



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**(CORAM: CHERERE-J)**

**SUCCESSION CAUSE NO. 512 OF 2013**

**IN THE MATTER OF THE ESTATE OF KIUMBIA M'MUKIRA alias KIUMBA**

**M'RIRIA (DECEASED)**

**AND**

**IN THE MATTER OF PROTEST**

**BETWEEN**

**JOSEPH KINOTI M'MUKIRA.....PETITIONER/APPLICANT**

**AND**

**ROSALIA NKATHA MUKIIRA.....1<sup>ST</sup> RESPONDENT**

**GLADYS NKIROTE M'RINKANYA.....2<sup>ND</sup> RESPONDENT**

**HELLEN MWARI MWIRIGI.....3<sup>RD</sup> RESPONDENT**

**NANCY GATWIRI.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. **KIUMBIA M'MUKIRA alias KIUMBA M'RIRIA (Deceased)** died sometimes on 16<sup>th</sup> March, 2003. His estate comprises of **LR.NO. NTHIMBIRI/KIUTHA/46**.

2. According to the chief's letter dated 07<sup>th</sup> June, 2013, the deceased was survived by the following dependents:

**1) M'Mukira M'Makathimo - Husband**

**2) Rosalia Nkatha - Daughter**

**3) Dennis Mwiti - Son**

**4) Joseph Kinoti - Son**

**5) Patrick Nkunja - Son**

**6) Samson Kiriinya - Son**

**7) Gladys Nkirote - Daughter**

## 8) Hellen Mwari Mwirigi - Daughter

3. Letters of Administration were issued to **JOSEPH KINOTI M'MUKIRA** on 12<sup>th</sup> November, 2013. On the basis of a consent dated 30<sup>th</sup> January, 2018, the court on the same date issued a Certificate of Confirmation of Grant distributing the estate equally to Joseph Kinoti, Rosalia Nkatha, Samson Kiriinya, Gladys Nkirote, Hellen Mwari Mwirigi. Patrick Nkunia Kimaita and Bernard Muthuri Kimaita were jointly to hold an equal share as the other beneficiaries for themselves and the children of Daniel Kimaita.

4. The Certificate of grant was rectified on 18<sup>th</sup> June, 2018 and the name of Dennis Mwititi that had been omitted was included with an order that he was to get as equal share as the other beneficiaries.

5. By Summons for revocation dated 10<sup>th</sup> May, 2019 and filed on 13<sup>th</sup> May, 2019, the Petitioner applied for revocation of the grant mainly on the ground that it was obtained through misrepresentation by making of a false statement and concealing the fact that the Petitioner was never made aware nor did he sign the consent of the mode of distribution.

6. The Petitioner in his supporting affidavit sworn on 10<sup>th</sup> May, 2019 averred that some of the beneficiaries had put up permanent structures and that the court order would result in their demolition and upsetting of the common boundaries. He therefore proposed that the estate be distributed as follows:

1) **Joseph Kinoti - 0.134 Ha**

2) **Samson Kiriinya - 0.134 Ha**

3) **Dennis Mwititi - 0.134 Ha**

4) **Rosalia Nkatha }**

5) **Gladys Nkirote } 0.134 Ha jointly**

6) **Hellen Mwari Mwirigi }**

7) **Daniel Kimaita s/o Patrick Nkunjia Kimaita 0.067 Ha**

8) **Bernard Muthuri s/o Patrick Nkunjia Kimaita 0.067 Ha**

7. Rosalia Nkatha Mukiira, Gladys Nkirote M'Rinkanya, Hellen Mwari Mwirigi and Nancy Gatwiri opposed the application.

8. Rosalia Nkatha Mukiira, Gladys Nkirote M'Rinkanya and Hellen Mwari Mwirigi who are daughters of the deceased averred that their father was since deceased and contended that they and their siblings were entitled to an equal share of their mother's estate regardless of their gender.

9. Nancy Gatwiri who together with Dennis Mwititi are children of deceased's son **JULIUS MWONYE** contended that the share apportioned to Dennis Mwititi ought to be shared equally between her and the said Dennis Mwititi.

### **Analysis and Determination**

10. I have considered the affidavit evidence on record and submissions for the Petitioner/Applicant and for the 1<sup>st</sup> Respondent. The gravamen of this application revolves around distribution of **LR.NO. NTHIMBIRI/KIUTHA/46**.

11. The law relating to distribution of a deceased's estate where there is no surviving spouse is to be found in Section **38** of the **Law of Succession Act (the Act)** which provides **THAT**:

**Where an intestate has left a surviving child or children but no spouse, the net intestate estate 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**

(Emphasis added)

12. In this context, I am content to cite the proclamation by the Court of Appeal in the case of **STEPHEN GITONGA M'MURITHI vs. FAITH NGIRA MURITHI [2015] eKLR** that:

**“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried”.**

13. I am equally content to cite Article 27 of the Constitution which provides for equality and freedom from discrimination and consequently find that all the children of the deceased are entitled to equality of inheritance of their mother's estate. The proposal made by the Petitioner assigning a bigger share of the estate to the sons and a smaller share to the female lineal descendants is not enforceable and is therefore

rejected.

14. There is evidence that two of deceased's sons Patrick Nkunja and Julius Mwonje are deceased. Patrick Nkunja is survived by Daniel Kimaita and Bernard Muthuri whereas Julius Mwonje is survived by Nancy Gatwiri and Dennis Mwiti.

15. In the persuasive decision in the case of **Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR**, Musyoka J stated as follows: -

**“.....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.”**

16. The foregoing holding applies to this case in that shares for Patrick Nkunja and Julius Mwonje which shall be equal to the ones of their surviving siblings shall devolve equally to their respective children who are grandchildren of the deceased.

17. This court ordered for a surveyor's report which was filed on 21<sup>st</sup> September, 2020. It revealed that the deceased's estate comprising of **LR.NO. NTHIMBIRI/KIUTHA/46** has boundaries marking equal portions occupied by Joseph Kinoti; Samson Kiriinya; Dennis Mwiti; Rosalia Nkatha; and Patrick Nkunga and Bernard Muthuri Kimaita jointly occupying one portion. The report also states that there are permanent structures on the portions except the one occupied by Rosalia Nkatha.

18. The fact that some of beneficiaries have developed part of the estate does not give them an advantage over the other siblings for the reason that all the beneficiaries as equal before the law.

19. From the foregoing analysis, it is hereby ordered:

**1) The deceased's estate comprising of LR.NO. NTHIMBIRI/KIUTHA/46 shall be distributed into seven (7) equal shares to the following:**

**(i) 1/7 to Joseph Kinoti**

**(ii) 1/7 to Samson Kiriinya**

**(iii) 1/7 to Rosalia Nkatha**

**(iv) 1/7 to Gladys Nkirote**

**(v) 1/7 to Hellen Mwari Mwirigi**

**(vi) 1/7 to Daniel Kimaita and Bernard Muthuri in equal shares**

**(vii) 1/7 to Dennis Mwiti and Nancy Gatwiri in equal shares**

**2) At subdivision, the surveyor shall ensure that there is little or no disruption of the developments.**

**DATED AT MERU THIS 4<sup>TH</sup> DAY OF MARCH 2021**

**T. W. CHERERE**

**JUDGE**

**Court Assistant**

**- Morris Kinoti**

**For Applicant - Mr. Mutuma for Mutuma & Koskei Advocates**

**For 1<sup>st</sup> Respondent - Mr. Riungu for A.G.Riungu & Co. Advocates**