



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**SUCCESSION CAUSE NO. 1211 OF 2010**  
**IN THE MATTER OF THE ESTATE OF NJENGA MUTUNDU (DECEASED)**

**JUDGEMENT**

1. The matter before court arises from summons for revocation of the grant that was issued to the widow of the deceased Njenga Mutundu, Margaret Wambui Njenga and three of their children; David Mwathi Pere, Jacinta Wangu Pere and James Waititu Pere, on the 25<sup>th</sup> of March 2011, confirmed on the 23<sup>rd</sup> of February, 2016 and rectified on 6<sup>th</sup> September, 2016.

2. The current application was filed by Catherine Njoki Pere, a daughter on grounds that the grant was:

- Obtained fraudulently by making of false statements and by concealment of information material to the case.
- The certificate of confirmation was obtained by means of untrue allegations.
- The distribution was unfair and discriminatory as the same favored the sons.

3. Catherine the Objector appears to be the only beneficiary of the estate who was opposed to the distribution of the estate.

Jacinta Wangu Pere on behalf of the Co-Administrator filed an affidavit opposing the application for revocation on grounds that the Objector was involved in family meetings that led to the distribution of the estate including signing of the initial consent for probate; the land said by the applicant to have been wasted is what would form the necessary roads at subdivision of the properties, the process of distribution was not in secrecy as alleged, as all beneficiaries were aware including the Objector who has indeed sold a portion of her inheritance based on the family agreement; distribution was equal and equitable as agreed by the entire family.

4. The matter proceeded by way of *viva voce* evidence with each side reiterating the evidence in their respective affidavits. Considering the evidence and submissions by counsel for the Objector, the Administrators' counsel having failed to file submissions, the issues for determination are:

- a. Whether the process of obtaining the grant and eventual confirmation was shrouded in secrecy so as to exclude the objector.
- b. Is distribution discriminatory against the female children of the deceased?
- c. If any of the above is in the affirmative, would revocation of the grant necessary?

5. Was the grant obtained fraudulently and by concealment of material facts?

In her affidavit in support of the application in her evidence in court the Objector maintained that she did not sign the consent as alleged. She further denied that the mode of distribution was agreed upon and alleged that distribution was done secretly without her involvement.

6. The case for the Administrators is that the Objector was all along involved although she missed one meeting despite being informed of the same. Further that it was agreed in all the meetings how the properties would be divided.

7. From the evidence on record, I am not convinced that the Objector was left out of the family meetings. Am I convinced that

The Objector signed the initial consent for purposes of obtaining the grant. I find the widow and Jacinta to have been honest and truthful in their evidence.

8. As for confirmation of the grant, minutes of a family meeting where the family met on 3<sup>rd</sup> October 2015 were annexed to the affidavit in

support of the application and which the court relied upon in confirming the grant. I do not doubt the court's decision in relying on the signatures on the minutes

In my view there is no hard and first rule that a particular format of consent must be used. The contents of the minutes are clear that the family was in agreement at the time on how the properties were to be divided. Indeed, the objector has been able to sell part of her portion using the said formulae.

9. Notable also is that the Objector's exhibit of the meeting of 3<sup>rd</sup> October 2015 is missing a crucial page containing Min. 5 of the said meeting which indicates how the beneficiaries had agreed on distribution.

This ground of the objection therefore is not sustainable.

**10. Is the distribution of the estate discriminatory against the female children of the deceased?**

There is an admission on the part of the Administrators that the sons are to get more acreage as compared to the daughters and though they alleged that this was a family agreement and the complaint by the Objector is merely because she had sold 1/8<sup>th</sup> of one of the portions allocated to her.

11. The deceased died intestate on 29<sup>th</sup> October 2008 and was survived by three sons and three daughters. Two of his sons are deceased and left their children behind. Those deceased are Peter Mungai and Wilfred Suyenka Pere. Those alive are:

- a. David Mwathi.**
- b. Wilson Kerugo**
- c. Jacinta Nango**
- d. Catherine Njoki**
- e. James Waititu**
- f. Joyce Wanjiku**

12. The widow was alive and appears from her evidence to have been the prime mover of the distribution of the estate. She died before the conclusion of the case on 24<sup>th</sup> of August, 2019.

13. The three properties left behind by the deceased are:

- 1. Ngong/Ngong/27300 measuring 9.708 Ha approximately 23.988 acres.**
- 2. Kajiado/Ole Kasasi/38 measuring 4.75 Ha approximately 11.737 acres.**
- 3. Kajiado/Kitengela/3226 comprising 6.07 Ha approximately 14.998 acres.**

**The same were distributed as follows:**

**Ngong/Ngong/27300**

**Male children – between 1Ha – 3.2Ha (2.471-3.2 acres)**

**Female children – 0.40Ha (0.988 acres)**

**Widow – 1.02Ha (2.52 acres)**

**Kajiado/Kitengela/3226**

**Widow – 0.75Ha (1.85 acres)**

**Sons - 0.75Ha (1.85 acres)**

**Daughters – 0.40Ha (0.988 acres)**

**Kajiado/Ole Kasani/38**

**Widow – 0.41Ha (1.013 acres)**

**Sons – between 0.40Ha – 0.42Ha (0.988 – 1.037 acres)**

**Daughters – 0.2Ha (0.494 acres)**

14. Both the Constitution of Kenya and section 42 Law of Succession outlaw discrimination on account of gender. Article 27 of the Constitution 2010 on equality and freedom from expression in particular sub-article 3 provides as follows:

**“Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”**

15. The above provision of the Constitution has to be read alongside section 35(2) of the Law of Succession Act so that when the widow in exercising the power distributing an estate she will not discriminate. Section 35 provides as follows:

**“Where intestate has left one surviving spouse and child or children**

**1. Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to -**

**a. The personal and household effects of the deceased absolutely; and**

**b. A life interest in the whole residue of the net intestate estate;**

**Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.**

**2. A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.”**

16. Further, courts have held over time before and after the coming of the Constitution 2010 that female children of the deceased are entitled to equal share as the male children.

Notable is the case of Rono v Rono [2005] eKLR where the Court of Appeal held inter alia that there is need to distribute the estate equitably and without necessarily discriminating against girls on account of sex or marital status(Waki JA).

On his part Omolo JA in expounding and explaining further the provisions of the law went ahead to agree with Waki JA and to add as follows:

**“..... Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice.”**

**Omolo J** was in my understanding trying to underscore the concept of equity based on the circumstances of each case. So that in given circumstances proportions may be equitable not necessarily the same.

**17. Should the grant be revoked?**

Though it is clear that the objector and her sisters were discriminated upon, in my view revoking the grant after 5 years may be unnecessary since the only issue is on distribution of the estate. Secondly, the widow having died, her share of the estate could bridge the gap between what was apportioned to the sons and daughters.

18. Consequently, I will order and direct the administrators to re-distribute the estate so that all that share that had been allocated to the widow will be shared amongst her three daughters exclusively and on equal shares which in my view will bring their shares not necessarily equal to the sons but closer to what the sons. This will make the distribution as equitable as possible taking into account that parties had taken possession of their respective shares.

19. This being a family matter each party will meet his/her cost

**DELIVERED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JUNE, 2021.**

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**ALI ARONI**

**JUDGE**