



## SUCCESSION

- *Distribution.*
- *The Constitution prohibits discrimination on gender.*

### REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA

### AT MERU

### SUCCESSION CAUSE NO. 192 OF 2006

### IN THE MATTER OF THE ESTATE OF M'MUGAMBI M'IRURA (DECEASED)

JOHN MATIRI MUGAMBI ..... PETITIONER

### VERSUS

FRANCIS KATHURIMA ..... 1<sup>ST</sup> DEFENDANT  
SILAS MURERWA MUGAMBI ..... 2<sup>ND</sup> DEFENDANT  
JUDITH KARIMI MUGAMBI ..... 3<sup>RD</sup> DEFENDANT  
MARGARET MBUYA MUGAMBI ..... 4<sup>TH</sup> DEFENDANT  
ROSEMARY GAKII MUGAMBI ..... 5<sup>TH</sup> DEFENDANT  
FAITH KENDI MUGAMBI ..... 6<sup>TH</sup> DEFENDANT

### JUDGMENT

The deceased M'Mugambi M'Rura passed away on 19<sup>th</sup> November 2005. The only asset that he left for his estate was Parcel No. *Abothuguchi/Katheri/1614*. He died intestate. His son John Matiri Mugambi petitioned for grant of letters of administration intestate. The deceased was survived by the following beneficiaries.

- John Matiri Mugambi – Son*
- Francis Kathurima – son*
- Margret Mbaya Mugambi – daughter*
- Rosemary Gakii Mugambi – Daughter*
- Silas Murerwa Mugambi – son*
- Judith Karimi Mugambi – Daughter*
- Faith Kendi Mugambi – Daughter*

An objection was filed on 24<sup>th</sup> August 2006 by Francis and Silas. Francis passed away before the objection was heard. The court on 31<sup>st</sup> October 2007 issued a grant in the joint names of John and Silas. Francis was survived by his wife Nancy Karuru M'Ikiara. Affidavit on distribution of the estate were filed by Nancy the wife of the late Francis by Judith and Silas. Those affidavits in their mode of distribution suggested that the estate of Francis would get 2 acres of the estate property, Silas would get 1 ½ acres Judith would get ½ an acre and the balance of 1 acre to be shared by Margate, Rosemary and

Faith. The deponent of those affidavits confirmed that the deceased in his lifetime gave portions of land to John, Francis and Silas. Francis was given by the deceased in his lifetime *Abothuguchi/Katheri/2846*. John was given *Abothuguchi/Katheri/2847*. Silas was given *Abothuguchi/Katheri/2849*. It is further stated and it has not been denied by John that John was given a further two acres by the deceased during his lifetime of parcel on *Ontulili/Katheri/731*. It was because of the further two acres that John was given by the deceased that the deponent of those affidavits stated that John was not entitled to share the suit property. It is further stated that John unlike them does not reside on the suit property. John himself by his affidavit dated 8<sup>th</sup> February 2011 confirmed that he resides at Nanyuki. An affidavit was also sworn by Stephen Kinyua Mbogori who is not a beneficiary of this estate. He described himself as a purchaser of a portion of the suit property. By his affidavit sworn 2<sup>nd</sup> May 2008 he stated that he had agreed to purchase one acre of the suit property from John. The agreement was on the basis that he was purchasing the one acre which John was to inherit from the deceased which was part of the estate property. He further deponed that the deceased was in the process of subdividing a land in his lifetime in order for him to obtain 1 acre which he, Mbogori was purchasing from John. In this regard, he annexed to his affidavit mutation form showing the sub division of the suit property into various portions. Although Mbogori did not annex evidence of consent from the Land Control Board he however stated that the deceased did obtain such a consent. He further stated in that affidavit that the estate owes him Kshs. 250,000/= which related to the one acre that he agreed to purchase. From the further affidavit filed by Silas and John, it does seem that Silas further sold to Mbogori a quarter acre of his presumed share of the deceased estate. In those further affidavits of John and Silas, they proposed that the estate property be divided with the estate of Francis getting 1 ½ acres and that Silas would get 1 ¼ acre and purchaser Mbogori would get 1 ¼ acre and the four daughters would each get a ¼ acre. Both John and Silas state that the deceased daughters are not entitled to more than a quarter of acre because they are married and not living on the suit property. What is before me in this matter for my determination is how the estate property should be distributed amongst the beneficiaries. Section 42 of the Law of Succession Act Cap 160 provides that previous benefits awarded to beneficiaries should be brought into account at the stage of distribution. It is accepted by all that the late Francis and Silas and John were each given parcels of land at *Abothuguchi/Katheri*. John was further given a portion of land of two acres. That being so, in my view, John is not entitled to share the suit property which is only five acres and which will be distribution amongst six other beneficiaries. I need to consider whether Mbogori who claims to have purchased 1 ¼ acres is entitled to either claim the 1 ¼ acres from the estate or to claim the money he paid for the same. Section 82 of the Law of Succession Act in particular section 82 (b) (ii) provides that:

***“No immovable property shall be sold before confirmation of the grant. “***

The grant issued in this case jointly in the names of Silas and John has to date not been confirmed. It therefore follows that according to that section the estate property could not be sold before confirmation of grant. Further, section 45 of the Law of Succession Act provides that unless expressly authorized by the Act no person shall for any purpose take possession or dispose of or otherwise intermeddle with any free property of the deceased person. Since section 82 provides that deceased immovable property cannot be sold before confirmation of grant it follows that the sale purportedly carried out by John and Silas when they purported to sell to Mbogori was not authorized by this Act. The actions of John and Silas in accepting to dispose the land without the authority of the Law of Succession Act was an act that as provided under section 45 (2) (a) and (b) would invite criminal action to be taken against them. The answer thereto as to whether Mbogori is entitled to claim the one and quarter acres he alleges he purchased from John and Silas is that he is not entitled. Can he however claim from this estate the money paid? The answer is in the negative. This is because it is accepted by John and Silas the payments were made to them personally and not the estate. If any money is owed by Mbogori it is owed by John and Silas. For John and Silas to state that their sisters because they are married are not entitled to get more than a quarter of the property is a fallacy. It is a fallacy when one considers that the Constitution of Kenya 2010 under Article 27 in particular sub Article 3, 4 -5 prohibits discrimination on the basis of sex, pregnancy, marital status amongst others. If they base their argument on the basis that according to their custom a married girl is not entitled to claim equal land, such a custom is also outlawed by Article 60 (1) (f) of the Constitution of Kenya 2010. That Article in respect to land its usage and management prohibits or eliminates gender discrimination in both law, customs and practices. That being so, the position taken by John and Silas that their sisters should not get equal portions of land cannot be sustained. In the end,

considering the issues raised in this judgment, the judgment of this court is as follows:-

**1. The grant issued by this court on 31<sup>st</sup> October 2007 in the joint names of John Matiri Mugambi and Silas Murerwa Mugambi is hereby confirmed as follows:-**

**- Parcel No. Abothuguchi/Katheri/1614 shall be distributed as follows:-**

**a) Lucy Karuru M'Ikiara 1 acre**

**b) Silas Murerwa Mugambi 1 acre**

**c) The balance to be shared equally between Margaret Mbaya Mugambi, Rosemary Gakii Mugambi, Judith Karimi Mugambi, Faith Kendi Mugambi.**

**2. If the petitioners fail to put into effect the judgment of this court within 14 days from this date hereof, authority is hereby given to the Deputy Registrar of this court to sign all the documents necessary to put into effect the judgment of this court.**

**3. The restriction registered on parcel no. Abothuguchi/Katheri/1614 on 15<sup>th</sup> august 2005 is hereby vacated.**

**4. There shall be no orders as to costs.**

**Dated, signed and delivered at Meru this 10<sup>th</sup> day of August 2011.**

**MARY KASANGO  
JUDGE**