



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 293 OF 2011**

**IN THE MATTER OF THE ESTATE OF JAPHET M'TUAMWARI M'IKANDI (DECEASED)**

**HENRY KOOME.....PETITIONER**

**VERSUS**

**ROSALIA JOHN MUKOMUTHAMIA.....OBJECTOR**

**JUDGMENT**

1. JAPHET M'TUAMWARI M'IKANDI ("the deceased") to whom the succession cause relates, died on 27<sup>th</sup> March 1988. Henry Koome petitioned for the letters of administration where he stated the deceased was survived by:

- a) Andrew Kirema
- b) Henry Koome
- c) Simon Mutwiri
- d) Rose Naitore
- e) Nicholas Kirimi
- f) Meglo Kimathi
- g) James Kinoti
- h) Patrick Nthauramba
- i) Rosalia John Mukomuthamia – daughter in law

He listed the asset of the deceased to be Land Parcel No. NYAKI/ MULATHANKARI/61.

2. On 27<sup>th</sup> June 2011 Rosalia John Mukomuthamia objected to the making of grant of representation on grounds that she was not consulted when this cause was lodged; the petitioner is the son of the objector; the petitioner omitted some details therefore incompetent to administer the estate; and the petitioner wants to disinherit the rest of the dependants.

3. On 19<sup>th</sup> July 2016 this court made a ruling and found that the application for striking out the objection was made prematurely and therefore dismissed it. Additionally, the deputy registrar was directed to issue the relevant notice to the Objector to take such steps or file such pleadings as are required by law.

4. On 14<sup>th</sup> February 2017 the objector in her affidavit in support of the objection to making of grant proposed that NYAKI/ MULATHANKARI/61 be shared amongst all the sons and daughters of the deceased.

5. Henry Koome in his affidavit dated 14<sup>th</sup> March 2017 proposed that LR. No. NYAKI/MULATHANKARI/61 be distributed as follows;

- a) Henry Koome-  $\frac{3}{4}$  acre

b) Henry Koome and Andrew Kirema M'Itwamwari to share the balance equally.

Notably, the consent to confirmation of grant had no signatures.

6. In his statement dated 3<sup>rd</sup> April 2017, the petitioner indicated that the deceased was his biological grandfather (father of his father) and Rosalia Mukomuthamia is his step mother having married his father after he had separated from his mother Grace Maringa. He was very young when his father re married and the deceased together with his grandmother took care of him and his two sisters. After his father re married his grandfather refused them to live with their father. Therefore he educated them and took care of their basic needs, thus, he is his adopted father. During his grandfather's lifetime he gifted him part of Mulathankari land. The other part of the land where he had built his house and where Henry has built his house was to be shared equally by his son Andrew Kirema and himself. He stated that his grandfather took him in because his son Andrew had moved to the UK to live there permanently and his father was moving to Giaki so he needed to have a child who will take care of him when he grows old. That the land at Giaki was given to his father and registered in his names and his step mother cannot say she being disinherited as she has already benefited from his grandfather. That he is the one who is in exclusive possession of the land after his grandparents died.

7. Charles Kirimi M'Mutiga in his statement dated 13<sup>th</sup> April 2017 stated that the deceased was his uncle. That Rosalia John Mukomuthamia is married to John Mururu hence a daughter in law to the deceased. The deceased had two parcels of land NYAKI/MULATHANKARI/61 and 164. The deceased gave his elder son John Mururu NYAKI/MULATHANKARI/164 during his lifetime. He confirmed what the petitioner said that the deceased took care and raised them up. That Koome became a teacher, Ruth became a teacher, Florence became a secretary but she died without having any children. That Koome has lived all his life on and has built and developed the land.

8. Charity Nkirote Ringera in her statement told the court that the deceased was her uncle and that she recalls that in 2010 they were called for a meeting at the chiefs camp to discuss the estate of the deceased. In that meeting and M'Mwaitari was called as the main witness and he stated that the deceased had shared his land at Mutharankari to Henry Koome and Andrew Kirima to share equally and on the side he had built his home and the smaller part on the other side of the road was to go to Henry Koome. She therefore supported the mode of distribution by Henry Koome. This was reiterated by the statement made by Eliud Mbaya.

9. In a statement dated 14<sup>th</sup> February 2017 Andrew Kirema M'Itwamwari the only surviving son of the deceased stated that his father wished that the land at Giaki to go to his son John Mururu (deceased) and is his wish that this land remain with his widow Rosalia and her sons. That the land at Mulathankari was gifted to Henry Koome and finally the land from the road to the river to belong to him and Henry Koome.

10. In an affidavit dated 26<sup>th</sup> July 2018 Andrew Kirema M'Twamwari swore and stated that he is the only surviving child of the deceased. That his father only had 2 children Himself and John Mururu. His father had 2 parcels of land LR NYAKI/GIAKI/164 measuring 7.59 Ha and NYAKI/MULATHANKARI/61 measuring 1.8 Ha. That during his lifetime his father stated that NYAKI/MULATHANKARI/61 be shared by the petitioner and himself. The deceased took the petitioner as his son and raised him after his mother left and his brother remarried. He read the mode of distribution by the petitioner and agreed with it and since his brother was provided for by the deceased during his lifetime the objector should be content with the land at Giaki.

11. In her further affidavit of protest dated 23<sup>rd</sup> October 2018 the objector stated that NYAKI/GIAKI/164 belonged to her husband and he did not inherit it from his father as alleged and therefore the said land is not available for distribution. NYAKI/MULATHANKARI/61 should consequently be distributed equally amongst them as suggested in her affidavit of protest.

12. In their submissions the petitioners stated that the deceased only had two children John Mururu Japhet (deceased) and Andrew Kirema. That John Mururu had two wives

1) Grace Maringa

- a) Henry Koome
- b) Florence Ntinyari (deceased)
- c) Ruth Nkoroi

2) Rosalia John Mukomuthamia

- a) Rose Naitore
- b) Nicholas Kirimi
- c) James Kinoti
- d) Patrick Thurania
- e) Simon Mutwiri

The deceased had two properties **LR No. NYAKI/GIAKI/164 AND NYAKI/MULATHANKARI/61**. On 2<sup>nd</sup> May 1967 the deceased transferred NYAKI/GIAKI/164 to John Mururu. That the deceased raised and educated the children of Grace Maringa as his own. That the

petitioner has always lived on NYAKI/MULATHANKARI/61

## ANALYSIS AND DETERMINATION

13. From the record, evidence and submissions by the parties, issues that emerge for determination by the court are;

a) **Did the deceased provide for John Mururu in his life time by giving him Land Parcel NYAKI/MULATHANKARI/164?**

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

14. I should ascertain the estate of the deceased, the beneficiaries and their respective shares in the estate.

### Estate property

15. Except the objector, parties claim that the deceased had two properties namely **LR No. NYAKI/GIAKI/164 & NYAKI/MULATHANKARI/61**. The objector claimed that land number 164 belonged to her husband but was not an inheritance from the deceased. Other parties and witnesses herein say that this land was a gift by the deceased to his son John Mururu. Nothing was adduced by the Objector to support the claim that the said land belonged to her husband and was not an inheritance from the deceased. I reject that argument. What about claim of gift inter vivos?

16. In **re Estate of the Late GedionManthiNzioka (Deceased) [2015] eKLR** Nyamweya J stated that:

**“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa)....**

**For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard Halsburys Laws of England 4<sup>th</sup> Edition Volume 20(1) at paragraph 32 to 51.**

**In Halsburys Laws of England 4<sup>th</sup> Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:**

**“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”**

17. The petitioners claim that the deceased gave his father NYAKI/MULATHANKARI/164 and his witnesses confirmed the claim to be true. The son of the deceased in his statement said that on 2<sup>nd</sup> May 1967 the deceased transferred the said property to his brother. The evidence shows that this land was a gift to late John Mururu who settled his family on the said land. I find this land was gift inter vivos. In law, the land belongs to the estate of John Mururu for the benefit of his entire family. I will therefore only take this property into account as per section 28 and 42 of the Law of Succession Act.

18. Therefore, the estate property is **NYAKI/MULATHANKARI/61**.

### Dependants

19. Now that I have identified the estate property I wish to ascertain the beneficiaries of the estate. Doubtless, from the evidence adduced, the deceased only had two children John Mururu Japhet (deceased) and Andrew Kirema. That John Mururu had two wives and each house is made up members shown below:-

3) Grace Maringa

d) Henry Koome

e) Florence Ntinyari (deceased)

f) Ruth Nkoroi

4) Rosalia John Mukomuthamia

- f) Rose Naitore
- g) Nicholas Kirimi
- h) James Kinoti
- i) Patrick Thurania
- j) Simon Mutwiri

20. John Mururu is now deceased. Andrew is living. These two are therefore by law entitled to the estate of the deceased. However, the Petitioner, a grandchild of the deceased claims he and her sisters are dependants of the deceased. Have they proved under Section 29(b) of the Law of Succession Act to be:-

**29(b) ...such of the deceased's..., grandchildren,...whom the deceased had taken into his family as his own,..., as were being maintained by the deceased immediately prior to his death;**

21. The petitioner claimed that the deceased willingly took the children of John Mururu born of his first wife Grace Maringa and raised them as his own, therefore making them his adopted children. He stated that when his father separated from his first wife Grace maringa and he remarried, the deceased refused the children to live with their father. Instead he took them into his family, and he and his wife took care of them as their own children. In a statement dated 14<sup>th</sup> February 2017 Andrew Kirema M'Itwamwari the only surviving son of the deceased stated that his father wished that the land at Giaki should go to his son John Mururu (deceased) and to remain with his widow Rosalia and her sons. He stated further that the land at Mulathankari was gifted to Henry Koome and finally the land from the road to the river to belong to him and Henry Koome. Other witnesses supported this position. I also note that evidence show that Henry has lived all his life in the said land and has his home there. There is sufficient evidence that the deceased took the petitioner into his family as his own child and maintained him immediately before his death. The petitioner is therefore a dependant as of his own right.

**Distribution**

22. The intestate left no spouse but children. Therefore, section 38 of the law of succession Act cited below is relevant:

**“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.”**

23. In this case the deceased willingly took in his sons children by his first wife Grace Maringa and raised them as his own therefore making them his adopted children. Andrew is not claiming to be entitled to the entire land and is comfortable with the distribution proposed by the Petitioner which gives him a small portion. It is not clear whether the objector and her children are in exclusive use and benefit of the Gaitu land. But I stated that such land would be for the benefit of the estate of the late john. I will proceed on that assumption. That notwithstanding, and taking all factors into consideration the grant herein is confirmed, and the estate property, namely, **NYAKI/MULATHANKARI/61** shall be distributed to the following in equal shares;

- 1. Andrew Kirema M'Twamwari
- 2. Estate of John Mururu
- 3. Henry Koome
- 4. Ruth Nkoroi

**Dated signed and delivered in open court at Meru this 13<sup>th</sup> day of February, 2019.**

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**F. GIKONYO**

**JUDGE**

**In presence of**

**Muriuki for objector**

**Kariuki for Mutegi for petitioner.**

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**F. GIKONYO**

**JUDGE**