



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

Succession Cause 330 of 2003

IN THE MATTER OF THE ESTATE OF SULEIMAN GITAU KINUTHIA (Deceased)

BENSON NJOROGE GITAU PETITIONER

VERSUS

PETER MWANGI GITAU OBJECTOR

JUDGMENT

The *late Suleiman Gitau Kinuthia* [deceased] died at the advanced age of 102 years on 16th June 2002 at Ol Rongai. On 4th August 2003, *Benson Njoroge Gitau* petitioned for the letters of administration in respect of the deceased estate. According to the affidavit in support of the application, the petitioner listed the following persons as the survivors of the deceased:-

1. **Benson Njoroge Gitau – son**
2. **James Mbugua Gitau – son**
3. **Peter Karanja Gitau – son**
4. **Ruth Wanjiru Gitau – daughter**
5. **David Gathiru Nyambura – son**
6. **Margaret Wanjiru – wife**
7. **Francis Mbugua Gitau - son**
8. **Mwihaki Gitau – daughter**
9. **Margaret Waithera – wife**

The inventory of the assets by the deceased as at the date of his death were also indicated as follows: -

- (a) **Nakuru/Ol Rongai Phase 11/395**
- (b) **Plot No.447 – Gatundia**

- (c) **B.A.T ordinary shares – No.1791**
- (d) **B.A.T ordinary shares – No. 2372**
- (e) **A Posho mill make GM 25 hammer mill**

On 25th November 2003, the petitioner was issued with the letters of administration intestate. On 28th May 2004, **Peter Mwangi Gitau** applied for the revocation of the grant on the grounds that he was also a son of the deceased for the only surviving widow **Margaret Waithera Gitau**. On 28th July 2004, the parties in this succession cause recorded a consent and included **Peter Mwangi Gitau** as a beneficiary of the deceased estate thereby leaving the issue of distribution of the deceased estate the only outstanding issue.

The petitioner filed the summons for confirmation of the grant dated 31st July 2006 and proposed his preferred mode of distribution as follows: -

- (a) **Benson Njoroge Gitau – B.A.T Shares – whole**
- (b) **James Mbugua Gitau – Plot No.447 Gatundia – whole**
- (c) **Ruth Wanjiru Gitau – one G.M Hamer Posho Mill – whole**
- (d) **Plot Number Nakuru/Ol Rongai Phase 11/395 as follows: -**
 - (i) **Benson Njoroge Gitau – 0.4452 Hectares plus 0.0465 hectares plot on the main road frontage.**
 - (ii) **James Mbugua Gitau – 0.4452 hectares plus 0.0465 hectares plot on the main road frontage.**
 - (iii) **Peter Karanja Gitau – 0.4452 hectares plus 0.0465 hectares plot on the main road frontage.**
 - (iv) **Ruth Wanjiru Gitau – 0.0465 hectares.**
 - (v) **David Gathiru Nyambura – 0.2428 hectares plus 0.0465 hectares plot on the main road frontage.**
 - (vi) **Margaret Wanjiru Gitau – 0.3642 hectares plot.**
 - (vii) **Francis Mbugua Gitau – 0.0465 hectares plot on the main road frontage.**
 - (viii) **Mary Mwihaki Gitau - 0.0465 hectares plot on the main road frontage.**
 - (ix) **Margaret Waithera Gitau – 0.3642 hectares**
 - (x) **Peter Mwangi Gitau - 0.0465 hectares plot on the main road frontage.**

And the plot marked 'A' on the sketch plan which is developed; the petitioner proposed that it be shared equally among **Benson Njoroge Gitau, James Mbugua Gitau, Peter Karanja Gitau** and **Margaret Waithera Gitau**.

As for the Plot marked 'B', he proposed it be sold off to defray the costs of litigation and survey fees. This proposal was consented to by seven beneficiaries namely; **Benson Njoroge Gitau, James Mbugua Gitau, Ruth Wanjiru Gitau, David Githiru Nyambura, Margaret Wanjiru Gitau, Francis Mbugua Gitau,** and **Mary Mwihaki Gitau**.

However, **Peter Mwangi Gitau the Objector** filed an affidavit of protest to the above proposed

distribution while contending that the deceased was survived by three houses, and that the deceased estate should be distributed amongst the three households. He named the three houses as follows;

The **First House**

- (a) *Benson Njoroge Gitau*
- (b) *James Mbugua Gitau*
- (c) *Peter Karanja Gitau*
- (d) *Ruth Wanjiru Gitau*
- (e) *David Githiru Nyambura*

Second House

- (i) *Margaret Wanjiru Gitau*
- (ii) *Francis Mbugua Gitau*
- (iii) *Mary Mwihaki Gitau*

Third House

- a) *Margaret Waithera Gitau*
- b) *Peter Mwangi Gitau*

Further he proposed that the deceased asset known as **Plot Number Nakuru/OI Rongai Phase 11/395** be distributed equally among the ten beneficiaries according to the proposed sketch plan which he attached to his affidavit. **B.A.T shares** to be given to ***Benson Njoroge Gitau*** and **one Posho Mill** be given to ***Margaret Waithera Gitau***. He also proposed that the rental proceeds of rental house in **Plot Number Nakuru/OI Rongai Phase 11/395** be shared equally among the beneficiaries. He also suggested that the rental income be distributed equally among the beneficiaries.

Counsel for both parties filed written and made oral submissions. They urged the court to consider their clients' respective proposed mode of distribution.

Looking at both proposals and the submissions by the respective Counsels, there is no dispute on how the main property namely **Plot Number Nakuru/OI Rongai Phase 11/395** should be shared. They are both in agreement that it be divided equally among the ten beneficiaries. The only dispute is over how the subdivision will be effected so that the beneficiaries especially the widow is not moved from her matrimonial home. The other dispute is the sharing of the business rental premises which are on the same portion of land. It seems that there are five shops and the petitioner proposes to give them to four beneficiaries while the protestor proposes that they be shared among the ten beneficiaries. There is also no dispute over who should take the **B.A.T shares** as both proposals suggest that these shares should go to ***Benson Njoroge Gitau***. Both parties proposals also suggest that **Plot Number 447 Gatundia** should go to ***James Mbugua Gitau*** and the **posho mill** should go to ***Margaret Waithera Gitau***.

Thus the only disagreement is over the proportionate sharing of the main property **Plot Number Nakuru/OI Rongai Phase 11/395** which consist of the widow's matrimonial home and the developed business plots which are said to have been accruing rental income from June 2002 when the deceased passed away and which the petitioner has not accounted for.

This estate should be determined according to the provisions of **Section 40** of the **Law of Succession**

which deals with intestate estate of a deceased who is survived by a polygamous household. The deceased in this matter had three wives. **Section 40 (1)** of the **Law of Succession Act** provides

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

Taking all the circumstances into consideration, it is important that when the subdivision is effected over the main property i.e **Plot Number Nakuru/Ol Rongai Phase 11/395**, the portions occupied by respective beneficiaries should revert to them. The developed portion of the plot should also be valued and shared equally among the beneficiaries. It may be difficult to share the shops equally among the beneficiaries, thus it may be easier to sell the plot and share the proceeds. But if the plot is divisible the beneficiaries can group themselves in a way that they can be registered as tenants in common. The petitioner should file accounts of the rents collected from the plot since he became the administrator within 30 days from the date of this judgment and the same should be distributed equally among all the beneficiaries.

Since there is no dispute regarding who should inherit the **posho mill**, the **plot at Gatundia** and the **B.A.T shares**, I need not make an order over the same, save that the values of those items should be taken into account and the share of the beneficiaries namely **Margaret Waithera Gitau**, **James Mbugua Gitau** and **Benson Njoroge Gitau** their shares in the main assets should be reduced by the value of those items so that there is equitable sharing among all the beneficiaries. This is also in tandem with the provisions of **Sections 42** of the **Law of Succession** which deals with previous benefits which should be brought into account during distribution as follows: -

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35,

that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

This being a family matter each party shall bear their own costs.

It is so ordered.

Judgment read and signed on 9th February 2007.

MARTHA KOOME

JUDGE