



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**SUCCESSION CAUSE NUMBER 54 OF 1998**  
*IN THE MATTER OF THE ESTATE OF JHAZ KING'ORI*  
*MITHIGI - DECEASED*

S M K }

B M K } .....PETITIONERS

VERSUS

P M K.....OBJECTOR

**J U D G M E N T**

This case arises out of a succession dispute regarding the distribution of the estate of the late Jahazi King'ori Mithigi who died on 8th December 1989. The deceased was survived by two widows Grace Wangechi King'ori and Helena Wanjiru King'ori who has also since died. He was also survived by amongst others, three sons from the house of Grace Wangechi and 3 sons and 1 unmarried daughter from the house of Helena Wanjiru King'ori. Letters of Administration intestate were issued by consent on 10th November 1999 to the deceased's sons Samuel Mithigi King'ori, Bernard Mithigi King'ori and Peterson Mwangi King'ori . They have however been unable to agree on the distribution of the estate so as to facilitate the confirmation of the grant. Directions were given on 21st July 2003 for the issue of distribution to be determined by way of viva voce evidence.

Peterson Mwangi King'ori objects to the distribution proposed by his coadministrators Samuel Mithigi King'ori and Bernard Mithigi King'ori contending that the deceased had expressed his wishes during his life time that his land Nyeri/Watuka/932 to 940 (formerly Nyeri/Watuka/582) should be inherited by his wife Helena Wanjiru together with her children, and his land known as Aguthi/Gathaithi/1 should be inherited by his wife Grace Wangechi together with her children. Apparently each wife was residing in the respective parcel of land the deceased intended to give them.

The objector maintains that the distribution proposed by his co-administrators is not only contrary to the express wishes of the deceased but is also oppressive as it would enable the house of Grace Wangechi to inherit the Gathaithi land and also share the land at Watuka with the house of Helen Wanjiku. The objector explained that the deceased had merely sub-divided the Watuka land into 7 portions to facilitate development or mortgage if need be.

Ayub Wanguku Kamau (P.W.2) a church elder at the PCEA Church testified that about a year prior to his death the deceased called P.W.2 and three other elders to whom He expressed his wishes in the presence of his wife Helena, the objector and two of his daughters that He wanted his wife Helena to remain in Watuka with her children and the first wife Grace to remain at Aguthii with her children. P.W.2 recalled attending a meeting at the deceased's home which was chaired by the sub-chief, and during which meeting the elders decided that each house should remain where the deceased left them.

Stephen Muruthi Murage (P.W.3) the Senior Assistant Chief of Watuka sublocation Gatarakwa location

testified that He attended a family meeting on 20th January 1991 at the Watuka home of the deceased. During the meeting which was attended by the deceased's family members from both Watuka and Gathaithi, and the Assistant Chief of Gathaithi, it was agreed that the respective families should remain in the land occupied by their mother. He maintained that this decision was arrived at amicably even though some of the deceased's sons residing in Gathaithi claimed to be having land in Watuka.

Jane Mukami King'ori (P.W.4) the deceased's unmarried daughter from the house of Helena Wanjiru also testified that a meeting took place on 20/1/91 during which it was agreed that the house of Grace remains at Gathaithi and the house of Helena at Watuka. Five years later Bernard Mithingi one of the deceased's sons from the house of Grace started claiming land in Watuka.

Matthew Wachira Kamangoya (P.W.5) who is the chief of Gathaithi testified that He visited the deceased's first wife Grace Wangechi and she made a statement which was recorded by Victor Kimani Rumuti (P.W.6) the Assistant Chief of Huhoini sub-location. In the statement Grace Wangechi explained that her husband had told her that she should remain at Gathaithi while her co-wife Helena was to remain at Watuka with her children.

Grace Wangechi King'ori (P.W.7) testified that the deceased put up a house for her co-wife Helena at Watuka and she lived there until her death. P.W.7 on the other hand lived on the deceased's land at Gathaithi. She testified that the deceased divided his land to children both in Watuka and Gathaithi she conceded that she was the one cultivating the Gathaithi land with her children. She denied having told P.W.5 and 6 how her deceased husband's land should be divided. She maintained that the whole of the piece of land at Gathaithi was hers and maintained that her children were entitled to the Watuka land because it was bigger.

Bernard Mithigi King'ori (D.W.1) testified that the deceased had sub-divided his Watuka land into 8 portions. The first 7 portions were registered as Watuka 934 to 940 each measuring 2.43 Hectares. The eighth portion which was 9.3 Hectares was registered as Watuka/933. This portion was given by the deceased to his wife Helena Wanjiru.

The deceased gave Watuka/936 to Bernard Mithingi King'ori. Watuka/938 He gave to Charles Wachiuri, Watuka/939 He gave to Samuel King'ori, Watuka/940 He gave to Peterson King'ori i.e. the objector. Each of the sons was shown the respective parcel of land given to him. The deceased did not however effect the legal transfer of the land parcels to his sons as they all remained in his name. The deceased did not indicate who He wanted to give plot Nos.934, 935 and 937.

After the deceased's death, the family held a meeting under the chairmanship of one Joseph Kahudhia and it was agreed that the distribution of the deceased's property be done according to his wishes. The land parcels in respect of which deceased had given no indication were agreed at the meeting to be allocated as follows: Watuka/934 being given to Jane Mukami, Watuka/935 being given to Anthony Mwangi and Watuka/937 being given to Ephantus Wahome. It was further agreed that the deceased Grace Wangechi retains the Aguthi land which was in Gathaithi.

D.W.1 produced minutes (D Exh.2) which He recorded during the family meeting. It was further agreed during the meeting that Grace Wangechi inherits the deceased's shares from Kenya Breweries, and Helena Wanjiru the shares from Nation and that the Kaigi plot was to go to Grace Wangechi and the Muthinga plot to go to Helena Wanjiru and finally the Mifugo Co-operative shares to go to the deceased's sister Alice Wamugu.

Josphat Kahudhia Nguchune (D.W.2) a cousin to the deceased and formerly assistant chief testified that He attended the family meetings held on 30th November 1996 during which all the deceased's properties were identified and distributed. He identified the minutes produced by D.W.1 (Exh.D2) as reflecting the distribution agreed upon. In his written submission Mr. Kebuka Wachira who appeared for the objector urged the court not to ignore the wishes of the deceased that the house of Helena Wanjiru should occupy Nyeri/Watuka/582 exclusively. He submitted that although the deceased had sub-divided the Watuka land, it has not been proved that He intended to transfer the portions to his children. He

further submitted that the Gathaithi land was the best arable land in Nyeri and therefore the house of Grace Wangechi should be content with that land.

Mr. Macharia who appeared for the Petitioners submitted that there was sufficient evidence that the deceased had not only sub-divided the Watuka land but had also given title deeds to some of the plots to some of his sons. In particular He gave Bernard Mithigi a power of attorney in respect of one sub-division and allowed him to mortgage that sub-division. He further submitted that the deceased's wishes were in accordance with the provisions of the law of Succession Act which provided for equitable distribution according to the number of children in each household. He concluded that the objector had failed to prove that the deceased had directed that his widow Grace Wangechi and her children remain at Gathaithi and Helena Wanjiru and her children remain at Watuka.

It is clear from the evidence that the two widows were each occupying separate parcels of land and that the deceased indicated a wish that this should continue after his death. The question is whether the deceased's wishes were that the children from each household should be restricted to the parcels on which their respective mothers were staying, and if so whether the court should go by this wish.

As concerns Aguthi/Gathaithi/1 it is evident that this land is 20.5 acres or (7.4 Hectares). It is evident that the deceased's widow Grace Wangechi had been in exclusive possession of this land. There was no serious dispute as to whether she should retain this land.

The dispute is over the Nyeri Watuka land (formerly Nyeri/Watuka/582) subdivided to Nyeri/Watuka 932 to 940. It is evident that this land being about 27 Hectares was much bigger than the Gathaithi land which was only 7.4 Hectares. It was suggested by the objectors' advocate that the Gathaithi land was the best arable land in Nyeri as compared to the Watuka land. There was however no evidence called in support of this contention and counsel cannot purport to give evidence through submissions.

It is apparent that the deceased on his own accord sub-divided the Watuka land into 8 portions. It is more than sheer coincidence that one portion should be much larger than the rest. Particularly when that portion is about 9.32 Hectares, slightly more than the acreage of the Aguthi/Gathaithi/1 land. I find that the clear intention of the deceased was not that his widow Helena should exclusively retain the Watuka land with her children but that she should retain the larger portion i.e Nyeri/Watuka/933, whilst leaving the other 7 portions free for distribution. This would be consistent with the deceased's wish that each widow remain in the land where they were. Moreover it is no coincidence that the remaining 7 portions were all equal and that the deceased's sons and 1 unmarried daughter entitled to inherit him were 7. Evidently the deceased intended each child to have 1 portion. I believe the evidence of Bernard Mithigi that He not only showed him his portion, but also gave him the title to the sub-division with a power of attorney.

I find that although the deceased had not effected the transfer of the sub-division to his children, he clearly intended that each child should have one portion and this is what was agreed upon by the clan elders during the family meeting of 30th November 1996. Although an earlier family meeting held on 20th January 1991 had proposed that each household should remain in the land where each widow was at the time of the deceased's death, this was not acceptable to some of the family members and this is what led to the second meeting of 30th November 1996.

It is evident that according to section 40 of the Law of Succession Act Cap 160 Laws of Kenya, the estate of the deceased should be divided equally between the two households according to the number of children in each household adding the wife as a unit. However the approach adopted by the deceased was a very practical and equitable approach as it had the advantage of enabling each widow to retain the land where she has been living whilst each child also gets their own share. I am satisfied that the distribution of the deceased's Nyeri Watuka land as proposed by the applicants not only reflects the deceased's wishes but is also fair and just. Since this was the only bone of contention. I would order that the grant issued to the Petitioners and the objector on the 10th November 1999 be confirmed with the distribution as follows:

- a) Land parcel TITLE NO. NYERI/WATUKA/933 – To be registered in the names of; S M K, E W K, P M K AND J K.
- b) Land Parcel TITLE NO. AGUTHI/GATHAITHI/1 – To be registered in the names of;- B M K, C W K AND A M K WITH G W K having a life interest.
- c) Land parcel TITLE NO. NYERI/WATUKA/934 – To be registered in the name of J M K.
- d) Land parcel TITLE NO. NYERI/WATUKA/935 – To be registered in the name of A M K.
- e) Land parcel TITLE NO. NYERI/WATUKA/936 – To be registered in the name of B M K.
- f) Land parcel TITLE NO. NYERI/WATUKA/937 – To be registered in the name of E W K.
- g) Land parcel TITLE NO. NYERI/WATUKA/938 – To be registered in the name of C W K.
- h) Land parcel TITLE NO. NYERI/WATUKA/939 – To be registered in the name of S M K.
- i) Land parcel TITLE NO. NYERI/WATUKA/940 – To be registered in the name of P M K.
- j) ½ Share Plot No.2 Kiaigi Market, Nyeri – To B M K.
- k) East African Breweries Shares – To C W K.
- l) Nation Media Group Limited Shares )
- m) Plot No. 12 Muthinga Tetu Nyeri ) To be shared equally by the following children of H W K:
1. S M K
  2. E W K
  3. P M K
  4. J M K
- n) Shares No. 12272, 12273 and 16512 in Laikipia Mifugo Co-operative Society Limited, Nanyuki – To ALICE WAMUHU MATHENGE.

Each party to bear his own costs.

*Dated, signed and delivered this 11th day of May 2005.*

**H. M. OKWENGU**

**JUDGE**