



REPUBLIC OF KENYA



KENYA LAW

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**In re Estate of Solomon Ngari (Deceased) (Succession Cause
68 of 1988) [2023] KEHC 1442 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 68 OF 1988**

FN MUCHEMI, J

MARCH 2, 2023

IN THE MATTER OF THE ESTATE OF SOLOMON NGARI (DECEASED)

BETWEEN

PETER GICHURU NGARI PETITIONER

AND

JOSEPH WACHIRA NGARI 1ST PROTESTOR

WILLIAM NGATIA NGARI 2ND PROTESTOR

RONALD KARIUKI NGARI 3RD PROTESTOR

ANNA WANGUI MBOGO 4TH PROTESTOR

SALOME NJOKI GACHERU 5TH PROTESTOR

DAINA WAIRIMU KINUTHIA 6TH PROTESTOR

JUDGMENT

Brief facts

1. This is a judgment on several protests dated 25th May 2009, 26th May 2009, 9th March 2015, 22nd February 2016, 18th January 2017, 23rd September 2017 and 14th May 2019 against the Summons for Confirmation of grant dated 19th September 2008 that set out the mode of distribution of the estate as proposed by the applicant in his supporting affidavit. The protests were consolidated and canvassed by way of *viva voce* evidence according to the directions given on 16/9/1999.



The 1st Protestor's Case

2. The counsels on record for the parties were Mr. Kebuka Wachira for the applicant, Mr. Kamwenji for the 1st protestor, Mr. S.K Njuguna for 2nd protestor, Mr. Muthigani for the 4th and 5th protestor and Mr. Gitonga Muthee for the 6th protestor. The 3rd protestor appeared in person.
3. PW1, Joseph Wachira Ngari, a son to the deceased, relied on his affidavit of protest and testified that the deceased had two parcels of land namely Kirimukuyu/Ngandu/50 and Ruguru/Karuthi/418. PW1 contests the mode of distribution and testified that the petitioner was not entitled to any share in Kirimukuyu/Ngandu/50 and that for land parcel Ruguru/Karuthi/418, he is entitled to 1 acre as shared out by the deceased. The witness further testified that he was given 3.4 acres by the deceased.
4. On cross examination, the witness testified that the deceased had other parcels of land before land adjudication that he bought using money he had received from his sons. Firstly, PW1 said he bought LR Konyu/Ichuga/1099 and registered it in the name of John Solomon Ngatho and Kirimukuyu/Ngandu/23 was registered in the name of Joshua Maina Ngari. The witness further stated that the deceased gave the petitioner land parcel number Ruguru/Karuthi/418 in 1978 and the petitioner resides there.
5. PW1 testified that the deceased did not leave a written will and that both the properties are in the deceased's name. The witness further stated that the family lived on Kirimukuyu/Ngandu/50 and his mother was given one acre of the land. He further stated that the 2nd protestor was given 2 acres and not 4.4 acres as claimed. The witness further stated that the deceased gave his sons land before his demise namely Konyu/Ichuga/1100 was given and registered to David Solomon Monjo and Konyu/Ichuga/1099 was given to John Ngatho.

The 2nd Protestor's Case

6. PW2, William Ngatia Ngari, a son of the deceased testified that the deceased had 5 parcels of land which he bought although he bought some of the parcels in his sons' names because he could not buy all of them in the same name. These land parcels are LR No. Konyu/Ichuga/1100 measuring 4.7 acres registered in the name of David S. Monjo, Konyu/Ichuga/1099 measuring 5 acres registered in the name of John Ngatho Ngare, Kirimukuyu/Ngandu/23 measuring 4 acres registered in the name of Joshua Maina Ngare and Nyeri/Island Farms/268 measuring 2.8 hectares registered in the name of Milka Nyaguthii Ngare. He further testified that they lived on Kirimukuyu/Ngandu/50 as a family and that his sister Lydia Wairimu was living on the portion allocated to his mother. The witness proposes that the said acre of land be given to Lydia Wairimu's daughters, the 4th & 5th protestors. He further proposed that land parcel Kirimukuyu/Ngandu/50 ought to be shared as per his affidavit dated 26/2/2016 and Ruguru/Karuthi/418 to be shared amongst him, Rose Njoki Ngare and Ronald Kariuki Ngare. PW2 testified that he is entitled to 4.4 acres out of Kirimukuyu/Ngandu/50 because he is the last born and he took care of his parents in their old age. He further testified that he helped the deceased repay a loan the deceased had taken in 1967. The loan amounted to Kshs. 7,000/- and the deceased used land parcel Kirimukuyu/Ngandu/50 as collateral for the loan. The witness stated that he finished paying back the loan in 1987 and the title deed was released to him.
7. PW2 further testified that he paid a veterinary bill of Kshs. 91,000/- as requested by the deceased in 1978 and paid back a loan the deceased had taken from his brother. The witness stated that in 1977, the deceased called two elders, Joseph Gachehe and Peter Githinji to help him demarcate a portion of 4.4 acres out of Kirimukuyu/Ngandu/50. The witness further stated that in the same year, the deceased showed all his siblings his 4.4 acres demarcated and shared out his land to his children as follows:-



- a. Joseph Wachira – 2 acres
 - b. James Munuhe- 2 acres
 - c. Mary Muthoni’s children – 1.7 acres
8. The witness testified that the applicant lied to the chief that the deceased had given him land from Kirimukuyu/Ngandu/50.
 9. On cross-examination, the witness testified that the deceased bought land parcel Kirimukuyu/Ngandu/50 alone. The witness further stated that Mary Muthoni and Lydia Wairimu lived in land parcel Kirimukuyu/Ngandu/50 and Lydia Wairimu planted coffee on 1.6 acres of the land but she was evicted by the 1st protestor. PW2 further testified that Lydia Wairimu died in 2008 whereas Mary Muthoni died in 1968 before the deceased’s death. The witness stated that he is not claiming any share in land parcel number Ruguru/Karuthi/418.
 10. PW2 testified that on land parcel number Kirimukuyu/Ngandu/50 there are boundaries that have been placed by himself, the 1st protestor and James Munuhe. He further stated that 1.4 acres was marked by the deceased as the area where the guest house partially built. The witness further testified that the deceased gave the area of the guest house to Mary Muthoni’s children.
 11. The witness stated that the family of David Monjo lived on Konyu/Ichuga/1100 and thus his family have no claim on land parcel Kirimukuyu/Ngandu/50.
 12. PW3, Joseph Gacheche Muchiri testified that he supports PW2’s contentions and testified that sometime in 1977, the deceased called him and Peter Githinji to assist the deceased demarcate land and give it to the 2nd protestor. On cross-examination, the witness testified that he did not know the exact measurements of the demarcated land and further that none of the deceased’s children were present when they carried on the exercise. The witness further testified that the 2nd protestor was not present during the demarcation exercise.

3rd Protestor’s Case

13. The 3rd protestor filed an affidavit. He is the son of the deceased and opposed the mode of distribution proposed by the applicant whereas the applicant claimed L.R. Ruguru/Karuthi/418 as his land alleging that the deceased allocated it to him. He did not attend court to testify during the hearing. He is of course a rightful beneficiary being a son of the deceased.
14. The same case applies to Rose Njoki Ngare, a daughter of the deceased who also filed an affidavit of protest and did not attend court to testify. Like her brother the 3rd protestor, Ruth is a rightful beneficiary of the estate.

The 4th & 5th Protestors’ Case

15. PW4, Salome Njoki Gacheru is the 5th protestor herein. She states that she is a daughter to Lydia Wairimu Ngari, a sister to the 4th protestor and a granddaughter to the deceased. PW4 testified on her own behalf and on behalf of the 4th protestor . She told the court that her mother had seven (7) children namely:-
 - a. Mary Muthoni Mbogo
 - b. Annah Wangui Mbogo
 - c. Salome Njoki Gachehu



- d. Gladys Nyaguthii Muriithi
 - e. Purity Wanja Gachegu
 - f. Mbogo Gachehu
 - g. Sarah Wanjiru
16. The witness testified that her mother occupied a portion measuring 1.6 acres on L.R No. Kirimukuyu/Ngandu/50 but she was chased away by the 1st protestor. This is the portion she is claiming for all the seven children of the late Lydia Wairimu including herself.
17. On cross examination, PW4 testified that her mother died in 2008 and she had not filed any protest. She further testified that her mother was not married and that she was living on the suit property till she was chased away and moved to Embu where her brother lives. The witness proposed that the court allocate her and her siblings the portion of Kirimukuyu/Ngandu/50 utilised by their mother which measures 1.6 acres.

The 6th Protestor's Case

18. PW5, Dina Wairimu Kinuthia, a daughter to Mary Muthoni and granddaughter of the deceased testified that she obtained a limited grant in respect of her mother's estate. PW5 testified that she was claiming 1.4 acres that the deceased gave her mother. She further stated that she supports the mode of distribution as proposed by the 2nd protestor. On cross-examination, the witness testified that the late Mary Muthoni had three children but two of them are deceased leaving her as the only surviving child.
19. Two beneficiaries, Ronald Kariuki Ngari and Rose Njoki Ngare filed their respective affidavits of protest dated 9th March 2015 and 26th August 2019 respectively. They are son and daughter of the deceased according to their affidavits. However the two beneficiaries did not attend court to testify or to ventilate their cases.

The Applicant's Case

20. The Applicant testified that he is the second child of the deceased and his father had eight (8) sons and five (5) daughters. His proposal is that the estate be distributed as per his affidavit in support for the confirmation of grant and supplementary affidavit dated 1/7/2019. This means that he takes L.R Karuthi/418 by himself and that his brothers do share L.R. Kirimukuyu/Ngandu/50 equally. The applicant contends that the 4th, 5th and 6th protestors are not beneficiaries of the estate as they are grandchildren of the deceased and further that their mother did not file a claim in the succession cause when it began. It is further stated that both his sisters Lydia Wairimu and Mary Muthoni were married and are not entitled to inherit from their deceased father.
21. The petitioner stated that he bought land parcel number Ruguru/Karuthi/418 in 1950 and it was registered in the deceased's name because he was in Nairobi and was later detained during the emergency in 1952. He further testified that David Minjo Gichuru is entitled to 0.9 acres out of land parcel number Kirimukuyu/Ngandu/50 because he was the deceased's favourite grandson and was named after him.
22. On cross-examination, the witness said that during land consolidation, one could not be registered as owner of two parcels of land and that there was a sale agreement between him and the seller of L.R No. Ruguru/Karuthi/418 where his father represented him. He stated that although he was aware that land parcel Kirimukuyu/Ngandu/50 was used as collateral for a loan, he was not aware that the 2nd



protestor paid for the loan. He also stated that he did not know that the deceased gave the 2nd protestor a portion of 4.4 acres out of L.R. No. Kirimukuyu/Ngandu/50. The petitioner states that he is the only one entitled to land parcel Ruguru/Karuthi/418 and that it should be bequeathed to him.

23. Parties disposed of the protests by way of written submissions.

The 1st Protestor's Submissions

24. The 1st protestor submits that the deceased gave him land from land parcel Kirimukuyu/Ngandu/50 in 1984 although he did not ascertain the acreage but pointed out the boundaries. He further submits that there was an award given by the District Officer Mathira Division which was filed in court on 13th July 1993 that confirmed that the deceased had given him a portion of the said land.
25. The 1st protestor argues that the petitioner was given one (1) acre of land in Ruguru/Karuthi/418 in 1978 in the presence of four witnesses and the petitioner signed documents to that effect. The 1st protestor contends that the deceased gave the petitioner the said portion of land to separate him from the 2nd protestor and James Munuhe. The 1st protestor further contends that the 2nd protestor is not being honest as he claims that the deceased gave him 4.4 acres of land in 1970, yet he was only 17 years old.
26. The 1st protestor further submits that the 4th & 5th protestors' mother deserted her matrimonial home in 1970 and he gave her shelter at his home on land parcel number Kirimukuyu/Ngandu/50. He further contends that in 1983, the 4th & 5th protestors' mother asked the deceased to give her land but the deceased refused and advised her to go back to her husband. The 1st protestor argues that the said Lydia Wairimu died in 2008 and if she had any interest in the deceased's estate she would have made a claim before she died in 2008. As such, the 1st protestor argues that the 4th & 5th protestors have no claim.
27. The 1st protestor submits that the claim by the 6th protestor is also untenable as she has brought the claim 23 years after the deceased's death. Moreover, the 1st protestor contends that this is a ruse by the 2nd protestor to bring this claim through the 6th protestor. The 1st protestor prays that the estate be distributed as was distributed by the award of the panel of elders or the distribution that was done by his brother David Monjo.

The 2nd Protestor's Submissions

28. The 2nd protestor relies on Section 42 of the [Law of Succession Act](#) and submits that David Solomon Monjo (deceased), John Ngatho Ngari (deceased), Joshua Maina Ngari (deceased) and Milka Nyaguthii Ngari are beneficiaries of the deceased who were given parcels of land by the deceased during his lifetime and thus ought not to be considered in the distribution of the estate herein.
29. The 2nd protestor submits that the deceased made his wishes on how his estate ought to be distributed and thus his wishes ought to be followed. The 2nd protestor reiterates what he deposed in his affidavit and submits that he is entitled to 4.4 acres out of land parcel Kirimukuyu/Ngandu/50 because the deceased allocated it to him and the deceased together with PW3 and Peter Githinji demarcated the portion for him.
30. The 2nd protestor contends that the petitioner has failed to prove that he purchased land parcel number Ruguru/Karuthi/418 and argues that the said land belonged to the deceased. The 2nd protestor argues that if the said parcel of land belonged to the petitioner, the deceased would have registered it in the petitioner's name as he did with the other parcels that he registered in the names of his other sons and daughters. In any event, the 2nd protestor submits that the petitioner did not request the deceased to



register the land in his name from the time when land registration ended in 1985 until 1985 when the deceased died.

31. The 2nd protestor submits that the deceased had given land parcel number Ruguru/Karuthi/418 to the petitioner and Ronald Kariuki Ngari to be shared equally between them and that is the reason why the petitioner settled on that parcel of land.

The 4th & 5th Protestors' Case

32. The 4th & 5th protestors argue that the petitioner only listed the male children as the beneficiaries of the deceased as follows:-
- a. David Monjo Ngare
 - b. John Ngatho Ngare
 - c. James Munuhe Ngare
 - d. Joseph Wachira Ngare
 - e. William Ngatia Ngare
 - f. Peter Gichuru Ngare
 - g. Leonard Kariuki Ngare
33. The 4th & 5th protestors contend that the deceased had five (5) daughters who were omitted from the list of beneficiaries and are namely:-
- a. Esther Nyawira Ngari
 - b. Mary Muthoni Ngari
 - c. Lydia Wairimu Ngari
 - d. Milcah Nyaguthii Ngari
 - e. Rose Njoki Ngari.
34. The 4th & 5th protestors rely on Article 27 of *the Constitution*, Section 38 of the *Law of Succession Act* and the case of In the Matter of the Estate of M'Iringo Kirigia HC Meru Succession Cause No. 100 of 2006 and submit that the law does not discriminate against gender and therefore all children of the deceased are entitled to an equal share of the deceased's estate. The 4th & 5th protestors further submits that they seek to inherit their deceased's mother share from the deceased.

The 6th Protestor's Submissions

35. The 6th protestor submitted that she is the personal representative in the estate of her late mother Muthoni Ngari. Her claim in the estate is her mother's share from the deceased's estate that measures 1.4 acres out of L.R . Kirimukuyu/Ngandu/50. She further supports the mode of distribution of the 2nd protestor.

The Applicant's Submissions

36. The Applicant submits that the deceased had eight (8) sons and five daughters but some of them have passed away and currently they are four sons and only one daughter who are alive. The Applicant submits that the 1st and 2nd protestors are not entitled to any more of the deceased's estate than the



rest of the siblings. He further submits that the fact that the deceased pointed out the portion of land that the 1st protestor should occupy, did not entitle him to claim it as an inheritance. The petitioner contends if the intention of the deceased was to give a bigger share of land to the 1st and 2nd protestors, nothing that prevented him from transferring the said portions to the two beneficiaries just like he did with the other sons. It is further submitted that if the claims by the 1st & 2nd protestors on land parcel number Kirimukuyu/Ngandu/50 were to be upheld, they would get 7.8 acres out of 11.4 acres leaving 4 acres to be shared out by the rest of the beneficiaries which is unfair.

37. The Applicant further submits that the 3rd protestor is entitled to a share in land parcel number Kirimukuyu/Ngandu/50 as he does not have any interest in land parcel number Ruguru/Karuthi/418. He further argues that he is in exclusive use and possession of the said land since 1978. Moreover, he contends that although the said parcel of land is in the name of the deceased's name, the deceased was holding it in trust for him.
38. The Applicant relies on Section 38 of the Law of Succession Act and argues that the claims by the 4th, 5th & 6th protestors are not supported by law as they are not surviving children of the deceased nor are they dependents of the deceased pursuant to Section 29 of the Law of Succession Act. Moreover, the petitioner submits that the deceased refused to give the 4th & 5th protestors' mother land when he was alive. The petitioner further argues that the 4th & 5th protestors filed their protest very late in the proceedings and in any event, their mother did not file any objection during her lifetime. The petitioner submits that the mother of the 6th protestor died in 1968 and she was not a dependent of the deceased. She did not survive the deceased and the petitioner argues that a claim based through her cannot stand. As such, the petitioner states that the 4th, 5th & 6th protestors have no claim over the estate herein.
39. The Applicant further submits that he claims an equal share in land parcel number Kirimukuyu/Ngandu/50 as he has lived on the said property since 1978 and he has planted coffee trees and structures on the land. The petitioner further contends that the deceased had expressed his wishes to give his grandson David Monjo Gichuru some portion of land, which the petitioner proposes that the portion of 0.9 acres should be given to him as directed by the deceased. David Monjo is deceased. The petitioner thus urges the court to confirm the grant in terms of his mode of distribution.

Issue for determination

40. The main issue for determination is whether the protests have merit.

Analysis and Determination

41. The deceased died intestate on 5th August 1985 and had one spouse and thirteen (13) children namely:-
 - a. David Solomon Monjo
 - b. Peter Gichuru Ngare
 - c. John Solomon Ngatho
 - d. James Munuhe Ngare
 - e. Esther Nyawira Ngare (deceased)
 - f. Mary Muthoni Ngare (deceased)
 - g. Lydia Wairimu (deceased)
 - h. Milka Nyaguthii Ngare



- i. Joseph Wachira Ngare
 - j. Joshua Maina Ngare
 - k. Rose Njoki Ngare
 - l. Ronald Kariuki Ngare
 - m. Timothy Ngatia Ngare
42. It is also not disputed that out of the 13 children, only 4 sons and two daughters are alive namely:-
- a. Peter Gichuru Ngare
 - b. Joseph Wachira Ngare
 - c. Milicah Nyaguthii Ngari
 - d. Rose Njoki Ngari
 - e. Ronald Kariuki Ngare
 - f. William Ngatia Ngare
43. Two daughters of the deceased Lydia Wairimu and Mary Muthoni are survived by their children, some of which are the 4th, 5th and 6th protestors who are claiming their later mother's shares.
- The deceased had the following assets available for distribution:-
- a. L.R No. Kirimukuyu/Ngandu/50 measuring 11.4 acres
 - b. L.R No. Ruguru/Karuthi/418 measuring 6.2 acres
44. The applicant and the 1st and 2nd protestors claim that the deceased expressed his wishes on how his estate ought to be distributed. Although the three sons claim that the deceased shared his estate during his lifetime, each of them gives a different account on the apportionment. According to the petitioner, the deceased did not allocate any portion of land to the 1st and 2nd protestor and thus they are not entitled to the bigger portions they claim on L.R. No. Kirimukuyu/Ngandu/50. The 1st protestor argues that the deceased allocated to him 3.4 acres out of the said property whereas the 2nd protestor states that his was 4.4 acres.
45. I agree with the Applicant's argument that if the 1st protestor is given 3.4 acres and 2nd protestor 4.4 acres out of L.R Kirimukuyu/Ngandu/50 which measures only 11.5 acres, there would be only 3.6 acres left to be shared by all the other beneficiaries. This mode of distribution would greatly disadvantage other beneficiaries who are, under the law, equally entitled to inherit from their deceased father. Furthermore, the 1st and 2nd protestors did not adduce sufficient evidence to prove that the deceased had expressed such wishes. The evidence of the 2nd protestor William Ngatia was that he was given 4.4 acres by the deceased because he helped him pay a bank loan, a veterinary bill and supported his father for he was his favourite son. He called PW3 as his witness who was said to have been summoned with one Githinji to be present as the deceased set aside his portion of 4.4 acres. PW3 said that a portion was demarcated for the 2nd protestor but he could not tell the acreage. I perused the statement of Peter Githinji who did not testify and who stated that he was with PW3 as the deceased set apart the 2nd protestor's portion. The statement does not state the acreage of the portion the deceased demarcated. It is only the word of the 2nd protestor that the court has that he was given 4.4 acres. This evidence is not sufficient to prove that such a portion was given to the 2nd protestor.



46. The evidence of the 2nd protestor that he assisted the deceased to pay a bank loan and other bills as well as taking care of him which the other beneficiaries did not do does not put him on an advantage over other beneficiaries in the estate of the deceased.
47. As for the 1st protestor said he was given land by the deceased in 1984. The deceased pointed out the land using various trees on the land and that he later fenced the portion shown to him. He attached a sketch plan drawn after he called a surveyor to ascertain the size of the land and it was confirmed to be 3.2 acres. The surveyor was not called as a witness and he was not present when the deceased allegedly pointed out the portion of the land to the 1st protestor. I found this evidence unreliable and insufficient to identify the alleged portion and its acreage. Again, it was only word of the 1st protestor that he was given land during the deceased's lifetime. This is vehemently denied by the other beneficiaries.
48. The deceased gave land to three (3) of his sons and one daughter during his lifetime which is transferred or registered in their names as the case may be. This was not disputed by any of the other beneficiaries. The 1st and 2nd protestor gave no satisfactory explanation as to why the said portions were not demarcated by way of subdivision of the main parcel L.R Kirimukuyu/Ngandu/50 and transferred to them. The elders award relied on by the 1st protestor does not assist him either for the reason that the panel lacked jurisdiction to determine ownership of land under the repealed Land Disputes Tribunal Act, 1991. Further, the said award is inapplicable in a Succession cause since the asset in question is still in the name of the deceased.
49. It is my considered view that the 1st and 2nd protestor have failed to discharge the burden of proof as required by the law to establish their alleged claims in L.R. Kirimukuyu/Ngandu/50.
50. The 3rd protestor Ronald Kariuki Ngari and his sister Rose Njoki did not adduce any evidence to support their protests. They are son and daughter of the deceased and therefore rightful heirs of the estate. The two siblings were opposed to the Applicant's mode of distribution whereas he claimed to have been given the whole of L.R. Ruguru/418 by the deceased on ground that the land was never given out to the applicant. The land is still in their father's name.
51. It is trite law that children of the deceased are all equal for purposes of inheritance despite their gender or marriage status. Section 38 of the *Law of Succession Act* provides:-
- Where an intestate has left a surviving child or children but no spouse, the net intestate shall, subject to the provisions of Sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.
52. The Court of Appeal in *Peter Karumbi Keingati & 4 Others vs Dr. Ann Nyokabi Gotha & 4 Others* Nairobi Civil Appeal No. 235 of 2014 [2015]eKLR held:-
- “Article 27 of *the Constitution* guarantees for the equality of all before the law and the right to equal protection and the benefit of the law. The Article further proscribes discrimination on grounds including race, sex and marital status. These Articles (27 & 45(3)- parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and dissolution of the marriage) bind the court when applying Section 35 of the *Law of Succession Act* to ensure that all beneficiaries are treated equally though that may not mean, for purposes of distribution of an estate, a surgical precision in sharing of the assets of the estate.”



53. Even before the promulgation of *the Constitution* in 2010, Makhandia J (as he then was) *in Re Estate of Solomon Ngatia Kariuki (Deceased)* (2008) eKLR made a very strong statement on the issue of discrimination against daughters generally in succession matters and he said:-

“The *Law of Succession Act* does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to state a claim to the deceased’s estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu customary law. Like most other customary laws in this country, they are always biased against women and indeed, they tend to bar married daughters from inheriting their father’s estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father’s inheritance because they are likely to enjoy inheritance of their husband’s side of the family.”

54. Gikonyo J *In the Matter of the Estate of M’Ngarithi M’Miriti alias Paul M’Ngarithi M’Miriti (Deceased)* [2017]eKLR regarding discrimination of daughters in inheritance:-

“From the arguments coming through it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society, that being born as a daughter disinherited you. And so, even the judicial journey to liberate daughters from being so downtrodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the Constitutional architecture of our nation at the time, before 2010, we only saw pinprick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But things changed when *Rono vs Rono* [2008] 1 KLR 803 delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance, it splendidly paid deference to the International instruments against all forms discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women CEDAW. And I am happy to say that from thence, there are many cases and the number is rising by the day as courts implement *the Constitution* which states categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and *the constitution*.”

55. It is trite law that a son will not have priority over a daughter simply because he is male. All male and female siblings are equal before the law and are entitled to equal protection of the law. In that regard, all the children of the deceased herein shall be regarded as equal before the law. In that regard, the Applicant’s mode of distribution must fail as he has excluded the daughters of the deceased on the ground that they were married and are female. It is important to note that the petitioner’s mode of distribution excludes not only the daughters of the deceased but also the grandchildren of the deceased on ground that their deceased mothers never made any claim in the estate during their lifetime. On this contention, the Applicant was wrong in that it was not necessary to file a claim during their lifetime. The Law of Succession and *the Constitution* comes to their aid.

56. The law is clear that grandchildren can inherit the estate of their grandparents through their parents. *In the case of Re Estate of Florence Mukami Kinyua (Deceased)* (2018) eKLR Matheka J stated:-

A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parents’ share in the estate of the grandparents. This was stated *in Re Estate of Wabome Njoki Wakagoto* (2013) eKLR where it was held:-



Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.

57. The Applicant argues that his own David Monjo Gichuru should inherit 0.9 acres out of land parcel number Kirimukuyu/Ngandu/50 because he was named after the deceased and the deceased expressed his wishes to the effect that David should be given a portion of the land. As explained above, the law allows grandchildren to inherit from their grandparents' estate through their deceased parents. The contention by the petitioner that the said David Minjo ought to inherit is against the law and would disadvantage other beneficiaries. Being the favourite grandchild of the deceased and being named after him does not add any child or grandchild an advantage over others. The Applicant herein is the rightful heir of the estate of the deceased. His children are not entitled to inherit from the deceased in the circumstances.
58. After considering the evidence of the parties in this protest, I hereby identify the beneficiaries as follows:-
1. Peter Gichuru Ngare - son
 2. John Ngatho Ngare - son
 3. Joseph Wachira Ngare - son
 4. James Munuhe Ngare - son
 5. Ronald Kariuki Ngare - son
 6. Rose Njoki Ngare - daughter
 7. Salome Njoki, Anna Wangui Mbogo grand children & Mary Muthoni Mbogo, Gladys Nyaguthii children of Lydia Muriithi, Purity Wanga Gacheru Wairimu(deceased) Mbogo Gacheu and Sara Wanjiru
 8. Diana Wairimu Kinuthia – Daughter of Mary Muthoni (deceased)
59. It is noted that Salome Njoki claims a portion of 1.6 acres out of L.R Ngandu/Kirimukuyu/50 that the deceased had allocated to her mother. Diana Wairimu Kinuthia claims a portion of 1.4 acres out of Ngandu/Kirimukuyu/50 which deceased had given her mother.
60. The assets of the deceased available for distribution have been identified as L.R No's Kirimukuyu/Ngandu/50 measuring 11.4 acres Ruguru/Karuthi/418 measuring 6.2 acres.
61. It is not in dispute that the deceased during his lifetime had given land to four (4) of his children and effected transfers as follows:-
- i. David Solomon Monjo - Konyu/Ichuga/1100 measuring 5 acres



- ii. John Ngatho Ngari – Konyu/Ichuga/1098 measuring 2.22 ha
 - iii. Joshua Maina Ngari – Kirimukuyu/Ngandu/23 measuring 3.90 acres
 - iv. Milka Nyaguthii Ngari – Nyeri/Island Farm/268 measuring 2.8 hectares
62. It is the law that if a deceased person had distributed his estate during his lifetime, his wishes should be respected. However, if it can be demonstrated that the wishes of the deceased are illegal, unfair or discriminatory to the other beneficiaries or some of them, the deceased's wishes should not be respected as was held in the case of *Paul Kirubi Nyingi & Another vs Francis Wanjobi Nyingi* Nyeri High Court Succession Cause No. 580 of 1999.

Under section 42 of the *Act*, any gifts inter vivos by the deceased to the beneficiaries must be taken into account in distribution of the estate. The said beneficiaries are not claiming any shares in the parcels available for distribution herein. As such, the shares of the four (4) beneficiaries are settled under Section 42 of the *Act*. It is also noted that none of the four (4) beneficiaries are claiming inheritance in the estate of the deceased.

63. This court proceeds to distribute the estate of the deceased as follows:-

L.R No. Kirimukuyu/Ngandu/50 measuring 11.4 acres to be shared equally as follows:-

- a. Joseph Wachira Ngari – son 2.1 acres
- b. William Ngatia Ngari - son 2.1 acres
- c. James Munuhe Ngari – son 2.1 acres
- d. Rose Njoki Ngari – 2.1 acres
- e. Salome Njoki Gachegu & Anna Wangui Mbogo– 1.6 acres (to share equally among themselves, Mary Muthoni Mbogo, Gladys Nyaguthii Muriithi, Purity Wanja Gachegu, Mbogo Gachegu and Sarah Wanjiru)
- f. Diana Wairimu Kinuthia – 1.4 acres

L.R. No. Ruguru/Karuthi/418 measuring 6.2 acres to be shared equally between:-

- a. Peter Gichuru Ngari – 3.1 acres
- b. Ronald Kariuki Ngari – 3.1 acres

Certificate of Confirmation to issue.

DATED AND SIGNED AT NYERI THIS 2ND DAY OF MARCH, 2023.

JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 2ND DAY OF MARCH, 2023

F. MUCHEMI

JUDGE

