



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.677 OF 2014**

**IN THE MATTER OF THE ESTATE OF M'IKIARA M'NGUTARI (DECEASED)**

**GEOFFREY MUGAMBI KIARA .....1<sup>ST</sup> PETITIONER**

**JULIUS GIOTBU KIARA.....2<sup>ND</sup> PETITIONER**

**NICHOLAS MURIUNGI KIARA .....3<sup>RD</sup> PETITIONER**

**VERSUS**

**PATRICK MUTHOMI GATOBU .....1<sup>ST</sup> INTERESTED PARTY**

**PAUL GITONGA MUGO .....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. **M'IKIARA M'NGUTARI** (“the deceased”) to whom this cause relates died on 14/06/2012. According to the petition documents filed to petition for grant letters of administration intestate it is indicated that he was survived by :

1. **Charity Kajuju** - Wife (deceased)
2. **Julius Gatobu Kiara** - Son
3. **Francis Kirimi Kiara** - Son
4. **Nicholas Muriungi Kihara** - Son
5. **Geoffrey Mugambi Kiara** - Son
6. **Jane Gacheri Kiara** - Daughter
7. **Joyce Muthoni Kiara** - Daughter
8. **James Kinoti** - Son (deceased)
9. **Esther Karai** - Daughter (deceased)

His asset is listed as land parcel **No. NKUENE/URUKU/52 (10.67 Ha)**

2. Grant letters of administration intestate were issued to Geoffrey Mugambi Kiara and Julius Gitobu Ikiara on 2/04/2015. Each of the administrators filed separate summons for confirmation of grant dated 16/02/2016 and 12/10/2015 respectively with each proposing a different mode of distribution. A protest was raised vide the affidavit of Maureen Gakii Kinoti daughter to son of the deceased James Kinoti sworn on 29/03/2016.

3. Vide the summons dated 27/02/2017 filed by Julius Gitobu, Francis Kirimi and Nicholas Muriungi they sought among other orders that DNA tests be conducted on the Respondents to determine if they are children of the deceased.

4. On 21/05/2019 the court made the following orders: that the said application be determined together with the application for confirmation which were to be heard via *viva voce* evidence. Also, the grant of letters issued by the court on 2/04/2015 to Julius Gitobu were revoked as it was alleged that the said Julius Gitobu went missing from 23/07/2018. The court went ahead and issued grant to Geoffrey Mugambi Kiara and Nicholas Muriungi Kiara.

5. **Protestor Witness No.1 M’Nkanata M’Nchiru** relied and adopted his statement dated 26/07/2018 as his evidence. He stated that the deceased was his childhood friend and they come from the same clan. He had two wives namely Charity Kajuju and Dorcas Kirume. The 2<sup>nd</sup> wife had no child but the 1<sup>st</sup> wife had five (5) sons and three (3) daughters. That when the children of the deceased were getting married he used to accompany the deceased. He attended all the functions for Jane Gaceri and Geoffrey Mugambi who are children of the deceased. He has never heard the deceased complain that some of the children in his home are not his or ever treated any child as an outcast or denounced any of them. All the sons have their homes on the Suit Land as the deceased showed them where to put up their homes. As for the daughters, they were not given land but the deceased had promised Muthoni two (2) acres. However, the deceased did not transfer the Suit Land to his children neither has he ever been called as a witness subdivision and sharing. Moreover, he was not aware whether the Geoffrey Mugambi Kara claimed land from the deceased when he was alive.

6. **Protestor Witness No.2 M’Raibuni Muguongo**, neighbor and friend of the deceased, relied and adopted is statement dated 26/07/2018 as his evidence. He stated that he has known the deceased all his life. He has five (5) sons and three (3) daughters. He knows all the sons of the deceased including Geoffrey Mugambi Kiara a.k.a Kilonzo who even has a home on the Suit Land. The deceased has never denounced his children Geoffrey and Jane Gacheri as his. That the deceased did not share out his land to his children before he died. He is not aware that a surveyor came for subdivision or of any dispute between the deceased and his children.

7. **Protestor Witness No. 3 Gladys Mwaromo Francis** relied and adopted is statement dated 26/07/2018 as her evidence. She stated that Jane Gacheri Kiara is married to his son Kiriinya Mathiu. When she asked Jane Gaceri to take her to her home she took her to the home of the deceased and his wife Charity. When dowry negotiations were done it was paid to the deceased. Dowry is paid to a girl’s father if he is alive of which that was the case for Jane. The dowry paid was keg of honey, heifer, clothing for the deceased and his wife, and sheep. **PW1**, deceased and his sons were present. On that day the 1<sup>st</sup> petitioner was introduced as the son of the deceased. Jane was then given to them by the deceased and his late wife Charity Kajuju.

8. **Protestor Witness No. 4 Joyce Muthoni Kiara**, daughter of the deceased, relied and adopted her statement dated 26/07/2018 as her evidence. She stated her siblings as Julius Gatobu, Francis Kirimi, James Kinoti (deceased), Esther Karai, Nicholas Muriungi, Jane Gaceri and Geoffrey Mugambi. They were all brought up together and none of them was said not to be the deceased’s child. The deceased did not subdivide the Suit Land or tell them what portion belonged to whom. Although, her brothers have their respective portions where they have their homes, tea bushes and planted vegetables. Daughters were not given any portion but the deceased had promised to give her one but did not specify the measurements. There was a time they met with advocates and she agreed to get two (2) acres. Later her brothers refused that she gets the said portion. She has not filed any document to propose what she wants as her share, even though the estate should be shared equally amongst all the deceased’s children.

9. **1<sup>st</sup> Administrator Witness No. 5 Jane Gacheri** relied and adopted her affidavit sworn on 9/04/2018. She stated that the deceased and Charity Kajuju are her parents by birth. She is the deceased’s child neither did the deceased denounce her as not being his child. Being her father, the deceased when she got married is the one who received her dowry. During the deceased’s burial she was included as his daughter which was not objected as well as in the chief’s letter of introduction. Though, in the eulogy she was indicated as Jane Gaceri Kiriinya which is her husband’s name while her ID indicates her father’s name Kiara. Since Julius, Francis and Nicholas claim that Geoffrey and her are not biological children of the deceased they should prove their allegation. Despite that, when they held a meeting with advocates M/S Gichunge and Kiogora it was agreed that the daughters of the deceased get two (2) acres each as proposed by Geoffrey Mugambi but her brothers refused. Subsequently, she changed her mind and now wants equal distribution of the estate. For her brothers’ claim is to enable them to continue occupying larger tracts of the Suit Land.

10. **1<sup>st</sup> Administrator Geoffrey Mugambi Kiara** stated that the deceased is his father and Julius, Francis and Nicholas are his brothers. His ID card is registered in the name of the deceased, his father. Furthermore, the eulogy of the deceased contains his name as a child of the deceased. What’s more, he has never been told that the deceased is not his father. He has his home on the Suit Land where the deceased showed him to construct his house and planted tea leaves. When the deceased died he left him settled there. When they became of age according to hierarchy Julius Gitobu, James Kinoti, Muriungu, Kirimi and him were given land by the deceased. When he got married he settled on the deceased’s land with his wife and two children.

11. The issue of DNA arose after the court ordered them to distribute the Suit Land. The applicants filed an application dated 6/08/2016 claiming that he is not a biological son of the deceased while in the Chief’s letter identified the beneficiaries which his siblings consented to vide affidavits sworn on 9/02/2013. It indicates that he is the last born of the deceased. With regard to his and Jane Gaceri’s ID cards they both show that they were born in 1973. He does not have his original ID but he was born in 1974. He would not accept DNA profile between him and his brothers. It should be between child and parent. If he was not the deceased’s child he would not have been given land. He thus seeks the court to consider his mode of distribution and make a just finding.

12. In *HCCC No. 127 of 2007* the deceased was sued because his brothers had subdivided the Suit Land. When he sued the deceased he wanted him to give them equal shares. He had been given 1.5 acres by his elder brothers. While his brothers had taken large tracts of land. They had several meetings but his brothers deliberately failed to attend and by the time the deceased died the dispute had not been resolved.

13. At the close of the 1<sup>st</sup> petitioner’s case, the 2<sup>nd</sup> petitioner called two witnesses. **1<sup>st</sup> Interested Party Patrick Muthomi Gatobu**, relied and adopted his statement dated 22/07/2009 as his evidence. He stated that the deceased is his grandfather for he is the son of Julius Gitobu Kiara. That the latter has been missing since 23/07/2018 and all efforts to trace him have been futile. Family members have authorized him to represent them in this matter. He supports the mode of distribution proposed by his father on 12/10/2015 as it is in consonance with the deceased’s wishes. He as well supports the DNA test to be done on Geoffrey and Jane who are not the biological children of the deceased. It should be done to confirm paternity. Nonetheless, he found the two staying on the Suit Land. The deceased left Geoffrey, his father,

Nicholas Muriungi and Francis Kirimi with 1.5 acres, 6 acres, 5 acres and 5.7 acres respectively. That in 2007 surveyors came to the Suit Land and marked boundaries. Geoffrey Mugambi, Cecilia Igoki and Joyce Muthoni sued the deceased and put a caution. When the surveyor went to register the portions subdivided they found that the Suit Land had been cautioned.

14. **1<sup>st</sup> Interested Party Witness No. 2 Robert Mithika**, private land surveyor practicing in Meru Town. He stated that he met the deceased at Mrs Ntarangwi advocate's office where he received verbal instructions from the deceased to subdivide the Suit Land. He did not tell him the purpose of the subdivisions. He undertook the exercise as per the provisions of the law and ensured that they obtained the land control board consent which they did and is dated 11/09/2007. He processed the approvals as required by the county government. They also processed the mutation of subdivision and new numbers issued Nos. 1877 – 1882. In the mutation form there is a stamp showing registry index map was amended on 23/11/2007. This means that the Suit Land is no longer in existence. He also has a sketch that shows how the deceased wanted to subdivide to the beneficiaries and the positions on the ground. However, they did not finalize registration of the title because there were a lot of cases. The mutation was never registered and as long as transfers have not been done to individual people the mutation and sketch cannot hold.

15. There were entries that made them not complete registration at the lands registry. Entry No.5 dated 12/09/2007 on the green card placed a restriction on the Suit Land which was lodged by the registrar. He did not consult the registry when he was preparing mutation which is dated 8/10/2007. That if all the officers were aware of the restrictions no dealings could have proceeded at the Land Control Board. Besides, there were no restrictions at the survey office, for if there were the county surveyor could not have approved the mutation.

16. At the close of the 2<sup>nd</sup> petitioner's case, the 3<sup>rd</sup> petitioner called two witnesses.

17. **The 3<sup>rd</sup> petitioner Nicholas Muriungi Kiara**, son of the deceased, gave a sworn testimony. He relied and adopted his statement dated 15/07/2019 as his evidence. He stated that the deceased had eight (8) children: Julius Gatobu, Kinoti, Esther Karai, Joyce Muthoni, Francis Kirimi, Nicholas Muriungi, Jane Gaceri and Geoffrey Mugambi. The deceased allowed the children of his wife the late Charity Kiara to live with him even though they were not his biological children. That the children of Charity should undergo DNA test to determine whether they are the children of the deceased.

18. In 2007 the deceased brought surveyors to the Suit Land where the Suit Land was divided into portions with the intent of the deceased to give his children. Geoffrey complained that his land was in fragments and be given as one portion. The deceased said that he would give him one acre of land. Cecilia Kinoti refused to accept land which the deceased wanted to give Geoffrey and they filed a suit against the deceased. The deceased later said that he was ready to give Geoffrey 1 ½ acres from the Suit Land. He was only giving him a place to stay since he was not his son. He always referred to him as son of his wife. He had wanted him to go to his father but he decided to give him a place to build. Prior to his death the deceased had shown each of his sons their respective portions where each have developed. As for Jane Gaceri she is not also a child of the deceased for the deceased did not sire her. As for distribution, the deceased gave Francis and Kinoti 5.76 acres each, Joyce Muthoni was given 0.50 acres and Julius Gitobu 6 acres. He does not deny that Geoffrey should not get anything. He was given 1.5 acres. If the court orders that he gives a share to the children of his late sister Esther Karai he would do it.

19. **3<sup>rd</sup> Petitioner's 2<sup>nd</sup> witness Moses Nkoroi** he relied on his statement dated 12/07/2019. He stated that his mother one Jenniffer Thiira is a sister to the deceased. That the deceased had six (6) children and the respondents are not one of them. He had lived with his wife separately though on the same land. Thus, the application for DNA is valid. On distribution, the deceased subdivided the Suit Land using a surveyor in the manner he wanted to share the same. Julius Gitobu got a slightly bigger portion while the other sons got the same size. The deceased indicated that Geoffrey to get 1 ½ acres which the 2<sup>nd</sup> respondent to get ½ acre. Joyce Muthoni was given 0.50 acres. In 2009 he was at the deceased's home when he gave his children portions of land. He was not present when the deceased brought a surveyor.

20. At the close of the 3<sup>rd</sup> administrator's case the **2<sup>nd</sup> Interested Party, Paul Gitonga Mugo** gave a sworn testimony. He relied on his protest sworn on 10/09/2019. He stated that the deceased was his grandfather for his mother Esther Karai was a daughter of the deceased. He has three other siblings who seek their mother's inheritance from the deceased's estate. Like other daughters of the deceased he together with his siblings are entitled to two (2) acres of the Suit Land.

21. At the close of oral evidence the 1<sup>st</sup> Petitioner and the 3<sup>rd</sup> Administrator filed their written submissions.

22. Having considered the applications on record as well as the evidence of the witnesses and the submissions herein this court is to determine :

**a) Who are the beneficiaries/dependants' of the deceased**

**b) How the estate should be distributed**

23. With regard to the first issue, **Section 29 of the Law of Succession Act** in defining the meaning of dependant provides as follows:

*(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*

*(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and*

*(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.*

At the top of the hierarchy are wife/husband and children of the deceased person. In this cause, the deceased was survived by 8 children.

However, a question has been raised as to whether Geoffrey Mugambi and Jane Gacheri are truly children of the deceased. This was raised by Julius Gitobu Kiara, Francis Kirimi and Nicholas Muriungi vide their application dated 27/02/2017. It is their case that the two were sired by Charity, wife of the deceased, with a different father and thus are not entitled to the estate of the deceased. A DNA test ought to be conducted to find out the same.

24. The 3<sup>rd</sup> administrator produced a replying affidavit sworn by the deceased in to High Court Civil Suit No. 127 of 2007 where the deceased was the defendant. The plaintiffs are Geoffrey Mugambi, Cecilia Igoki (wife to James Kinoti) and Joyce Muthoni. In paragraph 3 the deceased stated as follows:

*“That the applicants are my stepson, daughter-in-law and daughter respectively who live in Land Parcel Number NKUENE/URUKU/52.”*

25. From the words of the deceased in the above suit it is apparent that the 1<sup>st</sup> petitioner is a step-son to the deceased. From inception of this cause in 2014 the legitimacy of the 1<sup>st</sup> petitioner has not been questioned until 2017. During cross-examination the 3<sup>rd</sup> petitioner acknowledged that in the affidavit sworn on 11/03/2013 was sworn by him and his two brothers. In the paragraph 5 they averred that Geoffrey is the last born son of the deceased. He further told the court that the 1<sup>st</sup> petitioner was born in their home, resided in the deceased’s house and was initiated according to Meru Customs in the deceased’s person’s home. The 1<sup>st</sup> petitioner stays on the Suit Land with his family.

26. According to **Section 3 (2) of the Law of Succession Act** it defines a child as:

***“(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”***

The deceased acknowledged the 1<sup>st</sup> petitioner as a step-son which was stated so by the 1<sup>st</sup> Interested Party as well as the other petitioners and their witnesses. That being said, the evidence produced by the applicants showing that he was not a son of the deceased showed that ever since the 1<sup>st</sup> petitioner was born the deceased voluntarily took up responsibility and accepted him as his own. By doing so, the 1<sup>st</sup> petitioner is recognized as a child of the deceased under the eyes of the law according to **Section 3(2) of CAP 160**.

27. As for Jane Gaceri, the applicants stated that she is not a daughter of the deceased. Their application was supported by the 1<sup>st</sup> Interested Party who stated that DNA be conducted. However, during cross-examination he stated that Jane Gaceri is known to him as a sister to his father. The 1<sup>st</sup> petitioner produced the eulogy of the deceased which indicated that he and Jane are children of the deceased. Furthermore, their Protessor Witness No. 3 who is her mother in law told the court that Jane was given to her by the deceased and his wife. That the dowry they paid was paid to the deceased. This was confirmed by 3<sup>rd</sup> petitioner who stated during cross-examination that Jane who is known to him since childhood, born and brought up in their home was given for marriage by the deceased.

28. The applicants being the ones who alleged that Jane Gaceri is not a daughter of the deceased bore the burden of proving the same as provided for under **Section 107 – 109 of the Evidence Act** but they failed to do so .

29. Having established that the 1<sup>st</sup> petitioner and Jane Gaceri are children of the deceased the claim of conducting of a DNA test raised by the applicants fails for they have failed to prove their case on a balance of probability. Consequently, I am of the view that the deceased was survived by his eight (8) children.

30. The second issue is **how the estate of the deceased is to be distributed**. Having established that the deceased was survived by his children the guiding mode of distribution is provided for under **Section 38 of the Law of Succession Act** which states:

***“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.”***

31. It has been alleged that the deceased subdivided the Suit Land among the sons. According to the 1<sup>st</sup> Interested Party’s witness two he told the court that the deceased hired him as a surveyor to subdivide the Suit Land. He stated that the same was not actualized because a restriction was placed on the Suit Land. The deceased in his defence in High Court Civil Suit No. 127 of 2007 he stated in paragraph 5:

*“5) The defendant further states that being the registered owner of Land Parcel Number NKUENE/URUKU/52, he caused a subdivision of the same into 6 portions and has no intentions of transferring the same to the plaintiffs or any of his other sons.”*

He further stated in paragraph 6 and 10 of his replying affidavit:

*“6) That I have shown the 1<sup>st</sup> ,2<sup>nd</sup> applicants together with my other sons their respective portions of Land Parcel Number NKUENE/URUKU/52 where they have cultivated their crops and have planted tea bushes and I have not in any way threatened, distributed their occupation of the said parcel of land.*

..

*10)That I have not made my mind on which portions of land or the acreage of my portions thereof which is to be transferred to the applicants or any of my sons and daughters and I have also not decided whether or not any further subdivisions will be necessary.”*

It is apparent that the deceased’s sons were shown where to occupy in the Suit Land but the same had not been distributed to any beneficiary or gifted.

In consideration of the above analysis this court hereby makes the following orders.

- i. Application dated 27/02/2017 be and is hereby dismissed
- ii. Grant issued to Geoffrey Mugambi Kiara and Nicholas Muriungi Kiara on 21/05/2019 be and is by confirmed with the estate of the deceased being distributed as follows:

**a) Land Parcel Ni. NKUENE/URUKU/52**

1. Julius Gitobu Kiara
2. Francis Kirimi Kiara
3. Nicholas Muriungi Kiara
4. Geoffrey Mugambi Kiara To share equally
5. Jane Gaceri Kiara
6. Joyce Muthoni Kiara
7. Estate of James Kinoti Kiara
8. Estate of Esther Karai (deceased) her shares to go to her surviving children to share equally.

**b) Yetu Sacco Account No. 25069**

1. Julius Gitobu Kiara
2. Francis Kirimi Kiara
3. Nicholas Muriungi Kiara
4. Geoffrey Mugambi Kiara To share equally
5. Jane Gaceri Kiara
6. Joyce Muthoni Kiara
7. Estate of James Kinoti Kiara

**c) Kathima Water project Membership**

1. Julius Gitobu Kiara
2. Francis Kirimi Kiara
3. Nicholas Muriungi Kiara
4. Geoffrey Mugambi Kiara To share equally
5. Jane Gaceri Kiara
6. Joyce Muthoni Kiara
7. Estate of James Kinoti Kiara

**d) Cattle and Houses**

1. Julius Gitobu Kiara
2. Francis Kirimi Kiara
3. Nicholas Muriungi Kiara
4. Geoffrey Mugambi Kiara      To share equally
5. Jane Gaceri Kiara
6. Joyce Muthoni Kiara
7. Estate of James Kinoti Kiara

iii. No order as to costs.

**HON ANNE ADWERA ONG'INJO**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED BY EMAIL AT MERU THIS 15<sup>th</sup> DAY OF OCTOBER 2020.**

**HON ANNE ADWERA ONG'INJO**

**JUDGE**