



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

**Succession Cause 393 of 1999**

**IN THE MATTER OF THE ESTATE OF ERASTUS MURIUKI MUNYUTHE – DECEASED**

**CHRISTOPHER L. WANGAI MURIUKI ..... APPLICANT**

**Versus**

**KONYU MURIUKI ..... PROTESTOR**

**JUDGMENT**

The deceased ERASTUS MURIUKI MUNYUTHE had two wives namely Agnes Wanjiru Muriuki as the first wife and Mary Konyu Muriuki as the second wife. This judgment relates to the affidavit of protest filed by Konyu Muriuki protesting against the summons for confirmation of grant filed by Christopher L. Wangai Muriuki. The protest was heard by viva voce evidence. The evidence that was adduced is that in his lifetime the deceased housed his first wife on property KONYU/BARICHO/ 181 herein after called Mathira property. That property is 3.45 acres. The second wife was residing at parcel No. NYERI/WARAZA/51 which is 45 acres. That property shall hereinafter be referred to as Waraza property. The first wife died during the subsistence of this succession. The grant in this estate was issued in the joint names of Christopher Wangai Muriuki the son of the first wife and Mary Konyu Muriuki. Christopher applied for confirmation of grant and sought that the Mathira property be distributed amongst the sons of the first wife equally. They are in total four sons. In respect of the Waraza property he proposed the distribution be with Mary Konyu getting 23.5 acres, Christopher getting 8.55 acres and his three other brothers getting 4.55 acres each. The evidence that is not contested by both sides is that Christopher after the death of the deceased paid about Kshs. 20,000 being an outstanding loan payable to the District Land Adjudication/ Settlement Officers. It was agreed before the clan that Christopher was to get 4 acres from the Waraza property as compensation for the payment of that loan. In the affidavit of protest filed by the second wife dated 4<sup>th</sup> March 2008 it is stated that the deceased died having uttered an oral will. The second wife stated that he left the oral will in her presence and seven other persons who included her co-petitioner Christopher. That in that will the deceased stated that her and her children were to inherit the Waraza property while the first wife and her children were to inherit the Mathira property. She however failed to bring corroborative evidence to the making of that will. Christopher denied that the deceased left an oral will. I find that the existence of such a will was not sufficiently proved on a balance of probability. I make that finding having perused the court file of this cause. In this file I found a letter written by Munyu sub-location chief dated 24<sup>th</sup> August 1990 and from the content of it, it seems that the letter was written at the behest of the second wife. For better understanding I will reproduced that letter as follows:-

**Office of the Asst. Chief**

Munyu sub-Loc

24<sup>th</sup> August 1990

The settlement officer

Nyeri

**PLOT NO. 357 WARAZA SCHEME**

**ERASTUS MURIUKI (DECEASED)**

The above mentioned had two wives. The one staying in the above mentioned plot is known as KONYU MURIUKI.

Erastus Muriuki had also had another wife living in his plot in Mathira Division.

KONYU MURIUKI claim that she will not be given any share in MATHIRA and instead she will get three more acres in Plot No. 357 WARAZA SCHEME. The idea was decided by the clan elders as Konyu claims.

The purpose of writing to you is to assist that KONYU MURIUKI get her right share.

(Signed)

J. W. MBAU

Assistant Chief

**MUNYU/WARAZA SUB-LOCATION**

That letter did not refer to an oral will. Further by an affidavit by the second wife dated 6<sup>th</sup> May 1997 and filed herein the second wife although she mentioned the desires of the deceased mind you not the oral will, she did also intimate her willingness to get a share of the Mathira property and the Waraza farm property. Again for better understanding I do reproduce paragraph 5- 11 of that affidavit;

5. *That at the time of my husband's death I was living in the parcel of land NYERI/WARAZA/51 and my co-wife together with her children was living in KONYU/BARICHO/181.*
6. *That the wish of my husband which he expressly openly said was that we inherit his estate as we were living.*
7. *That it is therefore unfair for the children of my co-wife to bestow upon themselves the obligations to share the estate among themselves/including the land and I live in without consulting me.*
8. *That whereas they want to share the land I live among themselves, they have not given me a portion of the land our husband left them with.*
9. *That if they want the estate to be shared among the deceased's beneficiaries, then I also have sons whom they have not included.*
10. *That the manner of sharing, the state as specified in the application is unfair unjust, inequitable, and object to it very strongly.*
11. *That this issue should be heard by the court and decision made if we can not agree.*

It is clear from the above that prior to the affidavit of protest dated 4<sup>th</sup> March 2008 the second wife was not emphatic about the alleged oral will. Indeed as stated before prior to her protest she was interested in getting a portion of land at Mathira property. The deceased died in 1980 before the operations of the Law of Succession Act. Section 2(2) of that act applies to this estate. It provides:-

***“The estate of a persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”***

I am indebted to the counsel for the applicant, that is Christopher, for having provided an extract of the book of EUGENE COTRAN THE LAW OF SUCCESSION. The relevant portion of that book provides as follows:-

***“In a polygamous household, the distribution is by reference to the house of each wife. Widows, though not entitled to an absolute share of the estate, have a right of using during their lifetime of a portion of land and certain movables.....***

***The general principle here is that the house (githaka) of each wife gets an equal share of the property, irrespective of the number of children in each house.”***

I am however of the view that it was never the intention of our forefathers that any custom should remain static. I assume that if our forefathers were alive in this day and age they would have added a requirement that in giving any inheritance the value of the land be considered. I state so because the applicant accepted under cross examination that the Mathira property is more valuable than Waraza property. I have taken into account the evidence of the second wife that she does not desire to get any land at Mathira. That being so I will give her more than half of the share of Waraza property. It should be stated at this point that having found the existence of oral will was not proved sufficiently to this court then distribution need not follow the format that was stated by the second wife. The book of EUGENE COTRAN provides that where the deceased was polygamous distribution is by reference to house of each wife. That being so the distribution I propose to make is to divide and try as much as possible to give equal share the estate of the deceased bearing in mind the difference in value of the two properties. In the distribution awarded in this judgment I have taken into account the compensation due to Christopher for the payment of the loan he made on the Waraza property. The judgment of this court is that the grant is confirmed as follows:-

***1. KONYU/BARICHO/181 is to be distributed in equal shares as follows:-***

- a) Nelson Kario Muriuki ID 10378577***
- b) Christopher Lwance Wangai Muriuki ID 0257466***
- c) Charles Maina Muriuki ID 5557106***
- d) Michael Erastus Muriithi Muriuki ID 3462935***

***2. Land Parcel NYERI/WARAZA/51 to be distributed as follows:-***

- a) Christopher Lwance Wangai Muriuki ID 0257466 - 6.75 acres***
- (b) Michael Erastus Muriithi Muriuki ID 3462935 - 2.75 acres***
- (c) Charles Maina Muriuki ID 5557106 – 2.75 acres***
- (d) Nelson Kario Muriuki ID 10378577 – 2.75 acres***
- (e) Mary Konyu Muriuki – the balance of acres remaining after the above distribution for her lifetime***

*thereafter to her children.*

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

**MARY KASANGO**

**JUDGE**

*Dated and delivered this 14<sup>th</sup> day of May 2009*

**M. S. A. MAKHANDIA**

**JUDGE**