



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 571 OF 2009

IN THE MATTER OF THE ESTATE OF KARIUKI KIRUMA KIBIRA – DECEASED

**MERIOETH NYAWIRA KARIUKI.....PETITIONER/
RESPONDENT**

VERSUS

**FREDRICK GITONGA KARIUKI.....1ST
OBJECTOR/APPLICANT**

**SAMUEL NJUGI KARIUKI.....2ND
OBJECTOR/APPLICANT**

**NAPOLEON MAINA KARIUKI.....3RD
OBJECTOR/APPLICANT**

JUDGMENT

On the 10th day of May 2010, a temporary grant of Letters of Administration intestate in respect of the Estate of Kariuki Kiruma Kibira alias Kariuki s/o Kiruma, deceased, was given to Samuel Njugi Kariuki and Merioth Nyawira Kariuki. Mr. Samuel Njugi Kariuki, the applicant herein, has now applied vide the Summons for Confirmation of Grant dated 22nd May 2010 to have the grant confirmed. Merioth Nyawira Kariuki, the Respondent filed an affidavit of protest to oppose the summons. The dispute was directed to be determined by oral evidence. When cause came up for hearing, the Respondent and the Applicant each presented the evidence of two witnesses to buttress their positions. At the conclusion, learned counsels appearing in the cause were allowed to file written submissions.

I have considered the evidence and the submissions tendered by both sides. The Applicant identified the beneficiaries of the Estate as follows:

§ Merioth Nyawira Kariuki

§ Samuel Njugi Kariuki

§ Napoleon Maina Kariuki

§ Fredrick Gitonga Kariuki

The Applicant further identified the assets of the Estate as follows:

- (i) L.R. NO. Tetu/Thatha/44
- (ii) Plot No. 9 Ihururu Market.

- (iii) Shares at K.T.D.A. Gathuthi.
- (iv) Shares at Dairy Farmers Ltd.

- (v) Cows and sheep
- (vi) Main House

- (vii) Second House and store

He has proposed that L.R. NO. TETU/THATHA/44 be shared in equal measure between himself and the other beneficiaries. He also suggested that (ii) above be shared between Samuel Njugi Kariuki, Napoleon Maina Kariuki and Fredrick Gitonga Kariuki. He further proposed that the respondent inherits (iii), (iv), (v) and (vii) above whereas (vi) above would go to Napoleon Maina Kariuki.

The Respondent opposed the summons for Confirmation of Grant for various reasons. First she claimed that the Applicant excluded other dependants from benefiting from the Estate. She named the following ten grandchildren:

- (a) Mary Wairimu Kariuki

- (b) Rhoda Wanjiru

- (c) Florence Njeri

- (d) Josphine Waithera

- (e) Samuel Wangombe Kariuki

(f) Charles Muriithi Kariuki

(g) James Murage Kariuki

(h) Wallace Wahome Kariuki

(i) Victor Ndiritu Kariuki

(j) Samuel Karanja Kariuki

The Respondent proposed for the distribution of the Estate as follows:

“I verily believe that it would be just and equitable that the estate of the late Kariuki Kiruma be distributed as follows:

(i) **TETU/THATHA/44**

To be shared equally among the houses namely:

1st house

2nd house

(a) ***Esther Muthoni Kariuki 1st***

wife (dcd)

1. Merioth Nyawira Kariuki 2nd wife

2. Mary Wairimu Kariuki

(b) ***Samuel Njugi Kariuki***

Grand Children

(c) ***Napoleon Maina Kariuki***

3. Samuel Wangombe Kariuki

(d) ***Fredrick Gitonga Kariuki***

4. Charles Muriithi Kariuki

5. James Murage Kariuki

6. Wallace Wahome Kariuki

7. Victor Nderitu Kariuki

8. Samuel Karanja Kariuki

(ii) **PLOT NO. 9 IHURURU MARKET**

To be held in common among:

(a) ***Merioth Nyawira Kariuki***

(b) ***Samuel Njugi Kariuki***

(c) *Mary Wairimu Kariuki*

(d) *Napoleon Maina Kariuki*

(e) *Fredrick Gitonga*

(iii) *KTDA shares at Gathuthi Factory to Merioth Nyawira Kariuki.*

(iv) *Each person enumerated in paragraph 7 above to retain his/her dwelling house and any structural appurtenances thereto and any livestock under his/her care at all material times either as at the death of Kariuki Kiruma Kibira or thereafter.”*

There is no doubt that the Respondent is the step-mother of the Applicant. She had one daughter namely Mary Wairimu Kariuki before she got married to the deceased as his second spouse. The deceased's first wife was called Esther Muthoni Kariuki (now deceased), the mother of the Applicant, Fredrick and Napoleon. It would appear the deceased adopted the respondent's daughter as his daughter. The deceased's first marriage was blessed with eight (8) children i.e. three (3) sons and five (5) daughters. The main issue in dispute is that of distribution. The Applicant claims he built the house on the suit property in 1965 and that in 1983 he planted tea. He also pointed out that Fredrick Gitonga Kariuki built his house 12 years ago – on a portion shown by the deceased. He also planted tea on that portion. The Applicant also tendered the evidence of Samuel Muriuki Kariru who stated that the deceased had expressed his wishes to him and other elders that he wanted his land subdivided into four equal portions as it presently stands. The respondent on her part is of the view that the land in question should be divided into two equal portions so that the Applicant and his two brothers move to one portion. This will mean that Samuel Njugi Kariuki and Napoleon Maina Kariuki would be moved from the portions they now occupy. Two issues have arisen in this matter. First, is that the deceased got married to two wives. In distributing the Estate, the court will apply Section 40 of the Law of Succession Act. Secondly, there is the element that the deceased had during his life time expressed and implemented his wishes. I have already stated that the deceased's first marriage was blessed with three children. His second marriage was not blessed with any child, but nevertheless the deceased adopted the Respondent's daughter. This court is faced with some difficulty in that if I apply the provisions of Section 40 of the Law of Succession Act, I will have interfered with the wishes of the deceased and hence disturb the status quo as shown by the evidence. There is no dispute that Samuel Njugi Kariuki built his house in 1965 or thereabouts. There is also no dispute that Fredrick Gitonga Kariuki put up his house more than 15 years ago. The duo have produced tea licences indicating they developed their portions. I have also looked at the photographs produced and it is clear that there are clearly marked boundaries separating the portion occupied by each beneficiary. It would appear the deceased openly made his intentions clear by encouraging his sons to develop the portions he had shown them. There is no evidence from the deceased's daughters to show that they intended to inherit the deceased's Estate despite the fact that they are aware of the pendency of these proceedings. In the circumstances of this case I prefer that the wishes of the deceased be respected. Those wishes were clearly stated by Samuel Muriuki Kariru. A careful look at the photographs produced in evidence as exhibits will reveal that the deceased's wishes manifest itself on the ground.

In the final analysis, I dismiss the protest and proceed to order that the grant be confirmed as prayed in the Summons for Confirmation of Grant. Since the dispute involves members of the same family I direct that each party meets his or her own costs.

Dated and delivered at Nyeri this 11th day of February 2011.

J. K. SERGON

JUDGE

In open court in the presence of Ng'ang'a for the Applicant and Kingori holding brief gori for the petitioner.