



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 412 OF 2014**

**IN THE MATTER OF THE ESTATE OF PETER KINYUA ETHANGANIA**

**ALIAS PETER KINYUA ALIAS PETER KINYUA ETHANGATTA (DECEASED)**

**SIMON MUTABI ETHANGATA.....APPLICANT**

**VERSUS**

**JANET MERCY KINYUA.....RESPONDENT**

**RULING**

1. **Peter Kinyua Ethangania** (the deceased) died on 11/2/2014. He left behind parcel no. Ntima/Igoki/7548, Ntima/Igoki/6168, Nyaki/Giaki/Kiburine/260, Nkuene/Mitunguu-Kithino/119 and Kirimara/Kithithina/70 as assets forming his estate. He was survived by the following: -

- a) Janet Mercy Kinyua - widow
- b) Kenneth Mutuma Kinyua - son
- c) Duncan Munene Kinyua - son
- d) Martin Muriungi Kinyua - son
- e) BNK - son (minor)
- f) RAKK - daughter (minor)

2. By a ruling delivered on 30/05/2019, this Court directed the parties to file a Summons for confirmation if they were in agreement. In the event there was no agreement, each party was to file own mode of distribution for consideration by the Court.

3. The parties did not agree and they duly filed their own modes of distribution and filed their respective submissions. The issue for determination therefore is; ***how should the estate of the deceased be distributed?***

4. The deceased was polygamous. He had married the respondent as the first wife and one Dorcas M. Kinyua, who pre-deceased him as the second wife. **Section 40 of the Law of Succession Act (hereinafter "the Act")** provides: -

***"(1) 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.***

***(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38".***

5. The applicant is the brother in law of the deceased while the petitioner is the widow and first wife of the deceased.

6. The applicant submitted that the Court should apply the provisions of **section 35 (1) of the Act** and adopt his mode of distribution. In his distribution, the applicant proposed to give the widow who is the first wife only **Ntima/Igoki/6168**. On my part, I find that section 35(1) of the Act to be discriminatory of a widow, vis a vis children of a deceased.

7. I hold the opinion that the said provision is discriminatory of the widow because, it is more likely than not that a deceased person would acquire property during his lifetime in conjunction with and/or with the help and assistance of his spouse. Indeed, under the **Constitution of Kenya and Matrimonial Properties Act, 2012**, the principle of equality in marriage is recognized subject to contribution. Why then should it be that once the husband dies, the widow's interest in the immoveable property acquired by both mutates to that of a life interest only in the said property and subservient to the rights and interest of the children? That would be unfair, discriminatory and untenable at his point in time. Curiously, it is not so with a widower.

8. Indeed, in a proper case, the widow will be entitled to sue the personal representative of the deceased for a declaration that half of the estate, on proof of contribution, belongs to her so that only the remaining half will be available for distribution. She would still then be entitled to a share in the other half that belonged to the deceased husband. In this regard, I reject the submission made on behalf of the applicant as regards the application of **section 35 of the Act**.

9. I have looked at the respective proposed mode of distribution. I note that the applicant assigned values to the respective properties without producing the valuations. It is he who alleges that should prove. Without valuations, this Court is unable to gauge whether the values alluded to are correct or not. I will therefore not go with those values. I would adopt the application of **section 40 of the Act** but bearing in mind the foregoing. It would be fair that each beneficiary gets a share and therefore a taste of each property and to apply equity in the distribution of the estate.

10. I note that the applicant proposed that he becomes the sole trustee of the interest of the minors. On the other hand, the petitioner proposed that the applicant together with Charity Mwathi Ethang'ata be joint trustees. The Court was not told who this Charity Mwathi Ethang'ata was. The court does not know whether her interests will be contra to those of the minors. On the other hand, the Court cannot leave the interests of the minors in the hands of the applicant alone.

11. In this regard, the Court will appoint both the applicant and the petitioner, whom the Court well knows or assumes may not have interests that are opposed to those of the minors, as the joint trustees.

12. The applicant contended that his late father had given 0.25 acres to the Methodist Church in **Kirimara/Kithithino/70**. In her proposed distribution, the petitioner proposed to distribute 0.75 acres to **Mutethia Methodist Church**. It would seem that the parties were therefore agreeable to the fact that the said church is entitled to a share in that property. The only difference is the extent of the share. I will take this into consideration when undertaking distribution.

13. In this regard, the estate of the deceased will be distributed as follows: -

**A. NKUENE/MITUNGUU/KITHINO/119**

**Kenneth Mutuma Kinyua - 3 acres**

**Martin Muriungi Kinyua - 3 acres**

**Duncan Munene Kinyua - 3 acres**

**BNK and**

**RAKK - 6 acres (to be held in trust by SME and JMK until age of majority)**

**Janet Mercy Kinyua - Balance**

**B. KIRIMARA/KITHITHINA/70 - (13/19)**

**Mutethia Methodist Church - 0.75 acres**

**Kenneth Mutuma Kinyua - 1.75 acres**

**Martin Muriungi Kinyua - 1.75 acres**

**Duncan Munene Kinyua - 1.75 acres**

**BNK and**

**RAKK - 3.5 acres (to be held in trust by SME and JMK until age of majority)**

**Janet Mercy Kinyua - 3.5 acres**

**C. NTIMA/IGOKI/6168**

**Janet Mercy Kinyua - 0.68 Acres**

**D. NYAKI/GIAKI/KIBURINE/260**

**Kenneth Mutuma Kinyua - 2.2 acres**

**Martin Muriungi Kinyua - 2.2 acres**

**Duncan Munene Kinyua - 2.2 acres**

**BNK and**

**RAKK - 4.4 acres (to be held in trust by SME and JMK until age of majority)**

**Janet Mercy Kinyua - Balance**

**E. NTIMA/IGOKI/7548**

**To be sold and the proceeds be divided as follows: -**

**Kenneth Mutuma Kinyua - 20%**

**Martin Muriungi Kinyua - 20%**

**Duncan Munene Kinyua - 20%**

**BNK and**

**RAKK 40% to be held by SME and JMK for the use and benefit of the minors)**

**F. This being a family matter, each party to shoulder own costs.**

**DATED and DELIVERED at Meru this 14th April day of 2020.**

**A. MABEYA**

**JUDGE**