellen Wanja - 0.20 ha.

Eglas C. Njagi - 0.20 ha.

A certificate will issue to that effect.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 27<sup>TH</sup> OF SEPTEMBER 2012.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Parties**

**Njue CC**