



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2426 OF 2008**

**IN THE MATTER OF THE ESTATE OF KOIGI KAMUIRU (DECEASED)**

**RULING.**

1. The application that is coming for determination in this ruling is an affidavit of protest which was filed on 15th August, 2011 by Joel Ndungu Koigi, Joseph Njoroge Koigi and Peris Wanjiku seeking the following prayers ;

**a. That the property known as L.R. 209/ 4401 a plot in Makadara within Nairobi County be equally distributed like all other properties, to the beneficiaries.**

**b. That the asset should be sold and the proceeds shared to the beneficiaries.**

2. The hearing proceeded by viva voce evidence and parties agreed to file written submissions.

3. Joseph Njoroge Koigi (OW1) in his evidence stated that the property had **L.R. 209/ 4401 a plot in Makadara within Nairobi County**( hereafter referred to as the suit property) was never given to his sister, Mary Wangari. He further stated that they had a meeting at the chief's office and Mary Wangari did not claim the property at all. He alleged that there is no prove that the property belongs to Mary Wangari.

4. Samuel Gichuru Koigi (RW1) stated that he knows the suit property at Makadara was given to Mary Wangari. He further stated that he was present when Mary Wangari was given the title deed to the property in 1979. He also stated that other three other beneficiaries were also given other properties. He said that Mary Wangari has been paying the rates for over 20 years.

5. Mary Wangari Ndungu (RW2) stated that she was the one who was given the suit property by her father. She further stated that her mother had initially been given the suit property and when she passed on in 1973, the property was given to her in 1979. She stated that her father gave her the title and said that he would transfer it to her but it was not transferred to her before his demise. She also stated that other beneficiaries had been given other properties and titles were not transferred to them but their properties are not in dispute in this suit. She further added that she is the one who has been paying the rates since 1979. She further stated that during the meeting with the chief in Makadara, she did not agree to give them the suit property.

6. The deceased died on the 5th October, 2001. The deceased left 22 beneficiaries to the estate. There was an application for Citation on the 23rd October 2008 to other beneficiaries for purposes of securing a grant of letters of administration.

7. The consent to the mode of distribution was signed over by 8 beneficiaries on the 14th October 2010. Grant of letters of administration were issued on the 10th June 2009. Summons for confirmation of grant were brought on the 14th October, 2010.

8. An affidavit of protest dated 15th August 2011 was filed to stop the confirmation of the grant. A certificate of confirmation of grant was issued on the 13th March, 2012 clearly depicting how the properties of the deceased were to be distributed.

9. An affidavit was sworn on the 16th March 2015 for a rectification. The certificate of confirmation of grant was rectified on the 1st July 2015.

10. Lucy Wangeci Ndungu (RW3) stated that Mary Wangari was given the property by her late father in law in 1979. She stated that all the children were called by the deceased and she found them all gathered at a table where he said that he, the deceased gave Mary Wangari the plot in Makadara. She further explained that her husband was given shares in a plot and similarly the title deed but no transfer was done.

11. I have carefully considered the evidence adduced in this case and I find that the parties are in agreement that the deceased distributed part of his estate before his death to more than one beneficiary.

12. **W. M. Musyoka** in his book *A Casebook on the Law of Succession* observes that a father was allowed under Kikuyu Customary Law to distribute the bulk of his estate during his life time. The case of *Karanja Kariuki vs Kariuki* illustrates this point. **Madan, Potter and Kneller JJA** held that '*property of a Kikuyu man could be distributed during lifetime to his children, or he could give directions on the administration and distribution of his property shortly before his death.*'

13. The succession Act was enacted to assist in the distribution of estates of deceased that died intestate (without a will). This does not mean that a deceased cannot in his life time distribute his property to his children. There is evidence that the deceased distributed his property in 1979 which was before the enactment of the Law of Succession Act and this is in accordance with the Kikuyu Customary Law which as seen above allowed for the same.

14. In the case of **Estate of Ngamini Kirira (Deceased) [2016] eKLR** the court held that the deceased could divide his property before his demise and there is nothing wrong with that as long as it is not repugnant to justice and morality. Also in the case of **Re Estate of Ruth Nyakanini Rukwaro (Deceased) [2016] eKLR** the same sentiments were held.

15. There is evidence that Mary Wangari was gifted the suit property *inter vivos* and that she has been in possession of the title deed since 1979 and that she has been receiving the rent and paying rates in respect of the said property. I order that the title be transferred to her accordingly upon the rectification and confirmation of the grant.

16. I find that the protest has no merit and is hereby dismissed and I order as follows;

**DETERMINATION.**

1. The protest filed herein is hereby dismissed.

2. I order that this matter be mentioned within 30 days of this date for directions on the way forward.

3. This is a family matter and I direct that each party bears its own costs of this protest.

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2019**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI**