



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Succession Cause 617 of 2007**

**IN THE MATTER OF EPHANTUA MWANGI NJUGUNA**

**JOSEPH KABUGARA MWANGI.....PETITIONER**

**VERSUS**

**EPHANTUA MWANGI MUCHIRI.....APPLICANT**

**JUDGMENT**

**EPHANTUS MWANGI NJUGUNA** (the deceased) who died on 19<sup>th</sup> October 2004 was married to two wives, Mary Wangare Mwangi and Margaret Nduta Mwangi, both of whom are also deceased. On 10<sup>th</sup> August 2007 Joseph Kabugara Mwangi, a son of Margaret Nduta Mwangi, the deceased's 2<sup>nd</sup> widow, obtained a grant of letters of administration to the deceased's estate. On 22<sup>nd</sup> April 2009 Ephantus Mwangi Muchiri, a grandson of the deceased, applied for the revocation of that grant. By the consent of the parties, that grant was revoked and a fresh one issued in the joint names of the said Joseph Kabugara Mwangi and Ephantus Mwangi Muchiri. The issue before the court now is the distribution amongst the deceased's heirs of the deceased's sole property: **Title No. Nyandarua/Passenga/48** comprising of 32.86 acres.

The parties decided not to call any *viva voce* evidence and instead recorded a consent that I should rely on the averments in their affidavits and their respective counsel's written submissions and distribute the estate property.

It is not in dispute that the deceased's 1<sup>st</sup> wife, Mary Wangari Mwangi, had three children, Billiha Gathoni and Eliud Muchiri Mwangi both of whom are now also deceased and Hanna Wambui Mwangi. It is also not in dispute that the deceased's 2<sup>nd</sup> wife, Margaret Nduta Mwangi, had nine children all whom are alive. Mr. Kariuki Mwangi, counsel for the 1<sup>st</sup> administrator, submitted that as Bilha Gathoni is deceased and Hanna Wambui Mwangi is married, they should not be considered as beneficiaries of the deceased's estate. In his view pursuant to **Section 40** the **Law of Succession Act**, the 2<sup>nd</sup> administrator representing his deceased father and all the living children of the deceased except the married daughter Hanna Wambui Mwangi, should be taken as units and share the deceased's said land equally.

Miss Omwenyo for the 2<sup>nd</sup> administrator, is of the contrary view. She submitted that the deceased's estate should be shared equally between the two houses. Before that is done she said the income from the rental houses the deceased had constructed on the land as well as the rental income from a portion of the land leased to a Cell phone company as a base transmission station should be determined and shared equally between the two houses.

Although she did not say so, what Miss Omwenyo is asking me to do is to follow Kikuyu Customary law in the distribution of the estate. With respect that is legally untenable. This is because **Section 2(1)** of the **Law of Succession Act** (the Act) excludes the application of customary law to agricultural land of intestates dying after the Act came into operation, unless allowed by the minister under **Section 32** of the Act. **Section 32 of the Act** provides that:-

**“The Provisions of this Part shall not apply to –**  
**(a) agricultural land and crops thereon; or**  
**(b) livestock, situate in such areas as the Minister may, by notice in the Gazette, specify.”**

And **Legal Notice No. 94 of 1981** gives the Districts the Minister has specified to which customary law applies as **West Pokot, Turkan, Marsabit, Samburu, Isiolo, Mandera, Wajir, Garissa, Tana River, Lamu, Kajiado and Narok.**

As Nyandarua District in which the estate piece of land in this case is situate is not one of the specified Districts, Kikuyu Customary Law does not therefore apply to the deceased's estate in this case. This issue does not seem to have been live in the case of **Mwathi Vs Mwathi & Another [1995-98] 1 EA 229**. I cannot therefore follow the Court of Appeal decision in that case although the estate piece of land was situate in Kiambu District which is not one of the Districts specified in Legal Notice No. 94 of 1981.

This court has discretion under **Section 27** of the **Act**, to distribute the estate fairly having regard to the facts and circumstances of each case. Pursuant to **Section 40** the **Law of Succession Act**, I hold that all the living children of the deceased, including the deceased's married daughter Hanna Wambui Mwangi, and the 2<sup>nd</sup> administrator representing his deceased father, shall be taken as units and share the deceased's said land equally. I therefore hereby confirm the grant and order that the estate piece of land in this case shall be shared out equally as stated. This being an estate distribution matter, each party shall bear its own costs.

**DATED and delivered at Nakuru this 28<sup>th</sup> day of January, 2009.**

**D. K. MARAGA**  
**JUDGE.**