



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Succession Cause 15 of 2007**

***IN THE MATTER OF THE ESTATE OF JORUM MAHUI GICHURU (DECEASED)***

***And***

**AGNES KARINGO MAHUI.....PETITIONER**

**Versus**

**HARUN MAHUI MAINA  
JOSEPH KINYANJUI MAHUI  
ROBERT KARUME MAHUI  
PATRICK KANGI MAHUI  
CHARLES GITHIA MAHUI.....PROTESTERS**

**RULING**

This ruling relates to the estate of one, **Jorum Mahui Gichuru**, deceased. The deceased passed away on 2<sup>nd</sup> September, 2006. Subsequently a grant of letters of administration of his estate was made to his widow, **Agnes Karingo Mahui** jointly with her sons, **Robert Karume** and **Joseph Kinyanjui Mahui** on 27<sup>th</sup> September, 2007.

On 9<sup>th</sup> April, 2008, **Agnes Karingo Mahui** hereinafter referred to as “*the petitioner*” applied for the confirmation of the said grant. She indicated in the affidavit in support of the application that the deceased was survived by the following children:-

- **Harun Gichuru Mahui – son**
- **Joseph Kinyanjui Mahui – son**
- **Robert Karume Mahui – son**
- **Parick Kangi Mahui – son**
- **Charles Githia Mahui – son**
- **Grace Wanjiru Mahui – daughter and herself as the widow.**

She proposed that the estate of the deceased be distributed as follows:-

**“a) L.R. RUGURU/SAGANA/21 measuring approximately 6.4 acres to be inherited by:**

- i) **AGNES KARINGO MAHUI – 1.4 ACRES**

- ii) HARUN MAHUI MAINA – 1.0 ACRES
- iii) JOSEPH KINYANJUI MAHUI – 1.0 ACRES
- iv) ROBERT KARUME MAHUI – 1.0 ACRES
- v) PATRICK KANGI MAHUI – 1.0 ACRES
- vi) CHARLES GITHIA MAHUI – 1.0 ACRES
- b) **Motor vehicle Reg. NO.KRJ 236 Volkswagen to be inherited by AGNES KARINGO MAHUI.**
- c) **Motor vehicle Reg. No.KXC 822 Mazda station wagon to be inherited by AGNES KARINGO MAHUI.**
- d) **Motor vehicle Reg. No.KXT 259 Nissan Saloon to be inherited by AGNES KARINGO MAHUI.**
- e) **Plot No.NAIROBI/EASTLEIGH SEC. No.36/11/988 to be inherited by AGNES KARINGO MAHUI.**
- f) **Plot No.NAIROBI/EASTLEIGH Sec. No.36/111/989 to be inherited by AGNES KARINGO MAHUI**
- g) **Plot No.EMBAKASI – VILLAGE 9042/4/7 to be inherited by AGNES KARINGO MAHUI**
- h) **All monies in E.A.B.S Account No.05-5000045 Nairobi to be inherited by AGNES KARINGO MAHUI.**
- i) **All monies in E.A.B.S. Account No.05-31200164 Nairobi to be inherited by AGNES KARINGO MAHUI**
- j) **185 Shares in East African Breweries Limited to be inherited by AGNES KARINGO MAHUI**
- k) **Plot No.TOL 3 SAGANA SCHEME to be inherited by AGNES KARINGO MAHUI**
- l) **Plot No.TOL 19 SAGANA SCHEME to be inherited by AGNES KARINGO MAHUI.”**

Essentially, the petitioner wanted the entire estate of the deceased save for land parcel Ruguru/Sagana/21 to go to her.

This proposal did not go down well with the co-administrators, **Joseph Kinyanjui** and **Robert Karume Mahui** hereinafter referred to as “protesters”. They consequently filed a joint protest. Their protest hinged on the fact that the petitioner had included a stranger by the name of **Grace Wanjiru Mahui**, as being a child of the deceased which was not true as the deceased had never acknowledged in his lifetime that she was indeed his child, the proposal by the petitioner to award herself the bulk of the estate of the deceased does not take into account the meetings and agreements held on 5<sup>th</sup> December, 2007 and 21<sup>st</sup> December, 2001 by the family when distribution of the estate was discussed and agreed. Finally that the petitioner had failed to recognize the fact that most of the beneficiaries had contributed in one way or another in the development of the fixed assets of the estate and the deceased had even executed agreements with some of the protesters. They also deponed that they had the consent of the other beneficiaries to contest the mode of distribution proposed by their mother, the petitioner. Those other beneficiaries were **Harun Mahui Maina**, **Patrick Kangi Mahui** and **Charles Githia Mahui**. From the foregoing, it appears that all the sons of the deceased oppose the mode of distribution as proposed by their mother. So that the contest herein pits the mother against her sons.

On 15<sup>th</sup> May, 2009, the petitioner filed a further affidavit pursuant to leave granted to her by this court on 12<sup>th</sup> March, 2009. She deponed that in the lifetime of the deceased, he had given the protesters plots and assisted them to develop them and had categorically stated that the properties in his name would go to her upon his death. Indeed the

deceased charged rent to any son who lived on the property belonging to him and undertook court proceedings to recover any outstanding rent. **Grace Wanjiru Mahui** was deceased's daughter whom he sired with a house help who thereafter ran away. Since the deceased and petitioner were respected church members, the deceased persuaded her to accept the child as theirs. In the circumstances **Grace Wanjiru Mahui** is a dependant of the deceased and is entitled to the estate of the deceased. The protesters should be contented with the property given to them *inter vivos* by the deceased as they failed to respect him in old age.

The protesters were not done as yet. They also put in a further affidavit and claimed that the petitioner further affidavit was full of untruths, mischief and blatant lies aimed at impugning the name of the deceased as he did not in his lifetime admit or recognize the child **Grace Wanjiru** as his daughter; that in her own annexure marked "AKM1" at page 3 under the heading **HARMONY WITHIN FAMILY**, the deceased had stated that he did not know the child. Further that the petitioner had not included the child in the petition dated 10<sup>th</sup> January, 2007 as a beneficiary of the estate of the deceased. That they had only one sister **Grace Wanjiru** who passed on in the year 1965 and since then their parents did not bear or adopt any other girl as their daughter.

Earlier on directions had been issued by **Kasango J** that the application be canvassed by way of *viva voce* evidence. However those directions were on 12<sup>th</sup> March, 2009 reversed by the consent of the parties. They now opted to have the application canvassed by way of affidavits on record and written submissions. They were granted leave to file further affidavits if and when they deemed necessary. Subsequent thereto, parties filed and exchanged further affidavits as well as written submissions which I have carefully read and considered.

The protesters case is first and foremost that **Grace Wanjiru Mahui** is a stranger to the estate and therefore she is not entitled to inherit a portion thereof. The petitioner's response is that Yes, **Grace** was not her biological daughter. Rather the deceased sired her with a househelp that the petitioner had employed and when she gave birth, she ran away. The petitioner and the deceased thereafter took it upon themselves to bring her up as their own. It is common ground that the Grace stays with the deceased's family. It is also common ground that at the time that the deceased passed on, she was staying with the family. Indeed she knows of no other home than the deceased's. The protesters did not as much as question the basis upon which she was staying with them. They did not tell the deceased nor the petitioner to chase her away as she was a stranger to them. She was never picked from the streets. At least the protesters have not said so. On what basis then was she staying in the family? Apart from the protesters proclaiming that she is a stranger to the estate they have not countered sufficiently, the petitioners contention that she was sired by their deceased father with a househelp she had employed. They would have easily disapproved their mother's contention by availing a birth certificate. The birth certificate would have shown who the father of Grace was. Since they were the ones asserting that Grace was not a member of the family, it was up to them to prove it. It is a cardinal principle of law that whoever asserts must prove. The protesters have not been able to discharge that heavy burden.

The protesters too have based their assertion that Grace was a stranger to the estate on the fact that the petitioner in her petition did not include her name in form P & A 5. That may be correct. However, the petitioner in an affidavit sworn on 5<sup>th</sup> June, 2007 and filed in court on the same day, states that she had in fact included the name but Harun Mahui, the first protester deleted the same when he went to file the petition on her behalf. This may be correct too. The letter from the Chief of Ruguru location dated 4<sup>th</sup> January, 2007 shows the name of Grace as one of the beneficiaries. However it was subsequently deleted. There are also two letters from the Assistant Chief of Iruri sub-location dated 21<sup>st</sup> December, 2006 and 25<sup>th</sup> April, 2007 respectively. Those letters again are annexed to the same affidavit of the petitioner aforesaid. In the letter dated 21<sup>st</sup> December, 2006, the Assistant Chief has indicated that Grace is a beneficiary of the estate of the deceased. However in the subsequent letter dated 25<sup>th</sup> April, 2007, his name is omitted. Going by the acrimony that has characterized this cause parties herein and in particular the protesters are inclined to go to any length to disinherit Grace. I cannot therefore rule out the possibility of filing them fake or forged documents or even altering them. I cannot also rule out the possibility of them influencing the Chief or even the assistant thereof to recant their positions. These are the people whose activities against the petitioner led to the petitioner filing a complaint with the Shauri Moyo police station against them. Subsequently they were arrested and charged at Makadara law courts with the offence of creating a disturbance in manner likely to cause a breach of the peace contrary to section 95 (1) (b) of the Penal Code. Finally there is also a letter from the Assistant Chief, Eastleigh South, Nairobi. The letter is dated 22<sup>nd</sup> November, 2001 and confirms that the deceased and petitioner were guardians of Grace. The letter was written in the life time of the deceased. He never challenged or disputed the contents thereof.

The protesters too have relied on the minutes of the family meeting held on 29<sup>th</sup> December, 2001 in which the issue of Grace was allegedly discussed and the deceased failed to acknowledge Grace as his own child. However those minutes are of no evidential value in my view since they are not signed by any of the parties. They also claim that Grace having not been formally adopted as a child by the petitioner, she is still a stranger to the estate of the deceased. However Grace is only 5 or so years. She is still adoptable. She has not attained the age beyond which she cannot be available for adoption. Grace having stayed with the deceased and petitioner in the knowledge of the protesters all the years even if she is not a biological child of the deceased she still qualifies for a dependant.

For all the foregoing reasons I would hold contrary to the position held by the protesters that Grace is not a stranger to the estate of the deceased. She is a beneficiary of the same as a child of the deceased and or as a dependant in terms of section 29 (b) of the Law of Succession Act. The protesters are not and cannot be in a position to testify as to the love life of their deceased father. Only the petitioner would perhaps know.

The 2<sup>nd</sup> ground advanced by the protesters in support of the protest is that the petitioner has awarded herself the bulk of the estate and has ignored the agreements reached on 5<sup>th</sup> December, 2007 and 21<sup>st</sup> December, 2001 with regard

to the distribution of the estate of the deceased. Further they claim that the petitioner had failed to recognize the fact that most of the beneficiaries had contributed in one way or another to the development of some of the properties belonging to the estate. With regard to the minutes of the meeting held on 21<sup>st</sup> December, 2001, I have already held that they are of no evidential value for want of signature and or confirmation. The possibility that they were self-generated for ulterior motives cannot be ruled out going by the rather non-cordial relationship prevailing between the protesters and the petitioner currently. As for the minutes of 21<sup>st</sup> December, 2007, I note that they are signed by all the protesters save the petitioner. There must have been a reason why the petitioner failed to sign them. Either they did not reflect what transpired during the meeting or they are not genuine. I would accordingly disregard them as well.

The protesters claim to have contributed to the development of some of the properties belonging to the estate and that the deceased was on the verge of transferring some of the properties to them before he passed on. Some of the protesters too claim that they were in partnership with the deceased with regard to some of the properties. They exhibited alleged agreements for partnership between the deceased and the 4<sup>th</sup> protester, the deceased and 5<sup>th</sup> protester and the deceased with 3<sup>rd</sup> protester. To the extent that the alleged partnership agreements were not registered, they are of no evidential value. Further, the properties that were the subject of the said partnership agreement, were and are still registered in the name of the deceased solely. Accordingly, they were free property of the estate. According to the definition of free property in relation to the deceased under the Law of Succession Act, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest had not been terminated by his death. It is not in dispute that the said properties were solely registered in the name of the deceased at the time of his death. They were not registered in the joint names of the deceased and any of would be partners. This fact has not been discounted. Accordingly the deceased could have been able to dispose them without regard to the protesters. Accordingly the petitioner was entitled to treat the same as the property of the deceased, the alleged agreements and contributions of the protesters notwithstanding.

Pursuant to section 35 of the law of succession, the petitioner is entitled absolutely to a life interest in the whole residue of the net estate of the deceased as long as she does not re-marry. The law therefore vests in the petitioner a life interest in the entire net estate of the deceased to the exclusion of the protesters for as long as she does not re-marry. There is no evidence that the petitioner has re-married. Accordingly, the protesters cannot challenge her right to administer the estate of the deceased as she thinks how for as long as she does not re-marry. I do not understand what the hurry by the protesters to inherit the deceased's estate is all about. The petitioner has only a life interest in the same. Once she goes, the estate will certainly revert to them.

For all the foregoing reasons I am satisfied that the affidavit of protest is unmerited. Accordingly it is dismissed. The grant shall be confirmed as proposed by the petitioner in her application dated 3<sup>rd</sup> April, 2008. As parties

involved in this dispute is mother versus sons, I shall make no order as to costs.

***Dated at Nyeri this 22<sup>nd</sup> day of March, 2010.***

**M.S.A. MAKHANDIA**  
**JUDGE**

*Delivered on 22nd day of March, 2010,*

**By:**

**J.K. SERGON**  
**JUDGE**